US Erosion of the Right to Asylum

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Under the UDHR, all persons have the right to "seek and to enjoy . . . asylum from persecution."[1] From this designation as fundamental followed codification of the right in the *1951 Convention relating to the Status of Refugees* and the 1967 *Protocol Relating* (collectively 'the Convention'), the "centrepiece" of treaties and customary norms that make up international refugee law.[2] It defines and regulates the status and rights of refugees;[3] its purpose is to safeguard the basic rights of persons "outside their country of origin," who have fled due to a legitimate fear of persecution.[4] Fundamentally, it guarantees that asylees and refugees enjoy rights without discrimination;[5] without penalization for illegal territorial entry;[6] and, without expulsion or return to "territories where . . . life or freedom would be threatened on account of . . . race, religion, nationality, membership of a particular social group or political opinion,"[7]—or '*non-refoulement*'. What follows is background on development of the principle of *non-refoulement*, evasive US Asylum Cooperative Agreements ('ACAs') and implementing legislation, and the resulting erosion to the right to asylum.

Non-refoulement is non-derogable[8] and inextricable to the right to asylum: it is a "cardinal principle,"[9] and the "cornerstone of asylum and of international refugee law."[10] Inversely, it requires placing the asylee under effective control of one State beyond the grasp of a persecuting State.[11] That is, it imposes a negative duty on States not to place the refugee where s/he is at risk of harm territorially.[12] It is international custom by virtue of it being adopted in some form by 99% of UN Member States;[13] and is generally referred to as *opinio juris* by the UNHCR ExCom.[14] In international human rights law, it applies

[1] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 14
[2] UNHCR, *Convention and Protocol Relating to The Status of Refugees* (2010) Introductory Note, 2
[3] Daniel Moeckli and others (eds), *International Human Rights Law* (OUP 2017), 539
[4] Convention Relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137 (the Convention) art 1
[5] ibid art 3
[6] ibid art 31
[7] ibid art 33
[8] UNHCR ExCom, *General Conclusion on International Protection No. 79* (1996), available at: https://www.refworld.org/docid/3ae68c430.html [accessed 9 January 2021]
[9] UNHCR ExCom, *General Conclusion on International Protection No. 65* (1991), available at: https://www.refworld.org/docid/3ae68c404.html [accessed 9 January 2021]
[10] UNHCR, *Note on the Principle of Non-Refoulement* (1997), available at: https://www.refworld.org/docid/438c6d972.html [accessed 9 January 2021]
[11] Andreas Zimmerman (ed), *Commentary on the 1951 Convention relating to the Status of Refugees* (OUP 2011) [2]
[12] ibid
[13] Statute of the International Court of Justice (18th April 1946) 33 UNTS 993 (ICJ Statute) art 38(1)(b)
[14] *Zimmerman* (n 11) [29]

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regardless of asylee-status,[15] being referred to by the CPPR as a violation of the Art 7 ICCPR prohibition on exposing *anyone* to torture and other cruel, inhuman, or degrading treatment or punishment, including by "extradition, expulsion or refoulement."[16] The CAT prohibits "refouler" to where there are "substantial grounds" suggesting an existent risk of "being subjected to torture;"[17] in the ICPPED, "of being subjected to enforced disappearance."[18]

While foundational, the issue of *when* a State's *non-refoulement* obligation attaches is contentious. Some states have availed themselves to methods such as the 'the return to a safe third country' as a means to prevent or limit asylees from obtaining protected status within their territory of choosing. It is reasoned on a belief that an asylee is made safe from threat of persecution in the nearest neighbouring territory or first country of arrival en route to safety, and therefore imposes an obligation on the asylee to seek protected status in or from the territory or State deemed 'responsible'.[19] Originally adopted as a means to prevent a single applicant from initiating multiple asylum-claims to multiple signatory member states, the method first emerged in the Dublin Convention 1990.[20] It purportedly raised confidence in the system through harmonization of asylum procedure among member states through the assignation of 'responsibility' for an asylee to a single member state, based on that State's policy-willingness to host refugee populations, regardless of the asylee's intended territory for protection.[21]

The process was said to avail a greater level of certainty to the asylee in having an application for status heard, albeit confined to a single authority.[22] Prior to being deemed responsible for an applicant, however, member states retained the right to relocate an applicant to a third 'safe' State.[23] Where the asylee cannot be relocated to a third State, the Dublin Convention (later applied to EU Member States as the 'Dublin II- and Dublin III Regulations') applies, thereby allowing the host State to return the

