

2022

## The Legal and Moral Responsibility to Protect

Karen Musalo

*UC Hastings College of the Law*, [musalok@uchastings.edu](mailto:musalok@uchastings.edu)

Follow this and additional works at: [https://repository.uchastings.edu/faculty\\_scholarship](https://repository.uchastings.edu/faculty_scholarship)

---

### Recommended Citation

Karen Musalo, *The Legal and Moral Responsibility to Protect*, 45 *Fordham Int'l L.J.* 751 (2022).  
Available at: [https://repository.uchastings.edu/faculty\\_scholarship/1876](https://repository.uchastings.edu/faculty_scholarship/1876)

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

ARTICLE  
THE LEGAL AND MORAL RESPONSIBILITY TO  
PROTECT

*Karen Musalo\**

I. INTRODUCTION.....	752
II. THE INTERNATIONAL REFUGEE PROTECTION REGIME AND STATE VIOLATION OR AVOIDANCE OF OBLIGATIONS.....	755
A. The International Refugee Protection Regime .....	755
B. State Violation or Avoidance of Obligations .....	756
1. The United States.....	756
2. Australia .....	759
3. The European Union .....	760
III. THE MORAL AND ETHICAL DIMENSION OF MIGRATION POLICY .....	762
IV. THE UNITED STATES' ROLE IN HAITI, GUATEMALA, EL SALVADOR, AND HONDURAS.....	765
A. Haiti.....	766
B. Guatemala.....	769
C. El Salvador.....	773
D. Honduras .....	775

---

\*Karen Musalo is Professor of Law, Bank of America Foundation Chair in International Law, and Director of the Center for Gender and Refugee Studies (CGRS) at the University of California Hastings College of the Law.

I am grateful to my research assistants for their excellent work: Grace Carney, Paulina Leyva Hernandez, and Jett Murphy. I thank Jett for providing extensive research and analysis related to all the themes addressed in this Article; Grace for her meticulous and patient work in checking citations, locating additional authorities, and proof-reading; and Paulina for her collaboration with Jett on research pertinent to the discussion of the U.S. role in Haiti, Guatemala, El Salvador, and Honduras. I also thank my colleague Kate Jastram, and my colleague and husband, Richard A. Boswell, for their review and invaluable input, arising from their respective areas of expertise.

V. CONCLUSION ..... 779

## I. INTRODUCTION

In March of 2020, under the pretext of protecting public health, the Trump administration closed the border to asylum seekers,<sup>1</sup> a policy referred to as “Title 42,” which the Biden administration has continued.<sup>2</sup> Those who arrive at the border fleeing persecution are either returned to Mexico—if they are among the nationalities Mexico has agreed to accept<sup>3</sup>—or they are deported directly to the countries they fled. Leading international law scholars have decried this policy as a clear violation of the United States’ legal obligation, undertaken when it became a party to the 1967 Refugee Protocol,<sup>4</sup> not to “expel or return” individuals

---

1. *Q&A: US Title 42 Policy to Expel Migrants at the Border*, HUM. RTS. WATCH (Apr. 8, 2021), [https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border?gclid=CjwKCAiA4KaRBhBdEiwAZi1zzjzdUJly-wyllCkVrBsVizaY7jgJ8lgt56HWgxFaIsIFFONZGfA3RoCBVcQAvD\\_BwE](https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border?gclid=CjwKCAiA4KaRBhBdEiwAZi1zzjzdUJly-wyllCkVrBsVizaY7jgJ8lgt56HWgxFaIsIFFONZGfA3RoCBVcQAvD_BwE) [https://perma.cc/4GXU-AEWC].

2. *Fact Sheet: A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 15, 2021). On April 1, 2022 the Biden administration announced that it would terminate the use of Title 42, effective May 23. Mike LaSusa, *Pandemic Order Speeding Migrant Removals to End in May*, LAW360 (Apr. 1, 2022) <https://www-law360-com.uchastings.idm.oclc.org/articles/1480088/pandemic-order-speeding-migrant-removals-to-end-in-may> [https://perma.cc/2KNX-WELH]. The states of Louisiana, Missouri, and Arizona sued to block the termination, and were subsequently joined by twenty other states. On April 27, Judge Summerhays, a Trump appointee, issued a temporary order in the states’ favor, prohibiting the Biden administration from taking any action to phase out Title 42 prior to the May 23 date. Camilo Montoya-Galvez, *Judge Blocks U.S. Border Officials from Winding Down Title 42 Expulsion Policy*, CBS NEWS (Apr. 27, 2022) <https://www.cbsnews.com/news/title-42-immigration-judge-blocks-border-officials-may-23/> [https://perma.cc/9URC-VN8Y]. The court’s ruling did not rule on the ultimate issue of the policy’s termination. Miriam Jordan & Eileen Sullivan, *Judge Says Migrants Must Still Be Denied Entry for Health Reasons*, N.Y. TIMES (Apr. 25, 2022) <https://www.nytimes.com/2022/04/25/us/title-42-migrants-biden-border.html> [https://perma.cc/62PN-8P52].

