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LLM/MA IN: LLM in International Human Rights Law
STUDENT'S NAME: Arlen Millner
SUPERVISORS'S NAME: Geoff Gilbert
DISSERTATION TITLE **How Terrorism Affected Asylum Seekers at the U.S.-Mexico Border and What International Law has to Say About It**

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DISSERTATION

How Terrorism Affected Asylum Seekers at the U.S.-Mexico Border and What International Law has to Say About It

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"If I had a bowl of skittles and I told you just three would kill you, would you take a handful?" -Donald Trump Junior

Introduction

Under international law, the United States is obligated to give protection to those who are fleeing persecution based on race, religion, nationality, membership of a particular social group or political opinion [1]. In accordance with this obligation, the United States has created a system for which those fleeing persecution based on one of the 5 grounds can apply for asylum. However, after the events at the World Trade Center, the US has taken extreme measures to secure its borders from external threats, legitimate or otherwise. And while one may think that the term "refugees" would elicit sympathy due to the circumstances driving their migration, since the attacks on the World Trade Center and 9/11, Americans have turned their backs on immigrants and refugees for fear that they could now pose a threat to the public. Terrorism has raised Americans' awareness of immigration and border security, in fact in a "public opinion survey a few weeks after the [September 11th] terrorist attacks, 72 percent of those polled said better border controls and stricter enforcement of immigration laws would help prevent terrorism"[2]. When framed in this national security paranoia, human rights abuses to refugees becomes more acceptable to the public. Because of this new bias towards immigrants, asylum seekers, and refugees, they may be "exposed to prosecution, punishment and/or detention, on account of illegal entry, entry without documents or with falsified documents,"[3] despite the fact that the nature of fleeing from one's country often means that they may be unable to have these documents in their possession.

Part One: A Brief History of the Relationship between Terrorism and Immigration within the United States

[1] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol)
[2] Peter Andreas, 'Tale of Two Borders: The U.S.-Mexico and U.S.-Canada Lines After 9/11' (2003) The Center for Comparative Immigration Studies, page 2
[3] Guy S. Goodwin-Gill 'International Law and the Detention of Refugees and Asylum Seekers' (1986) The International Migration Review, page 203

I. President Bill Clinton and the World Trade Center Bombing

In 1993, during Bill Clinton's presidential term, a truck containing explosives was detonated inside the parking garage of New York's World Trade Center, killing six people and injuring over a thousand. The truck bomb was meant to take down the whole tower and send it crashing into another, luckily it failed. While the attack in itself failed, its objective to drive fear into the American public did not. The concept that foreign nationals would enter the United States with intent to devastate the American public, created an "othering" effect towards immigrants causing massive immigration reform. In order to instill a sense of safety in the public, the Clinton administration targeted borders, including the US-Mexico border, for more terrorism-focused precautions. In a statement, President Clinton said that '[he] asked the Vice President to work with our departments and agencies to examine what more might be done about the problems along our borders. [He] was especially concerned about the growing problems of alien smuggling and international terrorists hiding behind immigrant status'[4].

It began with Clinton's 1994 Executive Order which mandated that refugees had to step on U.S. soil before they could file for asylum. However, this act effects on asylum seekers paled in comparison to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Illegal Immigration Reform Act (IIRA). Fearing immigrant terrorists, Clinton "signed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These new pieces of legislation revised the denial and/or deportation provisions for every class of immigrant" [5]. These two acts have had lasting effects on immigration into the United States, even for asylum seekers. The IIRIRA allowed for expedited removal of any aliens found in the US without documentation unless the individual claimed asylum or expressed a fear of persecution from their home country [6]. Asylum applications also had to be made within a year of arrival into US territory, even if they were a child, unless there was evidence of exceptional circumstances [7]. The IIRIRA also made it harder to apply for asylum "by giving immigration officers at ports of entry 'the right to summarily deport persons

[4] Karen M Douglass and Rogelio Saenz 'The Criminalization of Immigrants & the Immigration-Industrial Complex' (2013) Daedalus, page 204
[5] Ibid, page 205
[6] Christine M Gordon, 'Are Unaccompanied Alien Children Really Getting a Fair Trial: An Overview of Asylum Law and Children' (2005) 33 Denv J Int'l L & Pol'y 641, page 654
[7] Ibid

seeking asylum'"[8]. Mandatory detention was officially authorized and legal counsel to those detained would officially not come at an expense to the American government, causing many of those who were detained to represent themselves in a court that is not in their native language [9].

II. President George W. Bush and 9/11

There is no doubt that the terrorist attacks on September 11, 2001 shocked the nation. Never before had there been an attack of such magnitude on American soil. Before September 11th, the American government had not taken terrorism terribly seriously as seen in George Bush's statement in a Cincinnati speech: "'On September 11th, 2001, America felt its vulnerability'"[10]. After September 11th, there was a real perception "that war is indeed a real possibility and that America's enemies will stop at nothing to attack the United States, its forces overseas, and its allies and friends"[11].

While President Bush had some experience with illegal immigration as Governor of Texas, he was generally seen to be relatively tolerant on the subject of immigration until the event of September 11th[12]. In order to combat public fear, the Bush administration created the Department of Homeland Security as well as passed a series of legislative orders to combat terrorism. The US PATRIOT ACT increased the budget for immigration enforcement as well as increased the number of Border Patrol agents. Refugee admissions also dropped to fewer than 27,000 following the terrorist attacks in 2001[13]. In 2002, "four Pakistani crewman had unlawfully obtained visa waivers from an immigration officer at the U.S. border and subsequently disappeared"[14]. This led to a new "zero tolerance" policy with regard to INS employees who failed to abide by INS policies. The "zero-tolerance" policy made immigration officers fearful of being fired and led to a spike in INS requests for further documentation and proof that the

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[8] Donald S Dobkin 'The Diminishing Prospects for Legal Immigration: Clinton through Bush' (2006) 19 St Thomas L Rev 329, page 332 see also Immigration and Nationality Act of 1990, Pub. L. 101-649, § 208(a)(b)(2)(A)(i)-(iv) 104 Stat. 4978

[9] Immigration and Nationality Act of 1990 (INA), Pub. L. 101-649, § 292, 8 U.S.C. § 1362

[10] Robert Jervis 'Understanding the Bush Doctrine' (2003) The Academy of Political Science 365 , Page 372

[11] James J. Wirtz and James A. Russel 'US Policy on Preventative War and Preemption' (2003) The Nonproliferation Review 113 , page 113

[12] Donald S Dobkin, 'The Diminishing Prospects for Legal Immigration: Clinton through Bush' (2006) 19 St Thomas L Rev 329, page 341

[13] Jens Manuel Krogstad and Jynnah Radford 'Key Facts about Refugees to the U.S.' (Pew Research Center, 30 January 2017) https://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/

[14] Dobkin (n 12), page 342

assertions made in the immigration application are truthful which in turn led to a backlog in application processing times[15]. In response to the backlogs, the INS Director "instituted the policy of allowing officers to deny applications outright, without any requirement to issue Requests for Evidence… Applications could now be summarily denied for even the most immaterial deficiencies, denying applicants the opportunity to respond, and leaving them in most cases with no recourse" [16].

III. President Barack Obama

Unlike his predecessors, President Obama campaigned on the promise of comprehensive immigration reform that would favor immigrants rather than portraying them as a national security threat. Obama led the way in helping the U.S. to be a more open place to immigrants and issued several executive orders improving the flawed and biased immigration system. While Obama did make some advances in immigration reform, his administration does hold the record for most deportations during a presidential term and was occasionally portrayed as not progressive enough on the issue of immigration.

One of Obama's more known initiatives was the Deferred Action for Childhood Arrivals (DACA) program. This program was issued as an executive order in 2012 in response to the Senate's inability to pass the Development, Relief, and Education for Alien Minors Act (DREAM Act) in 2011. The DACA program permitted certain illegal immigrants to request consideration of deferred action for a period of two years and work authorization[17]. DACA's criteria included coming to the U.S. before one's 16th birthday, being under the age of 31, continuously residence in the United States since June 15, 2007, and enrollment in school, or had obtained a certificate of completion from high school or had already graduated college, or were a veteran of the Coast Guard or Armed Forces of the United States[18]. Individuals were ineligible if they had been convicted of a felony or a significant misdemeanor[19]. In 2014, President Obama attempted to expand DACA to cover additional illegal immigrants, however, the expansion was blocked by states in the Supreme Court. Obama also put an end the "secure communities" program through an executive order. The goal of "secure communities" was to try to

[15] Ibid and also see Christopher Thomas 'The Changing World of Immigration' Blue: An E-zine of Holland & Hart http://www.hollandhart.com/blue/immigration.pdf, page 1
[16] Dobkin (n 14)
[17] Department of Homeland Security 'Deferred Action for Childhood Arrivals (DACA)' (Department of Homeland Security, 23 June 2018) https://www.dhs.gov/deferred-action-childhood-arrivals-daca
[18] Ibid
[19] Ibid

effectively identify and simplify the removal of criminal aliens in states custody. However, the program immediately sent the fingerprints of those arrested to immigration officials, meaning a wrongful arrest could lead to deportation.