[15] ibid [47]
[16] CCPR, *HRC Report* General Assembly Official Records, Suppl. No. 30 (1994) 193–195, para 9
[17] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85 (CAT) art 3(1)
[18] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006) 2716 UNTS 3 (ICPPED) Art 16(1)
[19] *Zimmerman* (n 11) [145]
[20] ibid [146]
[21] Agnès Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment' [1999] IJRL 646, 648
[22] ibid 649
[23] ibid

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applicant-asylee to the first member state of arrival, or otherwise preventing the then hosting State from declining to hear the asylee's application.[24] Where the asylee is placed in a third country, and an application is subsequently rejected, the asylee risks remaining within the third country without status or ultimate return to their country of origin.[25] This availed member states to a mechanism to refuse asylum simply because one is placed somewhere deemed 'safe'; critics highlighted that this allowed for risk-of-refoulement determinations to be avoided altogether.[26] The UNHCR ExCom highlighted that asylees were often "removed to . . . where their safety cannot be ensured," by virtue of the 'misuse' of 'safe third country' processing, which, to the committee, ran contrary to the principle of *non-refoulement*.[27]

Fault lies in the removing country, who relocates the asylee to the first port of entry based on assumed safety, into a receiving third-country that is often under-resourced and lacking the domestic political-will to provide effective safe-harbour to asylees. This leaves the asylee at risk of being sent back to the country of origin through sometimes chaotic and near-anarchic processes of return. Whether the Convention requires the transferring State to seek assurances that no threat of persecution exists in the third country prior to transfer was brought before the House of Lords in *R v Secretary of State for the Home Department, ex parte Adan, ex parte Aitseguer*.[28] The Lords ruled, *inter alia*, the Convention made it incumbent upon the transferring State to assure that a receiving third country would not ultimately relocate the asylee to a territory where persecution by State or non-State actors is a material risk.[29] The Lords also ruled that safety-determination processing must be consistent with Convention interpretation under international law, and *not* under esoteric domestic conceptions of 'reasonableness' by the transferring State.[30] This was subsequently applied to EU Member States by the ECtHR in *TI v the United Kingdom*, and to application of the Dublin Regulation in *KRS v the United Kingdom*."[31] In *MSS v Belgium and Greece*, the ECtHR ruled, *inter alia*, transfer of an asylee under the Dublin II Regulation to

[24] ibid
[25] *Zimmerman* (n 11) [146]-[147]
[26] ibid [148]-[149]
[27] UNHCR ExCom, *Refugees Without an Asylum Country No. 15* (1979), available at: https://www.refworld.org/docid/3ae68c960.html [accessed 11 January 2021]
[28] [2000] UKHL 67
[29] *Zimmerman* (n 11) [152]
[30] ibid
[31] ibid [153]

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degrading, abhorrent conditions symptomatic of grossly deficient asylum infrastructure amounted to a form of 'indirect refoulement'.[32]

The US Departments of Justice and Homeland Security (collectively the 'Government') enacted the '*Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*'[33] on 19 November 2019, towards effectuating ACAs with El Salvador, Guatemala, and Honduras. The stated purpose for ACAs was to avail asylees to a single system of protection with "full and fair procedure[s]," within a single mechanism towards asylum-claims process burden-sharing across ACA partner-nations.[34] ACAs effectively bar certain asylee applications, and provide for the Government to remove an asylee to alternative ACA partner-nations.[35] Because the US asylum system is purportedly "overtaxed," employing truncated, expedited procedures for removing qualifying asylees from US territories under ACAs is therefore justified by the Government.[36] The Government contends that asylees often do not qualify for relief and are prone to abandon application processes once released within US territory.[37] Out of a backlog of nearly one million immigration cases, more than half of pending asylum claimants are either Salvadoran, Guatemalan, or Honduran.[38] Hence, the Government sought ACAs with these three respective nations.[39]

Under the ACA regime, asylee eligibility and the appropriate ACA partner-nation is determined by a US asylum officer in the initial Government-encounter with the asylee; expedited removal determinations are decided by immigration judges.[40] If deemed removable but ineligible to a particular ACA partner-nation, an immigration judge simply selects an alternate partner-nation for asylee removal.[41] The Government traces what it deems significant increases of alien-encounters at the US southern border as a result of rules requiring asylees to first apply for protection within a State entered en route to the