3. *See id.* Under an agreement reached with the Mexican government in late March 2020, the Border Patrol began sending most Mexican, Guatemalan, Honduran, and Salvadoran families and single adults to Mexico. Despite this agreement, there has been extensive documentation of individuals expelled to Mexico who do not fit within this category, including Haitian asylum seekers. People expelled are usually driven by bus to the nearest port of entry and told to walk back to Mexico, often without their luggage and other belongings. *Id.*; *see also Q&A: US Title 42 Policy to Expel Migrants at the Border*, *supra* note 1.

4. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The United States became a party to the

fleeing persecution<sup>5</sup>—a view most recently articulated in a decision of the U.S. Court of Appeals for the District of Columbia.<sup>6</sup>

Although the Title 42 border closure is unprecedented, it is by no means the first time that the United States attempted to circumvent its non-refoulement obligations. In fact, it did so within a year of enacting the 1980 Refugee Act in execution of its treaty obligations,<sup>7</sup> when President Ronald Reagan implemented a policy designed to prevent Haitian asylum seekers from ever reaching the United States where they would be able to seek protection.<sup>8</sup>

The United States is not an outlier among wealthy countries in adopting policies which directly or constructively flout the prohibition on refoulement, or otherwise attempt to negate protection obligations. Deploying strategies referred to as the “externalization of migration controls,” these countries have increasingly taken actions which prevent asylum seekers from

---

Refugee Protocol on November 1, 1968. U.N. HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [<https://perma.cc/GD9N-RVVM>].

5. Memorandum from Harold Hongju Koh, Former Senior Legal Adviser of the U.S. Dep’t of State (Oct. 2, 2021), <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000> [<https://perma.cc/2B9C-AUA4>] (last accessed Mar. 9, 2022) [hereinafter “Koh Memo”]; Refugee Protocol, *supra* note 4, art. 1.

6. *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022). In *Huisha-Huisha*, a group of asylum-seeking families challenged Title 42 as a violation of the Immigration and Nationality Act and the legal right to assert claims for asylum and related forms of humanitarian relief. After back and forth appeals by plaintiffs and the government, the D.C. Circuit upheld, in part, the district court’s preliminary injunction, holding that the government cannot expel asylum-seeking families to places where they would be persecuted or tortured. *See id.*; *Title 42 Challenges*, CTR. FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/title-42-challenges> [<https://perma.cc/3Q98-YSBE>] (last visited Apr. 10, 2022).

7. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); David A. Martin, *The Refugee Act of 1980: A Forlorn Anniversary*, LAWFARE BLOG (Mar. 19, 2020, 2:30 PM), <https://www.lawfareblog.com/refugee-act-1980-forlorn-anniversary> [<https://perma.cc/6NAS-44VC>]. *See also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.”).

8. *See infra* notes 24 to 29 and supporting text for discussion.

accessing their territories or render them inadmissible without considering their claims.<sup>9</sup>

The externalization of migration controls is on full display in Australia and countries of the European Union, and is a practice that the United States adopted wholesale during the Trump administration.<sup>10</sup> As noted by one scholar, “States, while giving lip service to the obligations enshrined in the 1951 Convention, have . . . sought to limit the possibility of individuals to benefit from the rights to which they agreed some 50 years ago.”<sup>11</sup> Policies designed to deny protection have become so commonplace that for many observers, they are not seen as the repudiation of treaty obligations which they are.

This Article is an unapologetic call to resist the normalization of practices so deeply at odds with the letter and spirit of the international refugee protection regime. This appeal rests not only on legal obligations, but on moral and ethical considerations which undergird the juridical norms and prohibit denying entry to the stranger when it would cause him or her grave harm.<sup>12</sup> A call to moral and ethical considerations carries particular valence where the potential country of refuge contributed to the conditions leading to flight, and the need for protection.