While Obama led some initiatives that helped immigrants in the U.S., that's not to say he ignored the issue of illegal immigration. Deportations reached a record high under the Obama administration. The Obama administration "deported about 3 million immigrants between 2009 and 2016, a significantly higher number than the 2 million immigrants deported by the Bush administration between 2001 and 2008"[20]. Detention also ramped up under the Obama administration as a method of deterrence[21]. According to the Obama administration's DHS Secretary, detention sends "'a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released'"[22]. In 2014, the administration opened the country's largest detention facility that was built to house families, which contradicted Obama's promise to target criminals rather than families[23].

IV. President Donald Trump

Donald Trump's presidential election campaign was largely launched with his promises to stop illegal immigration into the United States, his criticisms mainly focused on the US-Mexico border. His anti-immigration rhetoric was well-received by the conservative American public since Trump used national security as an excuse to keep people, including refugees, out. Public remarks by President Trump after meeting with leaders on border security stated that "the border is a much more dangerous problem… It's a problem of terrorists… You know, I talk about human traffickers. I talk about drugs. I talk about gangs. But a lot of people don't say — we have terrorists coming through the southern border because they find that's probably the easiest place to come through"[24].

Nearly as soon as he took office, he "began issuing a series of executive orders promising major changes to the U.S. immigration system…including sharp cuts to legal immigration, 'the wall' across the

[20] Jynnah Radford 'Key Findings about U.S. Immigrants' (Pew Research Center, 17 June 2019) https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/
[21] Marcia Zug, 'The Mirage of Immigration Reform: The Devastating Consequences of Obama's Immgiration Policy' (2015) 63 U Kan L Rev 953, page 963-964
[22] Ibid, page 964
[23] Ibid
[24] The White House 'Remarks by President Trump After Meeting with Congressional Leadership on Border Security' (4 January 2019)

entire U.S.-Mexico border, and 'extreme' vetting of all applicants for admission" [25]. In 2017, the Trump administration implemented increased vetting for refugees, citing security concerns which slowed the admissions process even further [26]. For example, the administration increased the number of interviews that applicants must go through before being approved for immigration[27]. President Trump also reduced the number of refugees the United States accepts annually from the 110,000 set by the Obama administration down to 50,000, then to 45,000 in 2018, and in 2019 he set it to a record low of a mere 30,000 [28]. All of these measures claimed to be implemented due to threats from the border. In the National Strategy for Counterterrorism of the United States of America published by the White House, the administration referenced the 2015 ISIS attacks in Paris, France and partly blamed the "weaknesses in European border security"[29]. The National Strategy for Counterterrorism also noted that the attackers originally posed as immigrants in order to further their own border agenda in order to justify their policies.

The administration also began implementing policies that would help to deter any future border crossers as well as punish those who do cross. The Department of Homeland Security issued a "zero tolerance" policy at the U.S.-Mexico border which involved arresting anybody who crossed the border without authorization[30]. This policy also included the separation of children and parents during detention in hopes of deterring families from crossing[31]. The administration has also cut several programs the Obama administration installed to help migrant families, including the Central American Minors refugee and parole program, Temporary Protection Status and the Deferred Action for Childhood Arrivals (DACA) program [32].

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[25] Sarah Pierce and Andrew Selee 'Immigration Under Trump: A Review of Policy Shifts in the Year Since Election' (2017) Migration Policy Institute 1, Page 1
[26] Brittany Blizzard and Jeanne Batalova 'Refugees and Asylees in the United States' (The Online Journal of the Migration Policy Institute, 13 June 2019) https://www.migrationpolicy.org/article/refugees-and-asylees-united-states
[27] Sarah Pierce, Jessica Bolter and Andre Selee 'U.S. Immigration Policy Under Trump: Deep Changes and Lasting Impacts' (2018) Migration Policy Institute, page 7
[28] Sarah Pierce 'Immigration-Related Policy Changes in the First Two Years of the Trump Administration' (May 2019) Migration Policy Institute https://www.migrationpolicy.org/research/immigration-policy-changes-two-years-trump-administration, page 18
[29] The White House 'National Strategy for Counterterrorism of the United States of America' (2018), Page 8
[30] Pierce (n 27), page 2
[31] Amnesty International 'Illegal Pushbacks, Arbitrary Detention, and Ill Treatment of Asylum-Seekers in the United States' (2018), page 6
[32] Ibid

V. Key US Supreme Court Cases on Immigrant Rights from 1993 to Today

While the US Supreme Court was originally intended to be a non-political, unbiased entity, the way in which Judicial appointees are selected make it impossible for judges to be so. For example, a Court with a majority of Democratic-nominated Justices would predictably reach different decisions from a Court with the majority being Republican-nominated Justices. The President nominates all candidates which are subject to Senate approval, however, when the President and Senate are of the same party, it is easy to elect someone who shares their ideologies. President will often pick a nominee with the same opinions on immigration reform and biases towards certain immigrant populations in order to push their agenda without trouble from the Court. The issue with this of course is that Supreme Court Justices may sit for life and their decisions have a lasting impact can determine precedents on immigration law for decades or even Centuries. In their terms Bill Clinton appointed two Supreme Court justices, George H. W. Bush appointed two justices, and President Donald Trump has appointed two as well.

INS v. Cardoza-Fonseca (1987)

While not issued after September 11th 2001, *INS v. Cardoza-*Fonseca brought the US immigration standard of proof to international standards, for the time being that is. Section 243(h) of the Immigration and Nationality Act required that the Attorney General withhold deportation of an alien who could demonstrate that his life or freedom would be threatened in the country they would be returned to[33]. Under the Act the alien had to prove that it was more likely than not that the alien would be subject to persecution in the country to which they would be returned[34]. The Supreme Court held that the "'clear probability' standard of proof does not govern asylum applications"[35]. Instead, asylum applicants only have to show a "well-founded fear" of persecution which can be met even if the applicant cannot show it is more likely than no they will be persecuted, which is consistent with the standard set by the United Nations[36].

Reno v. Flores (1993)

[33] *INS v. Cardoza-Fonseca* (1993) United States Supreme Court, Syllabus
[34] Ibid
[35] Ibid
[36] Ibid

Reno v. Flores involved juveniles arrested by the Immigration and Naturalization Service (INS) to be deported. The INS code only allowed juveniles to be released to their parents, close relatives, or legal guardians, unless there were special circumstances, otherwise they are kept in juvenile care facilities[37]. The respondents of the case claimed that they had a Constitutional right to be released into the custody of other "responsible adults"[38]. The Supreme Court held that the code did not violate the Due Process Clause of the Constitution as the US must ensure that the children are properly cared for[39].

Sale v. Haitian Centers Council, Inc.

Sale v. Haitian Centers Council, Inc., an extremely controversial case, was brought before the US Supreme Court when President Bill Clinton issued an Executive Order ordering the Coast Guard to intercept vessels beyond the territorial sea of the US that were transporting people from Haiti to the United States. The Coast Guard was ordered to the return the passengers to Haiti without determining whether they qualify as refugees beforehand. The respondents claimed that the Executive Order violated both §243(h)(1) of the INA and Article 33 of the United Nations Convention Relating to the Status of Refugees[40]. The Supreme Court held that neither the INA nor the 1951 Convention limits the President's power to order the Coast Guard to return migrants intercepted in the high seas[41]. More importantly, the Supreme Court's interpretation of the 1951 Convention limited article 33's protection to those who were already within US territory[42]. While the Court noted that "gathering fleeing refugees and returning them to the one country they had desperately sought to escape may violate the spirit of Article 33", it mandated that "general humanitarian intent cannot impose uncontemplated obligations on treaty signatories"[43].

Zadvydas v. Davis (2001)

The Supreme court held that "the indefinite detention of "non-arriving" noncitizens posed serious constitutional concerns" [44]. The Court limited detention to only what is "reasonably necessary to secure removal, after which time the detained noncitizen would be entitled to release if removal is unlikely 'in the

[37] *Reno v. Flores* (1993) United States Supreme Court, Syllabus
[38] Ibid
[39] Ibid
[40] *Sale v. Haitian Centers Council, Inc*. (1993) United States Supreme Court, Syllabus
[41] Ibid
[42] Ibid
[43] Ibid
[44] Michael Kaufman, 'Detention, Due Process, and the Right to Counsel in Removal Proceedings' (2008) 4 STAN J CR & CL 113, page 121

reasonably foreseeable future'"[45]. The Supreme Court also set the "reasonable" timeframe of detention at 6 months, unless the US government can show that they will remove the alien in the foreseeable future[46].

Clark v. Martinez (2005)

In this case Martinez and Benitez where both declared inadmissible under §1182 and were being processed for removal, but were held beyond the 90-day removal period[47]. Both filed a habeas corpus petition challenging this detention. The Court attempted to resolve the case using *Zadvydas v. Davis* which limited detention beyond 90 days to those who were admissible and were then to be deported foreseeably after the 90 days. However, the *Zadvydas v. Davis* case failed to define if immigrants inadmissible to the U.S. have these same protections. Similar to *Zadvydas v. Davis*, the Court held that the US may detain inadmissible aliens beyond the 90-day removal period as long as it is reasonably necessary[48].