[32] (2011) IHRL 153 (ECHR)
[33] 84 Fed Reg 63,994
[34] ibid
[35] ibid
[36] ibid
[37] ibid 63,994-63,995
[38] ibid 63,995
[39] ibid
[40] ibid
[41] ibid

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US[42]—similar to the 'first country arrival' regime leading to the Dublin Convention. Simplified processing with ACA partner-nations is meant to address this increase. The Government notes a simultaneous increase in asylum-claims for a "fear of persecution," among those alien-encounters,[43] with only a small fraction ultimately qualifying for protected status.[44] This is purportedly so because most claims are meritless, and the Government laments the excess resource expenditure required for immigration processing at the southern border in general.[45] Therefore, the ACA regime facilitates pulling asylee determinations back to determining whether the asylee qualifies to apply for protected status first.[46]

Of required conditions barring applications for protected status and prompting removal to alternate ACA partner-nations, the most salient to meeting *non-refoulement* obligations requires that an applicant's "life or freedom . . . not be threatened," and s/he be availed to "full and fair" procedures for status adjudication within an alternative partner-nation.[47] The evidentiary burden, however, is placed on the asylee, who must demonstrate, without prompting, fear of a "more likely than not" threat of persecution in the partner-nation.[48] Whether full and fair asylum-procedures exist within an ACA partner-nation is a categorical determination made by the Government.[49] This regime purportedly facilitates needed diplomatic leverage towards the Government's pursuit of agreements with additional ACA partner-nations so that regional asylee burden-sharing goals can be achieved.[50]

Under existing immigration procedure, the initial asylee-encounter with the US immigration system involves a determination of admissibility by an immigration officer; if removal is appropriate but the asylee indicates an intent to seek asylum or a fear of persecution, the administering officer employs a low threshold to determine whether there is a "significant possibility" the asylee's claim has merit.[51] If no, the administering officer seeks concurrence from a supervising officer.[52] If obtained, the asylee is

[42] ibid
[43] ibid
[44] ibid
[45] ibid 63,996
[46] ibid
[47] ibid
[48] ibid 63,997
[49] ibid
[50] ibid
[51] ibid 63,998
[52] ibid

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entitled to have the removal/deportation determination reviewed by an immigration judge.[53] If removal is still deemed appropriate by the judge, the asylee may move to demonstrate that asylum relief nevertheless ought to be granted; if denied, the asylee may seek leave for appellate review.[54]

Under the new regime, an officer or immigration judge first determines whether the asylee is barred from applying for status under an existing ACA.[55] If barred, expedited removal proceedings are initiated unless the asylee offers, without prompting, a statement that persecution or torture in the alternate ACA partner-nation is feared.[56] If expedited removal proceedings are initiated, no determination is made as to whether there exists a credible threat of persecution in the asylee's country of origin.[57] If fear is deemed credible, the claim may be abandoned without adjudication,[58] falsely suggesting 'no-penalty' on the asylee who willingly accepts removal to an alternate ACA partner-nation. However, judicial review of removal determinations is barred by the regulations[59] unless a credible fear of harm is demonstrated by the asylee.[60] For an asylee to demonstrate a credible fear of persecution or torture in an alternate ACA partner-nation, it must be demonstrated to exist "more likely than not," which according to the Government, comports with Convention *non-refoulement* obligations.[61]

The Government interprets general congressional intent for asylee burden-sharing across nations by virtue of similar agreement with Canada enacted in 2004.[62] It notes as apparent workability of the ACA regime the multiple procedural similarities with earlier legislation, and more substantively, its consistency with the tenet designating the "salient factor" for determining risk of *refoulement* being whether the partner-nation "has laws and mechanisms in place . . . to protect refugees."[63] Therefore, the purpose of implementing rules is "defeated" if the Government must additionally consider whether an asylee's fear of persecution or torture is credible after an ACA-removal determination has already

[53] ibid
[54] ibid
[55] ibid
[56] ibid
[57] ibid
[58] ibid
[59] ibid 63,999
[60] ibid 64,003
[61] ibid 63,999
[62] ibid
[63] ibid 64,000

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been made.[64] Admittedly, a significant difference with the Canada agreement is that asylees enjoy no consultation period prior to the initial encounter where an US officer determines whether a volunteered statement affirming fear of persecution or torture is credible.[65] The Government cites no need for such a safeguard under the ACA regime, as the agreements incorporate "fewer and less complex exceptions" than the Canada agreement.[66]