Part II of this Article describes the origins and scope of our international refugee system, followed by an overview of the policies which circumvent or undermine protection—focusing on the United States, Australia, and the European Union. Part III articulates the moral and ethical arguments for the admission of those seeking protection. Finally, in Part IV, using the example of the United States’ role of intervention in Haiti, Guatemala, El Salvador, and Honduras, I will lay out the argument for an even greater responsibility where history reveals the moral debt owed by the country of refuge to those fleeing persecution.

---

9. Bill Frelick et al., *The Impact of the Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190, 193 (2016).

10. A full discussion of all the policies of externalization undertaken by the Trump administration is beyond the scope of this Article, but for a good overview, see Lindsay Harris, *Asylum Under Attack*, 67 LOY. L. REV. 121, 130-60 (2021).

11. Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT’L J. REFUGEE L. 533, 533 (2001).

12. Rebecca Sharpless, *Cosmopolitan Democracy and the Detention of Immigrant Families*, 47 N.M. L. REV. 19, 27 (2017).

## II. THE INTERNATIONAL REFUGEE PROTECTION REGIME AND STATE VIOLATION OR AVOIDANCE OF OBLIGATIONS

### A. The International Refugee Protection Regime

The 1951 Refugee Convention<sup>13</sup> and its 1967 Protocol<sup>14</sup> are the foundational documents for our contemporary international refugee protection regime. They have been ratified by the vast majority of nation states.<sup>15</sup> Art. 1 of the Convention defines a refugee as an individual with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion[.]” States are encouraged but not required to provide a durable status to individuals who meet the refugee definition.<sup>16</sup> Although state parties are not required to extend permanent status, neither may they return refugees to harm.<sup>17</sup> The obligation of non-refoulement is clearly set forth in Art. 33.1:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>18</sup>

The principle of non-refoulement has been referred to as the “most essential component” of refugee protection,<sup>19</sup> has been incorporated into many other international and regional instruments,<sup>20</sup> and is considered to have attained the status of

---

13. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

14. Refugee Protocol, *supra* note 4.

15. As of the end of 2020, 149 nations were parties to either the Convention, the Protocol, or both, while forty-four nations were not. See Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda*, 33 INT’L J. REFUGEE L. 188, 188-89 (2021).

16. Art. 34 provides: “The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.” 1951 Refugee Convention, *supra* note 13, art. 34.

17. UNHCR has advised that formal recognition as a “refugee” is not required for non-refoulement to apply. U.N. HIGH COMM’R FOR REFUGEES, NOTE ON NON-REFOULEMENT, ¶ 15, U.N. Doc. EC/SCP/2 (Aug. 23, 1977) [hereinafter UNHCR Note on Non-Refoulement].

18. 1951 Refugee Convention, *supra* note 13, art. 33, ¶ 1.

19. UNHCR Note on Non-Refoulement, *supra* note 17, ¶ 1.

20. *Id.* ¶ 2.

customary international law.<sup>21</sup> Some scholars argue that it is a jus cogens norm, from which no derogation is permitted.<sup>22</sup>

### *B. State Violation or Avoidance of Obligations*

The United States, Australia, and the countries of the European Union are illustrative of the range of strategies that wealthy, industrialized nations have adopted in violation or avoidance of their protection obligations under the Convention and Protocol. Among other exclusionary practices, the United States has openly violated the norm of non-refoulement by directly returning asylum seekers to the countries from which they fled. Australia and the European Union have focused on limiting or denying access to their territory, thereby preventing asylum seekers from ever claiming protection. Although these policies do not directly return an individual to the country of persecution, they often give rise to refoulement when inadequate protections exist in the country to which they are sent.<sup>23</sup>

#### 1. The United States

The United States became a party to the 1967 Refugee Protocol in 1968 and executed its treaty obligations by passing the 1980 Refugee Act. The Refugee Act adopted the international

---

21. Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 *GEO. IMMIGR. L.J.* 1, 8 (2008).