Negusie v. Holder (2009)

Daniel Negusie claimed he was still eligible for asylum despite the fact he was a persecutor because he was forced to assist in the mistreatment of prisoners in Eritrea under threat of execution[49]. However, the Immigration and Nationality Act (INA) bared applicants from obtaining refugee status if they "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"[50]. The Supreme Court held that involuntary or coerced acts do not meet the INA persecutor bar and does not comply with obligations under the Convention Against Torture (CAT) and Negusie was therefore still eligible for asylum[51].

Arizona v. United States (2012)

In 2010, the Arizona signed SB 1070 into law, also called the "Support Our Law Enforcement and Safe Neighborhoods Act". The act made illegal immigrants not carrying registration documents required by federal law a state misdemeanor and penalized anyone knowingly sheltering, hiring and transporting

[45] Ibid
[46] *Zadvydas v. Davis* (2001) United States Supreme Court, Syllabus
[47] *Clark, et al. v. Martinez* (2005) United States Supreme Court, Syllabus
[48] Ibid (n 36)
[49] *Negusie v. Holder, Attorney General* (2009), United States Supreme Court, Syllabus
[50] 8 U. S. C. §1101(a)(42)
[51] *Negusie v. Holder* (n 44)

illegal immigrants[52]. The United States Justice Department filed a case stating that the Act usurped the federal government's power to regulate immigration laws. The Supreme Court ruled that Arizona cannot require immigrants to always carry registration documents, allow police to search arrest anyone they think could be an illegal immigrant, or make it illegal for illegal immigrants to hold or search for jobs[53]. The Court did allow Arizona officials to investigate the status of individuals stopped or arrested as long as there was an actual reason to believe they are illegal[54].

Jennings v. Rodriguez (2018)

§1225(b) of Title 8 of the U. S. Code authorizes the detention of certain aliens seeking to enter the country while officials determine their status[55]. Alejandro Rodriguez, a Mexican citizen, was detained pursuant to while the US sought to remove him. During his detention, Rodriguez filed a habeas petition, claiming that he was entitled to a bond hearing to determine whether his detention was justified[56]. Rodriguez claimed Title 8 of the U.S. Code does not authorize prolonged detention. The Supreme Court held that the U.S. Code does not give detained aliens the right to periodic bond hearings during the course of their detention[57].

The US Supreme Court was created as a check to the Congressional and Presidential powers to prevent misuse of power. While the Court has issued some decisions that better the asylum process and sue process for immigrants, the Court could take better advantage of their judiciary power to create more equitable treatment for immigrants by acknowledging the provisions of the 1967 Protocol as superseding to US immigration policy. However, the Justices owe their career to the President who nominated them and it will be unlikely that they issue a decision that goes against that party.

Part Two: The Effects on Refugees at the US-Mexico Border and what International Law has to Say about It.

[52] *Arizona v. United States* (2012) United States Supreme Court, Syllabus
[53] Ibid
[54] Ibid
[55] *Jennings v. Rodriquez* (2018) United States Supreme Court, Syllabus
[56] Ibid
[57] Ibid

I. Asylum Application Approvals and Border Pushbacks

The US differentiates between a refugee and an asylum seeker. An asylum seeker is someone who seeks asylum at a US border while a refugee is someone who seeks protection while still overseas. Both categories must still prove that they meet the definition of a refugee found within the Immigration and Nationality Act which matches the definition within the 1951 Convention. So, for the purposes of this paper, asylum seekers are the same as refugees. Due to the ongoing political instability in Northern Central America, asylum seekers crossing the border have increased from one in a hundred to one in three [58]. Despite the fact that the number of asylum applications have risen, the Trump administration has taken steps to limit access to humanitarian protection within the United States. In a conference, Attorney General Jeff Sessions cited "the danger of being 'invaded' by Central American migrants" to justify the Trump administration's introduction of policies that "limit the ability of those seeking protection in the United States to succeed with their claims" [59]. For instance, the administration has eliminated domestic violence and gang violence as grounds for asylum[60].

In another report released by the Department of Homeland Security, the Trump administration has also decided to deny asylum to those "who enter or attempt to enter the United States across the southern land border after failing to apply for protection from persecution or torture while in a third country through which they transited en route to the United States"[61]. However, to be a "safe third country" the US must have a bilateral or multilateral agreement with them[62]. Thus far, there is no Central American country that has such an agreement with the US. US officials have been working to make such an agreement with Mexico which would then allow US officials to refuse all asylum-seekers who arrive to the US from Mexico unless they are Mexican nationals fleeing Mexico [63].

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[58] Doris Meissner, Faye Hipsman and T. Alexander Aleinikoff 'The U.S. Asylum System in Crisis: Charting a Way Forward' (2018) Migration Policy Institute 1, page 2
[59] Ibid, page 17 and also see Department of Justice 'Attorney General Sessions Delivers Remarks to the Association of State Criminal Investigative Agencies 2018 Spring Conference' (7 May 2018)
[60] Meissner (n 58), page 15
[61] Department of Homeland Security and Department of Justice 'Asylum Eligibility and Procedural Modifications' (2019) http://s3.amazonaws.com/public-inspection.federalregister.gov/2019-15246.pdf, page 1
[62] Ibid, page 14
[63] Illegal Pushbacks (n 31), page 25

The US has required migrants to remain or be returned to Mexico while the US processes their asylum claims. However, there is no reason to believe that those waiting or returned to Mexico are safe. Additionally, the Trump administration's new "zero-tolerance" approach to immigration means prosecuting all border crossers for illegal entry, including those who are claiming asylum[64]. Meaning even if asylum seekers are not forced to wait in Mexico, they may be forced to wait for their case to be heard in detention centers which have been accused of not meeting basic health standards.

A. International Human Rights Law

To begin, it is important to mention that the United States has only ratified three out of the nine core international human rights treaties: The International Covenant on Civil and Political Rights, the 1966 Convention on the Elimination of Racial Discrimination, and the Convention against Torture. While they have signed others, such as the Convention on the Rights of Children and the Convention on the Elimination of Discrimination Against Women, under international law the United States cannot be held accountable for the laws in such treaties unless ratified. However, in cases where the US has signed onto treaties but not ratified them, the Vienna Convention on the Law of Treaties states "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty" [65].

ICCPR

The Human Rights Committee has interpreted the ICCPR to include the obligation not to remove a person from their territory and send them to a country where there are grounds to believe they will come to irreparable harm [66]. This is derived from article 6, the right to life, and article 7, the right to be free from cruel, inhuman or degrading treatment [67]. Amnesty International has issued several reports indicating that migrants are by no means "safe" in Mexico,[68] meaning that Mexico cannot be one of the U.S.' safe third

[64] Illegal Pushbacks (n 31), page 6
[65] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), art 18
[66] UN Human Rights Committee (HRC) 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) https://www.refworld.org/docid/453883fb0.html para 9
[67] The United Nations High Commissioner of Refugees 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol'(2007) https://www.refworld.org/docid/45f17a1a4.html, para 19
[68] Illegal Pushbacks (n 31), page 33

countries. Article 4, the derogation clause, does not allow any derogation from articles 6 and 7, so there is no excuse for the U.S.' safe third country policy.

CERD

Discrimination is defined in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It is defined as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" [69]. President Trump and his cabinet have used dehumanizing rhetoric to describe immigrants and asylum seekers from the US-Mexico border which has shed a light on the discriminatory motivation of the new "zero-tolerance" policy[70]. They have regularly described these immigrants and asylum-seekers as "criminals", "smugglers," and "traffickers" in order to justify their refusals and detentions [71]. Article 4 states that State Parties "shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination"[72], yet racial profiling is also common in immigration enforcement, with ICE even pulling over American citizens who are of Latin American descent[73]. It is also evident that ICE officials often focus on patrolling Hispanic communities. Statistics show that "there are disproportionately high rates of individuals from a Mexican or Central American background in these proceedings in comparison to their proportion of the overall immigrant population"[74].

CAT

Unlike the 1951 Refugee Convention, the Convention Against Torture makes no conditions for which a person can be returned. Article 3 of CAT states that "no State Party shall expel, return ("refouler")

[69] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD), art 1(1)
[70] Illegal Pushbacks (n 31), page 30
[71] Donald Trump 'President Trump's Oval Office Address' (9 January 2019)
[72] CERD (n 63), art 4(c)
[73] Howard Lintz, Yallana McGee, Ola Mohamed, Safa Sajadi, Sarah Sawyer, Melanie Stratton, Jordan Wolfe and Deborah M. Weissman 'A Basic Human Right: Meaningful Access to Legal Representation' (2015) The Human Rights Policy Seminar University of North Carolina School of Law, page 102 and Carrie L. Arnold 'Racial Profiling in Immigration Enforcement' (2007) 49 ARIZ. L. REV. 113, 119-121
[74] Ibid, page 120

or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture"[75]. Article 3 in non-derogable, meaning that it applies to all persons, including during times of conflict or when combating terrorism [76]. In order to determine if the there are grounds to believe that there is a possibility of torture "competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights"[77]. In a report, Amnesty International collected testimony that showed that migrants face kidnappings and killings throughout their journey through Mexico to the US[78]. In regards to these pushbacks, the Special Rapporteur on cruel and inhuman treatment stated that "in displaying complete indifference as to the grave risks which some of the affected migrants may be exposed to, 'pushbacks' and border closures blatantly negate their human dignity in a manner which, in the view of the Special Rapporteur, is inherently degrading"[79]. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also warned against safe third country agreements by arguing that "readmission agreements circumvent migrants' due process rights and fall short of the procedural precautions States must take to ensure returnees will not be exposed to torture or ill-treatment" [80].

