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American Asylum: How the Policy of Turning Away Asylum Seekers Violates National and International Law

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Immigration in the United States is a contentious political issue with complicated economic, security, and policy implications[2]. Although there is popular support for legal migration,[3] much of the current rhetoric centered on immigration conjures intense division[4] arising, often, from misconceptions about the varying immigration policies of the United States.[5] These misconceptions are clearly exemplified in the current debate over the so-called "caravan" of migrants traveling from Central America, which has alternatively been called an "invasion"[6] or an attempt to reach safe haven in either Mexico or the United States.[7]

National security concerns have been heavily debated concerning the caravan specifically and immigration policies at the border more generally, but less public attention has been given to the legal implications of the administration's stated intention of keeping the caravan out,[8] and its past practice of turning away asylum seekers, the latter of which violates both national and international law.[9]

While the governance of borders is the prerogative of governments,[10] there are also precepts of international law that govern the relations between certain categories of migrants, notably refugees, and states. Under the Universal Declaration of Human Rights (UDHR) of 1948, "everyone has the right to seek and enjoy in other countries asylum from prosecution." [11] Though the UDHR is not a legally binding but rather an aspirational document,[12] the 1951 Convention relating to the Status of Refugees, which the United States ratified in 1968,[13] does create legally binding duties relating to refugees, notably "non-discrimination, non-penalization, and non-*refoulement*." [14] It is the prohibition against *refoulement*, which is "the [expulsion] or return [of] a refugee in any manner whatsoever to the frontiers of territories where life or freedom would be threatened" [15] that prohibits turning away asylum seekers without investigating their claims of "a well-founded fear of being persecuted for reasons of race, religion, nationality, [or] membership of a particular social group or political opinion." [16]

A similar doctrine exists in the U.S. Immigration and Nationality Act (INA) §208(a), which states, "Any alien physically present in the United States . . . irrespective of such alien's status, may apply for asylum . . ." [17] While the United States is not required to accept these asylum claims if they are found to be baseless, it is required to review such claims and may not simply turn asylum seekers away without an asylum officer investigating their claims[18] to determine if there is a "credible fear of persecution." [19] One current pending case, *Al Otro Lado, Inc. v. Nielsen*, [20] challenges CBP agents' failure to refer asylum claims to asylum officers, as well as alleged incidences of turning away asylum seekers. If these allegations are true, it seems likely that at least some CBP officers are violating both national and international laws through these actions, which raises broad questions about current American practice towards asylum seekers.

Immigration is a chaotic, complicated subject, and there are serious national security, economic, and social implications to consider when crafting policy. Despite this caveat, the United States cannot violate both its own and international laws in order to pursue preferred immigration policy objectives; reviewing asylum claims and granting asylum should those claims be found credible is not an optional duty but is rather required by both the INA[21] and



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the Convention relating to the Status of Refugees.<sup>[22]</sup> Immigration law in the United States does require careful review and may be ripe for modification, but the way to achieve desired policy goals is not to undermine national and international law by ignoring mandatory duties towards asylum seekers.

[1]

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[2]

Claire Felter & Danielle Renwick, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (July 2, 2018), <https://www.cfr.org/backgrounder/us-immigration-debate-0>.

[3] *Shifting Public Views on Legal Immigration in the U.S.*, PEW RES. CTR. (June 28, 2018), <http://www.people-press.org/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/> (showing a poll where 38% of respondents believe legal immigration should be kept at the present level and 32% believe that legal immigration should be increased).

[4]

David Jackson, *Donald Trump launches campaign tour by pounding immigration debate*, USA TODAY (Oct. 31, 2018), <https://www.usatoday.com/story/news/politics/elections/2018/10/31/donald-trump-launches-campaign-tour-pounding-immigration-issue/1834280002/>.

[5]

See *Myths and Facts About Immigrants and Immigration*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/fact-sheets/myths-and-facts-about-immigrants-and-immigration> (last visited Nov. 2, 2018) (noting common misconceptions about immigration, including one of the more common recent arguments that “immigrants come to the U.S. to obtain welfare and other benefits”).

[6]

Lia Eustachewich, *US sending 5,000 troops to meet migrant caravan at Mexico border*, N.Y. POST (Oct. 29, 2018), <https://nypost.com/2018/10/29/us-sending-5000-troops-to-meet-migrant-caravan-at-mexico-border/>.

[7]

*Migrant caravan: What is it and why does it matter?*, BBC NEWS (Oct. 30, 2018), <https://www.bbc.com/news/world-latin-america-45951782>.

[8]

Eustachewich, *supra* note 6.

[9] Shaw Drake and Edgar Saldivar, *Trump Administration is Illegally Turning Away Asylum Seekers*, AM. CIV. LIBERTIES UNION (Oct. 30, 2018) <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegally-turning-away-asylum-seekers>.

[10]

See, e.g., *Montevideo Convention on the Rights and Duties of States*, art 1, Dec. 26, 1933, 165 L.N.T.S. 3802 (noting that a state as an international person in the law should have “a defined territory”).

[11]

G.A. Res. 3/217A, art.14(1) (Dec. 10, 1948).

[12]

*What is the Universal Declaration of Human Rights?* AUSTRAL. HUM. RTS. COMM’N., <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> (last visited Nov. 2, 2018).

[13]

United Nations Treaty Repository, *Reservations, Understandings, and Declarations to the Protocol Relating to the Status of Refugees*, U.N., <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V-V-5-en.pdf> (last visited Nov. 2, 2018).

[14]

*Introductory Note to the Convention and Protocol Relating to the Status of Refugees*, U.N. OFF. HIGH COMM’N. FOR REFUGEES (Dec. 2010), <http://www.unhcr.org/en-us/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

[15]

Final Act and Convention Relating to the Status of Refugees art. 33 para. 1, July 28, 1951, 189 U.N.T.S. 137 (hereinafter 1951 Convention).

[16] *Id.*; art. 1 para. A(2).

[17] 8 U.S.C. § 1158(a)(1).

[18] 8 U.S.C. § 1225(b)(1)(A)(ii).

[19] 8 U.S.C. § 1225(b)(1)(B)(ii).

[20] See *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cali. 2018). Although certain Plaintiff's claims relating to CBP agents preventing them from making asylum claims were dismissed without prejudice, on October 12, 2018, Plaintiffs filed their first amended complaint joining new plaintiffs and alleging an official policy of turning back asylum seekers; see *Challenging Customs and Border Protection's Unlawful Practice of Turning Away Asylum Seekers*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers> (last visited Nov. 2, 2018).

[21] 8 U.S.C. § 1225(b)(1)(A)(ii).

[22]

1951 Convention, *supra* note 15.

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