22. See generally Allain, *supra* note 11.

23. Frelick et al, *supra* note 9, at 198-99.

refugee definition,<sup>24</sup> as well as the prohibition on refoulement.<sup>25</sup> No sooner had the law passed than President Reagan put in motion a plan to prevent Haitians from seeking the protection provided by the law. The Reagan administration entered into an agreement with Haitian dictator, Jean-Claude Duvalier,<sup>26</sup> which gave the US Coast Guard the authority to stop Haitian vessels in international waters, and to “return undocumented passengers to Haiti.”<sup>27</sup>

In order to maintain the fiction that the United States was not violating its obligations under both the Refugee Protocol and Refugee Act, Reagan issued an Executive Order providing that “no person who is a refugee will be returned without his consent.”<sup>28</sup> This was to be accomplished by Coast Guard screening to identify those with viable claims. However, the number of Haitians allowed to seek asylum shows the screening to be a sham. From 1981 to 1990, a time of high human rights violations, political repression, and persecution in Haiti, 21,455 Haitians were stopped by the

---

24. Compare Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; 8 U.S.C. § 1101(a)(42) (“The term ‘refugee’ means ... any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”) with 1951 Refugee Convention, *supra* note 13 (“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

25. “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A); *see also* withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 1208.16 (2021).

26. Stephanie Hanes, *Jean-Claude Duvalier, ex-Haitian Leader Known as Baby Doc, Dies at 63*, WASH. POST (Oct. 4, 2014), [https://www.washingtonpost.com/world/the\\_americas/jean-claude-duvalier-ex-haitian-leader-known-as-baby-doc-dies-at-63/2014/10/04/ecdaa2bc-4be3-11e4-b72e-d60a9229cc10\\_story.html](https://www.washingtonpost.com/world/the_americas/jean-claude-duvalier-ex-haitian-leader-known-as-baby-doc-dies-at-63/2014/10/04/ecdaa2bc-4be3-11e4-b72e-d60a9229cc10_story.html) [<https://perma.cc/65LM-MFA8>].

27. Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 295-96 (1993); KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: AN INTERNATIONAL AND COMPARATIVE APPROACH* 106-07 (5th ed. 2018).

28. Exec. Order No. 12,324, 46 Fed. Reg. 48,109, § 2(c)(3) (Sept. 29, 1981).



Coast Guard and returned, and only six were permitted to come to the United States to pursue their claims for protection.<sup>29</sup>

The George H.W. Bush administration abandoned the pretext of compliance with the norm of non-refoulement. The bloody September 1991 coup which overthrew Jean Bertrand Aristide, the first democratically elected president of Haiti, led to a growing exodus of Haitians fleeing the island nation. Rather than allow them to step foot on US soil, where they could apply for protection, the Coast Guard returned them to Haiti without any screening.<sup>30</sup>

Then-presidential candidate Bill Clinton denounced the policy in the strongest possible terms<sup>31</sup> and then adopted it when he was elected. The Haitian Centers Council challenged the policy of interdiction and return as a violation of non-refoulement provided for in both the Refugee Act, and the Protocol. In a 1993 Supreme Court decision referred to as “eccentric and highly implausible”<sup>32</sup> by one of the Protocol’s drafters, the Court held that the policy violated neither domestic law nor treaty obligations.<sup>33</sup>

Recent policies demonstrate the United States’ ongoing willingness to breach the prohibition on refoulement, with Title 42 being a clear example. Asylum seekers subject to Title 42 are either sent over the border to Mexico, where they are likely to suffer grievous human rights violations, or put on planes and directly returned to their home countries.<sup>34</sup> Although Title 42’s border

29. Karen Musalo, *El Salvador: Root Causes and Just Asylum Policy Responses*, HASTINGS RACE & POVERTY L.J. 178, 230 n.281 (2021), [hereinafter Musalo, *El Salvador: Root Causes*].

30. See Julie Ann Waterman, *The United States’ Involvement in Haiti’s Tragedy and the Resolve to Restore Democracy*, 15 N.Y.L. SCH. J. INT’L & COMP. L. 187 (1994).

31. Clinton declared:

I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum . . . This process must not stand. It is a blow to the principle of first asylum and to America’s moral authority in defending the rights of refugees around the world.

Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT’L L.J. 675, 688 n.65 (1993), (citing *Clinton Continues Summary Return of Haitians: U.S. Lawyers Investigate In-Country Processing*, REFUGEE REP., Jan. 29, 1993, at 1-2).

32. Louis Henkin, *Notes from the President*, AM. SOC’Y INT’L L. NEWSL. (Sept.-Oct. 1993) reprinted in KAREN MUSALO ET AL., *supra* note 27, at 142.

33. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 159 (1993).