In their interpretation of CAT, the UN Committee Against Torture said that "States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers, which would compel persons in need of protection under Article 3 of the Convention to return to their country of origin in spite of their personal risk"[81]. The US is aware of this obligation as US

[75] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 3(1)
[76] Advisory Opinion (n 61), para 20
[77] CAT (n 75), art 3(2)
[78] Amnesty International 'Facing Walls: USA and Mexico's Violations of the Rights of Asylum Seekers' (2017), page 33
[79] Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2018) A/HRC/37/50 https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf para 54
[80] Ibid, para 46
[81] United Nations Committee Against Torture 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22' (9 February 2018) https://www.refworld.org/docid/5a903dc84.html, para 14

law, in conformity, prohibits border authorities from pushing asylum-seekers back across the border[82]. Instead they must refer them to an asylum interview officer to assess their risks of torture [83].

B. International Refugee Law

While the US does meet the minimum of refugee law standards by granting asylum applications for persecution on grounds of race, religion, nationality, political opinion, and membership of a particular social group, they have eliminated allowing applications on grounds of domestic violence and gang violence[84]. The administration removed these two classes claiming that they cannot fall under membership of a particular social group since the only commonality is the harm that they face. However, it has been recognized that gender-related violence, including domestic violence, inflicts severe pain and suffering and have been used to persecute by State and non-state actors[85]. While claimants must prove the discrimination arises from State laws, even when States have prohibited domestic violence if they continue to condone it or are unable to effectively stop it, this can amount to persecution[86]. Also, UNHCR's Guidelines on Gender-Related Persecution states that "The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size" [87]. In terms of gang violence, the refugee definition recognizes both State and non-State actors as agents of persecution[88]. Acts committed by gangs can be considered persecution if "such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection"[89]. While the U.S. is not obligated to abide by the UNHCR's recommendations as to who qualifies as a refugee, the U.S. cannot return them to any country where they continue to face these threats.

Forcing Immigrants to wait in Mexico while the US processes asylum claims also violates the principle of non-refoulement or returning people to a place where they face harm. The principle of non-

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[82] 8 U.S. Code Title 8 – Aliens and Nationality
[83] Illegal Pushbacks (n 31), page 12
[84] Meissner (n 52), page 17
[85] The United Nations High Commissioner of Refugees 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (2002) UN Doc HCR/GIP/02/01 https://www.refworld.org/docid/3d36f1c64.html, para 9
[86] Ibid, para 11
[87] Ibid, para 8
[88] Ibid, para 19
[89] Ibid, para 19

refoulement is also part of customary international law and is therefore binding on every country in the world, even if the US had not ratified the 1967 Protocol[90]. The principle is derived from article 33(1) of the 1951 Convention which states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" [91]. According to UNHCR, the prohibition of return in "any manner whatsoever" also includes non-admission at the border [92]. Additionally, non-refoulement does not just apply to the country of origin but also to "any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk" [93]. Even if US claims of being overrun by asylum-seekers was true, they are still obligated under article 33(1) to "adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger" [94]. The UN Special Rapporteur on torture also deemed "'pushbacks' and … measures that are designed, or of a nature, to deprive migrants of their right to seek international protection and to have their case assessed in an individualized due process proceeding …incompatible with the prohibition of refoulement"[95].

In international refugee law, "time spent in transit or in a country of first refuge may make a refugee ineligible for asylum or admission, even if non-returnable to any other country"[96]. This depends on whether or not the country of first refuge continued to threaten their lives or freedom. And while the UNHCR has recognized "safe third country returns" as legal, the third country must be compliant with basic human rights standards[97]. So, while the US could legally make a "safe third country" agreement with Mexico, the US must first make sure that Mexico is a safe country for asylum-seekers. In a report

[90] Advisory Opinion on the Extraterritorial Application (n 67), para 15
[91] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention), art 33(1)
[92] Advisory Opinion on the Extraterritorial Application of (n 67), para 7
[93] Ibid
[94] Ibid, para 8
[95] Report of the Special Rapporteur (n 79), para 54
[96] Goodwin-Gill (n 3), page 203
[97] Moreno-Lax 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in G.S. Goowin-Gill and P. Weckel, Migration & Refugee Protection in the 21st Century: Legal Aspects (2015), page 671; also see Executive Committee of the High Commissioner's Programme 'Conclusion on International Protection' (9 October 1998) UN Doc A/53/12/Add.1, para (aa)

issued by Amnesty International, Amnesty found that "Migrants and asylum-seekers are frequently subject to muggings, extortions, kidnappings and killings on their journey through Mexico…[and] collected dozens of testimonies of migrants and asylum-seekers that during their transit through Mexico have been victim to such crimes"[98]. Mexico's National Human Rights Commission also released reports on the kidnappings of migrants and acknowledged that Mexican officials have worked with gangs to carry out said kidnappings[99]. The report goes on to state that "hotspots for kidnapping include Tamaulipas state, which borders the United States,"[100] so the U.S. cannot refuse asylum seekers just because they did not apply for asylum before reaching the U.S..

The Trump administration's new "zero-tolerance" policy prosecutes all who enter illegally, including asylum seekers, by making them wait in detention facilities. This goes directly against UNHCR's guidelines on detention. UNHCR guidelines on detention point out that it is reasonable for refugees to be without documentation or to enter a territory illegally due to the nature of fleeing one's country[101]. The guidelines add that asylum seekers should not face adverse consequences purely because they are unable to provide documentation. While the guidelines admit that "it is permissible to detain an asylum-seeker for a limited initial period …such detention can only be justified where that information could not be obtained in the absence of detention"[102]. In regard to the standard of proof refugees must provide, seeing as they could likely not have documentation, those reviewing the cases should do so on a balance of probabilities similar to civil cases since that is what removal proceedings are considered[103]. The reviewer does not have to be fully convinced of each claim made by the applicant, but rather just decide whether or not based on the facts of the situation whether or not the claim is credible[104]. By refusing or

[98] Facing Walls (n 65), page 33
[99] Ibid
[100] Ibid, page 34
[101] The United Nations High Commissioner for Refugees 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) https://www.refworld.org/pdfid/503489533b8.pdf, para 25
[102] Ibid, para 28 and Executive Committee of the High Commissioner's Programme 'Detention of Refugees and Asylum-Seekers" (13 October 1986) UN Doc A/41/12/Add.1 https://www.unhcr.org/uk/excom/exconc/3ae68c43c0/detention-refugees-asylum-seekers.html, para. (b)
[103] Office of the United Nations High Commissioner for Refugees 'Note on Burden and standard of Proof in Refugee Claims' (1998) https://www.refworld.org/pdfid/3ae6b3338.pdf
[104] Note on Burden and standard of Proof (n 101)

detaining asylum seekers for lack of documentation, the U.S. is forcing them to prove their case with a standard of proof above the international standard.

II. Detention Centers

Today the United States operates the world's largest immigration detention system. There is roughly 30,000 immigrants detained in this system on any given day[105]. After being picked up by immigration officials, an individual can be released on bond if they are not deemed a "threat" to national security[106]. The enactment of Antiterrorism and Effective Death Penalty and Illegal Immigration Reform and Immigrant Responsibility (IIRIRA) acts means there is now a wider range of individuals subject to mandatory detention, including anyone considered a national security or terrorist risk. The IIRIRA also requires that all port of entry asylum seekers be detained and remain in detention even after officials confirm their claims as credible, unless they are deemed not to be a national security or flight risk [107].

In addition to the concerns mentioned above, several reports have come out revealing that the conditions within these detention facilities are less than pleasant and may even violate international law. A report released by the Department of Homeland Security Inspector found "violations of ICE's 2011 Performance-Based National Detention Standards, which set requirements for facilities housing detainees" [108]. They "observed immediate risks or egregious violations of detention standards … including nooses in detainee cells, overly restrictive segregation, inadequate medical care, unreported security incidents, and significant food safety issues"[109]. Examples of risks included "spoiled and moldy food in kitchen refrigerators, as well as food past its expiration date"[110], "detainee bathrooms that were in poor condition, including mold and peeling paint on walls, floors, and showers, and unusable toilets"[111] and that "detainees reported never being given lotion or shampoo and never receiving any toiletries after intake. [their] review of the facility toiletry stock revealed that the facility had no lotion on hand and the housing

[105]'United States Immigration Detention Profile' (Global Detention Project, May 2016) https://www.globaldetentionproject.org/countries/americas/united-states
[106] Ibid
[107] 'Fact Sheet: U.S. Asylum Process' (10 January 2019) National Immigration Forum https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/
[108] John V. Kelly 'Concerns about ICE Detainee Treatment and Care at Four Detention Facilities' Office of Inspector General Department of Homeland Security (3 June 2019) https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf, page 0
[109] Ibid
[110] Ibid, page 3
[111] Ibid, page 8

units did not have any toiletry supplies to provide to detainees"[112]. In addition to the report released by the Department of Homeland Security, a leaked report from the Department of Health and Human Services shows that those in detention have also reported sexual abuse within the centers[113]. A group known as Freedom for Immigrants filed a federal complaint within the Department of Homeland Security when it "found that between January 2010 and July 2016, the OIG received over 33,000 complaints of sexual assault or physical abuse [but]… investigated less than 1 percent of these cases"[114].