The expedited removal mechanism under the ACA regime effectively facilitates governmental avoidance of asylee safeguarding from persecution and torture and Covenant non-compliance. Absent legitimate screening, an asylee's initial encounter with US immigration involves automated subjection through diversionary matrices that ultimately allow for US avoidance of *non-refoulement* requirements while exposing the asylee to peril added to a journey-to-safety typically made perilous thus far. If a credible fear exists, the asylee must solicit an apprehension, save for being presented with an unsolicited written invitation in English to declare so if wished. While noting that most southern-border-encountered asylees' origins at the southern border are from ACA partner-nations, the Government is silent on the long-term, endemic poverty rendering asylee partner-nations entirely bereft of asylee-processing infrastructure. The Government is also silent on its own historical designation of ACA partner-nations as the "most violent region on the planet,"[67] or UNHCR-funded research finding alarming levels of death squads, gender-based violence, violence against children, and violence against sexual minorities in the region.[68]

While reduced crime has been reported in the period leading up to ACA implementation, partner-nations remain incentivized to forego asylee interests for more pressing urgencies, including hunger and drought. Indeed, there carries an implicit benefit for ACA nations to return asylees to countries of origin in the absence of US-assured Convention compliance within ACA partner-nations, particularly where the US—regional exemplar of Convention compliance seeks to limit its own obligations. Prior to 2017,

[64] ibid
[65] ibid 64,003
[66] ibid
[67] Elizabeth Zechmeister (ed) *The Political Culture of Democracy in the Americas* (USAID 2014) 4
[68] Beatriz Manz, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations* (UCB 2008) 9-12, 18-21, 26-29

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Guatemala had no domestic law defining or regulating asylees.[69] For asylee processing under the ACA regime, it maintains a staff of 12 to process all ACA removals from US territories.[70] Despite similar conditions in other ACA partner-nations, the Attorney Generals of 19 US States and the District of Columbia report that asylees whose nations of origin (and place of credible threat of harm) are removed to alternate, neighbouring ACA partner-nations[71] where threat-of-harm is either related- or similar-to that in the nation-of-origin (the combined area of current ACA partner-nations is smaller than the State of Michigan[72]). By contract, El Salvador is yet to implement domestic law for the processing of asylees removed under the ACA, and presently only apportions a single staff-member to process asylee-claims.[73] While Honduran domestic law contains provisions on asylum status, its insufficiency is widely known,[74] prompting UNHCR observation and consultation in hopes of advancing its asylum-process infrastructure within a modicum-at-least of international standards.[75] Honduras also customarily detains foreigners encountered within its territories.[76]

From normative aspirations to guarantee access to safety for all fleeing harm within their country-of-origin flowed development of custom, and later an international legal order binding States to individuals and each other. In normative form, the conceptual space prompts readily-available maxims: one fleeing harm *ought not* be returned to harm; a State's failure to assure this *ought to be* sanctionable. Procedure developed over nearly 70 years, having been widely adopted by nearly all nations, made these norms realisable to the individual asylee. Towards achieving hidden, anti-immigration political aims, the Government has sought to chip away at procedural minutiae that, taken collectively, amounts to *non-refoulement* non-adherence, and thus a diminution of the right to asylum.

The Government seeks to maximise the effectiveness of asylee-reduction through incorporating additional ACA partner-nations.[77] This inevitably will enhance disappearance of *refoulement*

[69] *Comments from States Attorneys General Regarding Interim Final Rule*, State of California Office of the Attorney General (19 December 2019) 3
[70] ibid
[71] ibid
[72] See 'Complaint' *UT et al v BARR et al*, 1:20-cv-00116 USDDC (15 January 2020) 33
[73] *Bercerra* (n 69) 4
[74] ibid 5
[75] ibid
[76] ibid
[77] *Fed Reg* (n 33) 64,002

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determination proceedings, and thus exacerbate non-compliance in other nations situated south of the US border. Effectively, by exporting inbound aliens to address what the Government characterises as resource 'over-taxing', the Government is aggressively dismantling regional *non-refoulement* process. The disappearance of *non-refoulement* process within an entire region instigates spread, ultimately eroding the normative content behind the principle. This sets the process of norm-to-law in *retrograde*, with real consequence to life: with the disappearance of the norm, there is no equivalent diminution of state-promulgated threats of harm to life. While not so stated, the ACA regime and implementing procedure amounts to an evasion of US and partner-nation *non-refoulement* obligations, and ultimately an erosion to the right to asylum from a norm to a concept bereft of substance and consequence.