A. International Human Rights Law

In International law, the State retains the power to control the entry of non-nationals. This power can also include the use of detention [115]. However, the US' obligations under the ICCPR, ICERD, and CAT also applies to detention facilities, which means that there are certain standards and protocols that must be administered and followed in the treatment of detainees, US national or otherwise. These conventions also include rights such as freedom from arbitrary detention, non-discrimination, and freedom from inhuman and degrading treatment.

ICCPR

Article 2(1) of the Covenant on Civil and Political Rights obligates States to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" [116]. This article means that the US has to provide the following rights from the ICCPR regardless of race or nationality to everyone within their jurisdiction, including asylum seekers.

Articles nine through fifteen outline the right to be free from arbitrary detention and the conditions that legal detention must meet. Article 9 guarantees the right to liberty, or freedom from arbitrary detention, to everyone which "includes, among others, girls and boys, soldiers, persons with disabilities,

[112] John V. Kelly (N 101), page 10
[113] Allegations of Sexual Assault Reported by the Department of Jusitce https://teddeutch.house.gov/uploadedfiles/naduac1214_sexual_assaults_fy2015-18.pdf
[114] 'Widespread Sexual Assault' (Freedom for Immigrants, 2017) https://www.freedomforimmigrants.org/sexual-assault
[115] Goodwin-Gill (n 3), page 196
[116] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 2(1)

lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity" [117]. The right to liberty is not absolute, it can be justified in some instances such as enforcement of criminal laws. Article 9 outlines the conditions which can equate to arbitrary detention, such as illegal grounds for arrest, not informing the victim of the reasons they were arrested, lack of court procedure, and not being brought before a judge in a reasonable time period[118]. By detaining immigrants regardless of their asylum claims without a justifiable reason and for indefinite amounts of time, the United States has violated their right to liberty. The Human Rights Committee stated that "[administrative] detention presents severe risks of arbitrary deprivation of liberty" and that "such detention would normally amount to arbitrary detention as other effective measures addressing the threat…would be available" [119]. While the Committee also recognizes that detention in the course of immigration proceedings is not always arbitrary, it must be justifiable, proportionate and the reasoning needs to be specific to the individual [120]. An Assistant Field Office Director told Amnesty International in an interview that "all asylum applicants are put in for expedited removal, except for family units when there's no space for them. […] All single adults get placed into custody. The default is immigration detention, and not measuring flight risk" [121]. Since the United States is using detention across the board and it is not tailored to the individuals' circumstances, the detention runs the risk of being arbitrary by this standard as well.

Article 10 stipulates that those who are deprived of their liberty must "be treated with humanity and with respect for the inherent dignity of the human person"[122]. In concurrence, Article 7 details that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". However, based on the US' own Homeland Security reports, these detention centers are in extremely poor conditions and are without respect to the dignity of those who are detained. The Working Group on Arbitrary Detention during its visit to the United States:

> "observed that the current system of detaining immigrants and asylum seekers is… punitive, unreasonably long, unnecessary, costly when there are alternative community-based solutions,

[117] Human Rights Committee 'General Comment Number 35 Article 9 (Liberty and Security of Person), para 3
[118] ICCPR (n 109), Article 9
[119] Ibid, para 15
[120] Ibid, para 18
[121] Illegal Pushbacks (n 31), page 51
[122] ICCPR (n 109), Article 10(1)

> especially for children and families, not based on an individualized assessment of the necessity and proportionality of detention, carried out in degrading conditions, and a deterrent to legitimate asylum claims" [123].

The conditions noted in the report clearly shows a disregard for human dignity and that the U.S. subjects immigrants and potential asylum seekers to degrading treatment contrary to their obligations under article 7 and 10.

Under the Trump administration 26 detainees have died, and in many of the cases the deaths could have been prevented[124]. In a Human Rights Watch report, independent medical experts determined that "more people died in immigration detention in fiscal year 2017 than any year since 2009, and the most recent detailed information we have about immigration detention deaths shows that they are still linked to dangerously inadequate medical care"[125]. While the ICCPR does not explicitly state that there is a right to health, issues related to health and detention could be raised under article 6, the right to life, and article 10, humane treatment. It can be inferred from both of these articles that there are obligations to safeguard the health of those detained by State Parties as they are under State jurisdiction. This view can be seen in Human Rights Committee Statements "'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures"[126] and "not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7… but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty"[127]. The Human Rights Committee has upheld that there is a right to medical care during detention in cases such as *Pinto v. Trinidad and Tobago* and *Kelly v. Jamaica* [128].

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[123] Human Rights Council 'Report of the Working Group on Arbitrary Detention on its visit to the United States of America' (17 July 2017) UN Doc A/HRC/36/37/Add.2 https://www.undocs.org/A/HRC/36/37/Add.2, para 87

[124] Ariana Sawyer 'Another Needless Death in US Immigration Detention' (Human Rights Watch, 26 July 2019) https://www.hrw.org/news/2019/07/26/another-needless-death-us-immigration-detention

[125] 'Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention' (Human Rights Watch , 20 June 2018) https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration

[126] Human Rights Committee 'CCPR General Comment No. 6: Article 6 (Right to Life)' (30 April 1982) https://www.refworld.org/docid/45388400a.html, para 5

[127] Human Rights Committee 'CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)' (10 April 1992) https://www.refworld.org/docid/453883fb11.html, para 3

[128] *Pinto v. Trinidad and Tobago* (1990) Report of the Human Rights Committee UN Doc A/45/40, para 12.7; see also Kelly v. Jamaica (2 April 1991) Human Rights Committee UN Doc CCPR/C/41/D/253/1987, para 5.7.; see also Rick Lines 'The right to health of prisoners in international human rights law' (2008) International Journal of Prisoner Health 4(1) 353, page 16

In *Pinto v. Trinidad and Tobago*, the Committee held that "the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person encompasses the provision of adequate medical care during detention, and that this obligation, obviously, extends to persons under the sentence of death"[129]. Since the Committee has given the right to medical care to those on death row, it can be inferred that it applies to those in U.S. administrative detention as well[130].

This medical treatment not only has to be available, but it has to be timely as well according to the Human Rights Committee. In *Lantsova v. Russian Federation*, the Committee found that in order to meet the obligations under the right to life, "health care must be available to diagnose and treat prisoners when they are ill or otherwise in need of attention, as anything less than this does not constitute a 'properly functioning medical service' within the terms of Article 6(1)"[131]. In the report issued by the Human Rights Watch on the deaths of immigrants in detentions showed a case where "all three experts agreed that the oxygen levels [of a patient in detention] recorded in the facility between March 14 and March 16 were dangerously low and should have prompted immediate evacuation to a hospital"[132]. The experts concluded that if the detainee had been taken to the hospital in a timely manner, his life might have been spared. This case bears a striking resemblance the *Lantsova v. Russian Federation* case where "[Mr. Lanstov] received medical care only during the last few minutes of his life, that the prison authorities had refused such care during the preceding days and that this situation caused his death"[133]. In that case the Committee held that "even if … neither Mr. Lantsov himself nor his co-detainees had requested medical help in time, the essential fact remains that the State party by arresting and detaining individuals takes the responsibility to care for their life"[134]. In the case of the U.S. detainee, he had asked several times to see a doctor and each time the detention nurses turned him away. If the Human Rights Committee determined that the Russian Federation had a responsibility to care for a detainee who had not asked for medical assistance, the United States has certainly broken their obligations under article 6 by failing to provide medical assistance to a detainee who requested it.

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[129] Pinto v. Trinidad and Tobago (n 128), para 12.7
[130] Rick Lines (n 128) page 16
[131] Ibid, page 23 also see *Lantsova v. Russian Federation (2002) Human Rights Committee UN Doc CCPR/C/74/D/763/1997*, para 9.2
[132] Code Red (n 109)
[133] *Lantsova v. Russian Federation* (n 115), para 9.2
[134] Ibid

Article 4 does allow for derogation in times of emergency, however, there can be "no derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18" which guarantee fundamental rights such as the right to life [135]. Article 9 is not included in the list of non-derogable rights and often swapped in favor of security during times of perceived threats, real or otherwise [136]. There are certain elements of article 9 that are non-derogable, such as the guarantee against arbitrary detention. This is because, even in situations that allow derogations under article 4 cannot justify detention that is unreasonable or unnecessary [137]. The existence of a national emergency can help to determine whether a detention is arbitrary[138]. However, the United States has not declared a state of national emergency nor has it informed the United Nations Secretary General of its derogations or reasons for derogating. Even if the US-Mexico border was a legitimate national security threat, any derogations of article 9 cannot exceed the needs of the actual situation and must also conform with the United States' other obligations under international law.

CERD

Discrimination based on nationality is of course inherent in immigration law and within the bounds of international law[139]. While non-nationals may be detained briefly for immigration or identification purposes, an issue may arise if they are detained for criminal activity or national security since nationals also pose a threat but are not preemptively detained[140]. CERD article 2 prohibits States from promoting, engaging or defending acts or groups that support discrimination[141]. To justify the detention of non-nationals the Trump administration has led the public to believe that immigrants coming from the southern border are "criminals" and "rapists". This rhetoric directly goes against article 4 as well which mandates that States "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or

[135] ICCPR (n 109), art 4(2)
[136] Goodwin-Gill (n 3), page 200
[137] Human Rights Committee 'General Comment Number 35 Article 9 (Liberty and Security of Person), para 66
[138] Ibid
[139] ICCPR (n 109), art 13
[140] Daniel Wilsher 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 The International and Comparative Law Quarterly 897 http://www.jstor.org/stable/3663433, page 909
[141] CERD (n 56), art 2(1)(a) and (b)

promote racial hatred and discrimination in any form,"[142]. The mandatory detention of immigrants only continues to this perception, by keeping them locked up the U.S. government makes the public believe they must have done something to deserve it.

CAT

CAT defines torture as an act that is intentional, condoned or carried out by a government official, inflicts severe pain, and is carried out to punish, coerce or intimidate [143]. When determining intent, it **"**does not require that torture and ill-treatment be the desired purpose or outcome of a law, policy or practice… customary international law … only requires the perpetrators' awareness of "a substantial likelihood" that torture or ill-treatment would occur as a consequence of their conduct"[144]. The US had admitted that the policy of detention is used to deter immigrants or coerce them into withdrawing their asylum claims. Mandatory detention of asylum seekers fits CAT's definition as it causes pain and suffering and is used a tool of coercion. Even in the case that it is just used to deter immigrants rather than punish them for entry, "indefinite detention as part of a program of 'human deterrence' is unlikely to ever be either legitimate or humane" [145]. Under article two, even if the United States was claiming they use mandatory detention for national security reasons, there are "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"[146].

Article 10 of CAT ensures that every "State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of … persons who may be involved in the custody, interrogation or treatment"[147]. In addition, "each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person". A recent report issued by the Department of Homeland Security suggests that detention center employee training is inadequate[148]. Even if the US government claims they do not know about the conditions of the

[142] Ibid, art 4
[143] CAT (n 75), art 1(1)
[144] Report of the Special Rapporteur (n 79), para 62
[145] Goodwin-Gill (n 3), page 210
[146] CAT (n 75), art 2(2)
[147] Ibid, art 10
[148] Department of Homeland Security Office of Inspector General 'The Performance of 287(g) Agreements Report Update' (30 September 2010) https://trac.syr.edu/immigration/library/P5049.pdf

detention facilities or that officials were using it as a method of making applicant relinquish their asylum claims, under article 16 State Parties are required to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment"[149].

CRC

While the United States is the only UN member that is not a party to the Convention on the Rights of the Child, article 18 of the Vienna Convention on the Law of Treaties (VCLT) states that signatories to treaties must "refrain from acts which would defeat the object and purpose of [the] treaty"[150]. Additionally, the CRC is the most widely ratified international convention with every other member state in the world is party. Its wide acceptance could mean that the CRC has reached customary international law status. While the CRC does not explicitly prohibit detention, it does lay out a "best interest" principle and provide conditions for detention.

CRC article 3 sets out the "best interest" principle, meaning that a State must keep children as the primary consideration in all State actions concerning them[151]. The Committee has also made it clear that the "best interest" principle applies to children outside their country of origins[152]. A report from the Special Rapporteur on torture noted that:

> Children deprived of their liberty are at a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment. Even very short periods of detention can undermine a child's psychological and physical well-being and compromise cognitive development. Children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems[153].

This report indicates that detention is never the best interest of the child, and that mandatory detention of migrant children shows a blatant disregard of the best interest principle which is at the core of the CRC.

Article 37 of the CRC provides that no child be arbitrarily deprived of their liberty and that detention be used only as a measure of last resort[154]. When detention is imposed, the State has to show

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[149] 1951 Convention (n 91), art 16(1)
[150] Vienna Convention (n 65), article 18
[151] Convention on the Right of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 3(1)
[152] United Nations Committee on the Rights of the Child 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) UN Doc CRC/GC/2005/6, para 1
[153] Report of the Special Rapporteur (n 79), para 16
[154] CRC (n 151), art 37(b)

that the use of child detention is “legitimate aim of punishment of juvenile for the wrongdoing and the needs of public safety”[155]. The last resort principle imposes the duty to explore alternatives to detention on States[156]. By placing children in detention whenever parents are apprehended at the border, the U.S. has clearly not explored other options and is not their last resort. The article also ensures that children that are deprived of their liberty are treated with humanity and respect, are not subject to torture or other inhuman or degrading treatment and are only detained for the necessary time period[157]. However, several human rights organizations found that the children are held “in jail-like border facilities for weeks at a time without contact with family members, regular access to showers, clean clothes, toothbrushes, or proper beds”[158]. In addition, “officials at the border seem to be making no effort to release children to caregivers--many have parents in the US -- rather than holding them for weeks in overcrowded cells at the border”[159]. Seeing as the U.S. refuses to provide proper care for the children and shows no imitative on trying to ensure they are out within a reasonable period; they are failing their obligation not to go against the purposes of this treaty.

B. International Refugee Law

The two most prevalent international refugee law documents are the 1951 Convention relating to the Status of Refugees (1951 Convention) and the 1967 Protocol. The United States is only party to the 1967 Protocol, however, article 1 of the 1967 Protocol states that “The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined”[160]. Although detention is not expressly banned by the 1951 Convention, States still cannot use detention when it is unnecessary[161]. Any restriction of movement, other than to determine identity, would need to be justified by more than national security speculation to avoid being labelled as arbitrary[162]. Support for detention limits can be found in article 31(2) which states that “Contracting States shall not apply to the

[155] Eva Manco ‘Detention of the Child in the Light of International Law – A Commentary on Article 37 of the United Nation Convention on the Rights of the Child’ (2015) 7(1) Amsterdam Law Forum 55, page 63
[156] Ibid, page 62
[157] Ibid, art 37(a) and (c)
[158] Nicole Austin-Hillery and Clara Long ‘We Went to a US Border Detention Center for Children. What We Saw was Awful’ (Human Rights Watch, 24 Jane 2019) https://www.hrw.org/news/2019/06/24/we-went-us-border-detention-center-children-what-we-saw-was-awful
[159] Hillery and Long (n 149)
[160] 1967 Protocol (n 1), art 1(1)
[161] Goodwin-Gill (n 3), page 209
[162] Goodwin-Gill (n 3), page 209

movements of such refugees restrictions other than those which are necessary"[163]. Article 31(1) of the 1951 Convention also states that "contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who… present themselves without delay to the authorities and show good cause for their illegal entry or presence" [164]. Prosecuting asylum seekers for illegal entry violates both this article and US immigration law which allows all aliens to apply for asylum, irrespective of if they entered legally[165].

Article 33 of the 1951 Convention prohibits States from expelling or returning a refugee to places their lives or freedom would be in danger[166]. A report issued by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment states that:

> "States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to "voluntarily" return to their country of origin… deliberate practices such as these amount to "refoulement in disguise" and are incompatible with the principle of good faith" [167].

U.S. officials have made it clear the policy of detention is used as a deterrence method for keeping migrants out, meaning that the condition of detention is deliberately harsh and violates the U.S.' obligation not to return a refugee to where they may face danger. According to an advisory opinion issued by UNHCR, article 33(1) also obligates States to "grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures"[168]. The mandatory detention of those who cross illegally or without documentation can hardly be labelled as either fair or efficient.

Article 9 does provide a national security exception which states that "Nothing in [the] Convention shall prevent a Contracting State… from taking provisionally measures which it considers to be essential to the national security in the case of a particular person"[169]. However, the measures taken by the State to ensure national security can only last as long as the State needs to determine whether or not the person is in fact a refugee[170]. However, the U.S. is not applying detention to particularly people, it is a broad

[163] 1951 Convention (n 91), art 31(2)
[164] Ibid, art 31
[165] 8 U.S. Code Title 8 – Aliens and Nationality
[166] 1951 Convention (n 91), art 33
[167] Report of the Special Rapporteur (n 79), para 45
[168] Advisory Opinion on the Extraterritorial Application (n 67), para 8
[169] 1951 Convention (n 91), art 9
[170] Ibid, art 9

sweeping policy, that while it has been claimed that it is for national security, the immigrants cannot all pose a real threat to national security purely because they crossed the U.S.-Mexico border. In 2012 UNHCR issued Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (Guidelines on Detention). While guidelines in themselves are no formally binding like treaties or conventions, they do provide authoritative interpretations of States' obligations under said treaties. These Guidelines recognizes that States has the right to control the entry of non-national within their territory, but also mandate that detention can only be used as a last resort[171]. Mandatory detention of immigrants who cross illegally or without documentation is not a method of last resort and therefore goes against these guidelines.

III. Child Separation during Detention

One of the strongest and most recent backlashes against the United States is their new policy on separating immigrant parents from their children during detention. The US reason for this is that since all migrants attempting to cross the border without documentation are referred to the Department of Justice for a crime, their children are then unaccompanied minors and therefore should be separated. Apart from the separation itself, advocates against separation also say that the Department of Homeland Security does not meet the basic standards of care for the children.

A. International Human Rights Law

Family separation and mandatory child detention violate multiple fundamental human rights such as the right to family, the right to liberty, and the right to freedom from torture and other inhuman treatment [172]. Children's rights under the ICCPR, CAT and the CRC are violated during family separations by "exposing them to extreme and unnecessary trauma after being separated" [173].

ICCPR

The Human Rights Committee stated that "children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best

[171] Unites Nations High Commissioner for Refugees 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) https://www.refworld.org/pdfid/503489533b8.pdf, para 21 and Derek N White and Christi L Thornton and Kristen Hunsberger and Zoe Meier, 'International Refugee Law' (2013) 47 Int'l Law 349, page 349
[172] Illegal Pushbacks (n 31), page 7
[173] Ibid

interests as a primary consideration with regard to the duration and conditions of detention"[174]. Seeing as the United States was able to process asylum, applications in previous administrations without detaining children, this new policy is not a measure of last resort and could be seen as arbitrary detention under article 9 of the ICCPR. In addition to the detention of children being considered arbitrary detention, detaining children separately from their parents breaks several other obligations within the ICCPR. For instance, the right to family life is protected in article 17 of the ICCPR which states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" [175]. The expression "arbitrary interference" does extend to interference that is allowed under national laws[176]. However, arbitrary interference is not defined it the contents of the ICCPR. General Comments issued by the Human Rights Committee do allude to a "reasonableness standard", meaning that interference may be labelled as arbitrary if it is unreasonable, unnecessary is unproportionate to the need[177]. Because child separation can have devastating effects on the mental health of both the child and the parent, it is not proportionate to the need to determine asylum status or for identification.

Article 23(1) of the ICCPR recognizes that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State" [178]. This article recognizes that parents have a right to care for and raise their children[179]. This includes the right of parents to determine the religious and moral education of their children, which cannot be exercised in the case of detention separation [180]. General comments issued by the Human Rights Committee state that article 23 "implies the adoption of appropriate measures…to ensure the unity or reunification of families, particularly when their members

[174] Human Rights Committee 'General Comment Number 35 Article 9 (Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35, para 18
[175] ICCPR (n 116), article 17
[176] Human Rights Committee 'General Comment No. 16 Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)' (1988) https://www.refworld.org/docid/453883f922.html, para 4
[177] Ibid
[178] ICCPR (n 116), art 23(1)
[179] Lea Brilmayer 'Family Separation as a Violation of International Law' (2003) Yale School Legal Scholarship Repository 213, page 226
[180] Ibid and also see ICCPR (n 116), art 18(4)

are separated for political, economic or similar reasons"[181]. The U.S. has taken measures directly against family unity by separating parents from their children during detention, violating obligations under article 23.

CRC

The "best interests" principle, laid out in article 3, obligates States to keep the children's best interests in mind in all State actions concerning them[182]. However, several human rights organizations have documented the harm that can occur to children who are separated from their parents this way. For example, the President of the American Psychology Association has said that the "administration's policy of separating children from their families as they attempt to cross into the United States … threatens the mental and physical health of both the children and their caregivers" [183]. The United States is deliberately ignoring the best interests of migrant children by both detaining them and separating them from their care givers. The detrimental affect family separation and detention has on a child according to experts could go against the object purpose of the CRC, meaning the United States has gone against its obligations as a signatory to the treaty.

Articles 7 and 8 specifically address the right of parents to be with their children. Article 7 gives the child "the right to know and be cared for by his or her parents" [184]. Article 8 recognizes the right to family relations without unlawful interference[185]. Neither of the rights given in these articles can be met during child separation during detention. While article 9 of the CRC allows for family separation in extreme circumstances, this can only be done when it is necessary to ensure the best interests of the child such as when parents are neglecting a child [186]. Otherwise, article 9 prohibits separating children from their parents against their will. Additionally, even in the circumstances that allow for family separation, the child has the right to maintain "direct contact with both parents on a regular basis, except if it is contrary to the

[181] Human Rights Committee 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) https://www.refworld.org/docid/45139bd74.html
[182] CRC (n 151), art 3(1)
[183] American Psychological Association 'Statement of APA President Regarding the Traumatic Effects of Separating Immigrant Families' (29 May 2018) https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families
[184] CRC (n 151), art 7(1)
[185] Ibid, art 8
[186] Ibid, article 9

child's best interest" [187]. Reports of US detention centers show that when children are separated from their parents, they often do not get to have contact even though they are mandated to. US detention separations often do not give parents up to date information as to the location of their children, which directly contradicts article 9(4) which requires the State to provide family members with information regarding the whereabouts of the child [188].

CAT

The prohibition of torture in a non-derogable human right and a part of customary international law[189]. Amnesty International compares the act of child separation to torture. They equate it to torture because US officials are using the mental suffering of parents that are separated from their children to deter immigrants from entering the United States [190]. This theory holds since CAT defines torture as an act that is intentional, condoned or carried out by a government official, inflicts severe pain, and is carried out to punish, coerce or intimidate [191]. The President of the American Psychology Association even described the policy as cruel in "The administration's policy of separating children from their families as they attempt to cross into the United States without documentation is not only needless and cruel, it threatens the mental and physical health of both the children and their caregivers"[192]. A report issued by the Special Rapporteur stated that in the case of administrative detention, such as immigration related detention, "it is now clear that the deprivation of liberty of children based on their or their parents' migration status … becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children"[193]. Even if the children are released from detention facilities relatively quickly, the "[torture] threshold can be reached very quickly, if not immediately, for migrants in situations of increased vulnerability, such as children, women, older people, persons with disabilities, medical conditions, or torture trauma, and members of ethnic or social minorities" [194].

B. International Refugee Law

[187] CRC (n 151), art 9(3)
[188] Ibid, art 9(4)
[189] Report of the Special Rapporteur (n 79), para 23
[190] Amnesty International 'USA: Policy of separating children from parents is nothing short of torture' (18 June 2018) https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/
[191] CAT (n 75), art 1(1)
[192] American Psychological Association (n 183)
[193] Report of the Special Rapporteur (n 79), para 80
[194] Ibid, para 28

Forcible separation of families also violates the US' obligation under international refugee law. Article 31 of the 1951 Convention states that "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who… enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" [195]. Department of International Protection defined a penalty as "any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could"[196]. It has also been established that "any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds"[197]. The Trump administration has used family separation as a means of both deterrence and punishment of asylum seekers, this policy directly contradicts the US' obligation not to punish refugees for their means of entry. The United States has also utilized the trauma that comes with the indefinite separation from one's children to push asylum-seekers to give up their claims and accept deportation to their country of origin which violates the principle of non-refoulement[198]. This is backed by a report issued by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment which states that "States increasingly subject migrants to unnecessary, disproportionate and deliberately harsh reception conditions designed to coerce them to 'voluntarily' return to their country of origin" [199].

IV. Lack of Legal Counsel

Due process is also a huge concern when it comes to immigrants in detention. Although the article six of the US Constitution entitles US citizens to legal counsel free of charge if they cannot afford it, this is only in the case of criminal proceedings. While "section 292 of the Immigration Nationality Act allows noncitizens in removal proceedings to have the "privilege" of being represented by counsel" it does

[195] 1951 Convention (n 91), art 31
[196] Department of International Protection, internal note, May 2000.
[197] Guy S. Goodwin-Gill 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' (October 2001) A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations https://www.unhcr.org/3bcfdf164.pdf, para 64
[198] Illegal Pushbacks (n 31), page 8
[199] Report of the Special Rapporteur (n 79), para 45

"explicitly states that this shall be at "no expense of the government'"[200]. This means unless they are able to afford one themselves, they will not have one. What is even more disconcerting is that immigrant children are also required to represent themselves in court, even though they cannot understand where they are, immigration law, or even the language of the court in some cases. Forcing immigrants to go through immigration proceedings alone hinders their chances to obtain protection and undermines the principle of due process.

International Instruments such as the ICCPR grant the right to legal aid in criminal cases, and the same treatment under the law to migrants as nationals do. While it is true that US nationals cannot face deportation hearings in the US, the consequences of their civil trials cannot be compared to the costs immigrants who are deported have to face. The consequences of deportation, especially in the case of asylum seekers, could be seen as worse than any criminal punishment a US national would face in criminal court [201].

The chances of obtaining asylum are far greater if the asylum applicant has an attorney. According to a fact sheet on the US asylum process "90 percent of applicants without an attorney were denied, while almost half of those with representation were successful in receiving asylum"[202]. Due to the costs of obtaining attorneys, the inability to earn money while in detention, and the remote locations of the detention centers, only one in five detainees actually are able to retain a lawyer to assist in their case[203]. This low rate of representation is alarming seeing that even the American courts recognize that having counsel can make a significant difference in the outcome of a detainee's case.

A. International Human Rights Law

ICCPR

While there is no general right to free legal counsel for aliens during removal proceedings, the right to legal counsel is found in several human rights instruments. While the right to counsel is typically only applied to criminal cases, it could be argued that these laws should require states to provide legal aid in

[200] Policy Seminar (n 71), page 97 and 8 U.S. Code Title 8 – Aliens and Nationality
[201] Brian Rowe, 'The Child's Right to Legal Assistance in Removal Proceedings under International Law' (2010) 10 Chi J Int'l L 747, page 756
[202] Fact Sheet (n 107)
[203] Kaufman (n 44), page 121

certain cases such as to children and asylum seekers due to the grave nature of their cases[204]. Removal proceedings can have severe consequences on asylum seekers in the US, including separation from family members and being returned to a country where their life or freedom is in danger.

The ICCPR clearly states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him"[205]. Article 26 of the ICCPR states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law" [206]. Under this article, non-nationals are afforded the same protection under the law as nationals of the United States. The justification for not giving immigrants these rights is that the proceedings are not criminal but civil and are therefore not entitled to the same protection as criminal defendants[207]. The logic behind this is that those in civil proceedings do not face the same kind of punishment as those in criminal proceedings because they aren't as severe. However, deportation can be hold far more severe consequences for immigrants than criminal proceedings do nationals. The US Supreme Court has even recognized that deportation is in a way a punishment in "[deportation] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted"[208]. Despite even the US' highest court recognizing deportation as a punishment, the US does not even require that those in deportation proceedings even go before a judge in some cases since immigration officers have the power to issue final orders of removal[209]. These immigration officers are not judges and many are not even lawyers[210]. In addition to the harsh consequences of deportation, detention facilities are built and operated almost identically to US prisons. The Department of Homeland Security inability to keep up with the flow of immigrants also causes many of the detainees to be housed in jails alongside criminal offenders [211].

[204] Ibid, page 752
[205] ICCPR (n 116), art 10
[206] Ibid, art 26
[207] Policy Seminar (n 71), page 98
[208] Ibid, page 99 and *Bridges v. Wixon* (1945) United States Supreme Court
[209] Ibid, page 102 and 8 U.S. Code Title 8 – Aliens and Nationality
[210] Ibid
[211] Kaufman (n 44), page 116

Article 13 of the ICCPR does not give immigrants the right to free legal counsel but it does state that any "alien lawfully in the territory of a State Party to the present Covenant may … be allowed to submit reasons against his expulsion and to have his case reviewed by, *and be represented for the purpose before*, the competent authority or a person or persons designated by the competent authority"[212]. Those detained do have the right to obtain legal counsel, however, the US has made it unnecessarily difficult for immigrants to use counsel. The locations of detention centers are remote and often far away from where the detainees are apprehended, creating a barrier to find evidence they need for their case and access to prompt legal counsel[213]. Short visiting hours, restrictive telephone privileges, and the practice of switching immigrants from detention facility to detention facility without informing them or their families all contributes to the fact that detainees are unlikely to receive legal counsel[214]. Even of the US is not required to provide legal counsel, they cannot manufacture circumstances that severely hinder a detainee's right to obtain legal counsel of their own.

CRC

In the current US asylum application system, children face the same procedures as adults. The system does not afford children, no matter their age, any special treatment towards determining their claims. This is especially concerning for unaccompanied children who face deportation back to persecution because of their inability to express their fears to a court without an adult to help them. However, several international human rights instruments detail the special treatment that children should receive due to their heightened vulnerability. The most prevalent instrument to outline the rights dedicated to children, including migrant children, would be the CRC which does touch on the right to legal counsel.

Article 3 paragraph 1 of the CRC provides that "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"[215]. In UNHCR's Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, UNHCR reaffirmed when it stated that "the basic guiding principle in any child care and protection action

[212] ICCPR (n 101), art 13
[213] Policy Seminar (n 71), page 109
[214] Ibid, page 109-110 and Peter Markowitz 'Barriers to Representation for Detained Immigrants Facing Deportation' (2009) 78 FORDHAM L. REV. 541, 542
[215] CRC (n 151), art 3(1)

is the principle of the 'best interests of the child'"[216]. The UNHCR also states that since children are not "legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would prow his/her interests. Access should-also be given to a qualified legal representative"[217]. The only real way to meet the "best interests" of refugee children is to ensure that these children receive proper help with submitting their asylum claims.

According to article 37 (d) of the Convention on the Rights of the Child, children, including migrant children, "have the right to prompt access to legal aid and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court… and to a prompt decision on any such action" [218]. The remote location of the detention facilities as well as financial constraints immigrant children would face would severely hinder their ability to get prompt legal aid. The UN Committee on the Rights of the Child directly warns against this in "Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable"[219].

Article 20 also provides children that are separated from their families with "special protection and assistance"[220]. Since the parents of these children are unable to help their child plead their cases of persecution to the courts, "special assistance" could include free legal representation to give them a higher chance of success. Article 12 gives children the right to be heard. In order to make their voice heard in an effective manner, children need to be able to understand the legal process in the case of immigration and asylum. In the case of asylum claims, "the child must additionally have the opportunity to present her or his reasons leading to the asylum claim"[221]. Due to the age and vulnerability of immigrant or refugee children, they may be unable to be heard in court without at least a legal advisor which should

[216] Office of the United Nations High Commissioner for Refugees 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (February 1997) https://www.unhcr.org/3d4f91cf4.pdf
[217] Ibid, para 8(3)
[218] Report of the Special Rapporteur (n 79), para 66
[219] United Nations Committee on the Rights of the Child 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) UN Doc CRC/GC/2005/6
[220] CRC (n 151), art 20(1)
[221] United Nations Committee on the Rights of the Child 'General comment No. 12 (2009): The right of the child to be heard' (20 July 2009) UN Doc CRC/C/GC/12, para 123-124

come free of charge in order to fulfil the right to be heard[222] as a child will likely unable to afford one themselves.

B. International Refugee Law

International refugee law does not require that all immigrants in removal proceedings have the right to free legal counsel[223]. However, the 1951 Convention outlines some rights refugees and asylum seekers have in court as they go through the asylum process. Article 16 of the 1951 Convention guarantees refugees "free access to the courts of law on the territory of all Contracting States" and also gives refugees the same treatment in court as do nationals of that state, including legal counsel[224]. Since they are granted the same treatment as nationals in terms of the law, "if domestic law allows legal aid in civil matters as well as in criminal cases, refugees should be entitled to this service as well"[225]. The U.S. does not provide free counsel to civil matters, but it does grant them the right to obtain counsel at a charge. The U.S. builds the detention facilities in extremely remote location, effectively limiting detainees right to obtain legal counsel, even if it is at a cost.

The right of non-refoulement is guaranteed under the 1951 Convention[226] an under customary international law. The principle of non-refoulement means that a state cannot return a refugee to a place they will face persecution. In the case of children, due to their lack of legal knowledge or what asylum even is, a State may not be aware of the child's situation before they are removed if the child does not have proper legal counsel[227]. In order for the U.S. to be sure that it meets the international standard of non-refoulement, the U.S. should protect itself by giving immigrant children a legal advisor who can make their claims heard.

Conclusions

[222] General comment No. 12 (n 212); also see Hélène Soupios-David, Elona Bokshi, Maria Hennessy and Silvia Cravesana 'Right to Justice:
Quality Legal Assistance for Unaccompanied Children' (July 2014) European Council on Refugees and Exiles, page 11
[223] Rowe (n 201), page 754
[224] 1951 Convention (n 85), art 16(3)
[225] Rosa da Costa 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations' (June 2006) Protection Operations and Legal Advice Section, Division of International Protection Services, United Nations High Commissioner for Refugees,
[226] 1951 Convention (n 91), art 33
[227] Rowe (n 201), page 755

Throughout the years several Presidential administrations have let fear trump the United States' international obligations to immigrants, asylum seekers and refugees. However, under the Trump administration there has been blatant infringements on customary or non-derogable obligations such as non-refoulment, freedom from arbitrary detention, and freedom from torture or other inhuman treatment. Detention of asylum seekers violates several international treaties, including the ICCPR, the CRC and the 1951 Convention. The deplorable conditions and lack of medical care in the detention facilities violate these instruments as well as CAT. As one of the founding members of the United Nations, the United States should hold themselves to at least the international standards if not surpass them.

The United States has negated many of its international obligations by making removal proceedings a civil rather than criminal trials. There is not much of a difference between the consequences of a criminal and removal trial, except maybe the rights available at trial[228]. If removal proceedings were considered criminal, immigrants and asylum seekers would be entitled to greater protection against detention and deportation. The only reason that deportation proceedings are non-criminal is so that the State can shortcut protections for non-citizens that are normally protected under international law[229].

The international community has recognized the increased vulnerability of children and has addressed their needs in several key human rights instruments. While the United States has not ratified the CRC, they did sign it and have an obligation under the Vienna Convention on the Law of Treaties to not go against the core fundamental nature of the CRC. The devastating effects that refoulement, detention, and family separation have on children, as demonstrated by prominent psychologists and human rights advocates, clearly go against the founding principles of the CRC and the United States should rectify their laws to meet their obligations.

[228] Rowe (n 201), page 758
[229] Ibid

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