34. See *Delivered to Danger: U.S. Government Sending Asylum Seekers and Migrants to Danger*, HUM. RTS. FIRST (Feb. 19, 2021),

closure had been in place since March 2020, it was the mass expulsion of Haitian asylum seekers in the fall of 2021 that drew public attention, and garnered explicit condemnations of the returns as acts of refoulement.<sup>35</sup>

## 2. Australia

Australia is a party to the Refugee Convention and Protocol. Over the past two decades, however, it has revised its laws and policies in ever-harsher ways to prevent asylum seekers from accessing its territory and claiming refugee protection. One of the most telling aspects of Australia's relationship to its treaty obligations is that in 2014 it removed most references to the Refugee Convention in its Migration Act.<sup>36</sup>

The inception of harsh and exclusionary policies is often dated back to August 2001 when a Norwegian freighter, the *Tampa*, rescued a sinking ship of ailing asylum seekers and was denied permission to land at the Australian territory of Christmas Island.<sup>37</sup> After a long standoff, during which Australia would not back down, New Zealand and Nauru agreed to accept the passengers for asylum processing.

After the *Tampa* incident, Australia established a naval barrier to prevent asylum seekers from entering its territorial waters—a

---

<https://www.humanrightsfirst.org/campaign/remain-mexico> [https://perma.cc/6SGA-SVTT]; *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, HUM. RTS. FIRST (Aug. 24, 2021), <https://www.humanrightsfirst.org/resource/human-rights-travesty-biden-administration-embrace-trump-asylum-expulsion-policy-endangers> [https://perma.cc/SJ97-J73R]; *A Guide to Title 42 Expulsions at the Border*, AM. IMMIGR. COUNCIL (Oct. 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border> [https://perma.cc/N9KE-E78L].

35. See Koh Memo, *supra* note 5. See also Press Release, U.N. High Comm'r for Refugees, News Comment by UN High Commissioner for Refugees Filippo Grandi on Conditions and Expulsions at US border (Sept. 21, 2021), <https://www.unhcr.org/en-us/news/press/2021/9/614a27324/news-comment-un-high-commissioner-refugees-filippo-grandi-conditions-expulsions.html> [https://perma.cc/99UZ-4T9L] (“The summary, mass expulsions of individuals currently under way under the Title 42 authority, without screening for protection needs, is inconsistent with international norms and may constitute refoulement.”).

36. Frelick et al., *supra* note 9, at 205.

37. Tara Magner, *A Less than 'Pacific' Solution for Asylum Seekers in Australia*, 16 INT'L J. REFUGEE L. 53, 54 (2003).

policy dubbed the “Pacific Solution.”<sup>38</sup> It has since broadened the Pacific Solution, engaging in joint activities with Indonesia, Sri Lanka, and Malaysia to deter asylum seekers.<sup>39</sup> To ensure its ability to refuse protection to asylum seekers, the Australian Parliament enacted legislation excising Christmas Island and other of the country’s outer territories from its immigration law. Australia transfers any migrants who arrive on its territory or who are interdicted at sea to other countries for asylum processing and refuses to resettle any of them.<sup>40</sup>

### 3. The European Union

In March 2022, Russia’s invasion of Ukraine led to the flight of three million refugees within the first few weeks of the war. The actions and statements by EU countries and their populace have been welcoming.<sup>41</sup> Ukrainian refugees have been permitted entry with no documentation requirements and provided with free transit and phone communication, while volunteers have gathered to distribute necessities, such as food and medicine.<sup>42</sup> Most importantly, the EU Council activated for the first time its 2001 Temporary Protection Directive giving Ukrainians immediate protection for a minimum of one year, as well as the right to live and receive benefits in the EU country of their choice.<sup>43</sup>

The European Union’s response to Ukrainians is a model to be emulated, but it stands in stark contrast to its policies over the

38. *Id.* at 56.

39. Frelick et al., *supra* note 9, at 205.

40. This practice in Australia is commonly referred to as “offshore processing.” See *Offshore Processing: An Overview*, KALDOR CTR. FOR INT’L REFUGEE L. (Aug. 10, 2021), <https://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview> [https://perma.cc/VZ6Q-MPQS]; *Australia: 8 Years of Abusive Offshore Asylum Processing*, HUM. RTS. WATCH (July 15, 2021), <https://www.hrw.org/news/2021/07/15/australia-8-years-abusive-offshore-asylum-processing#> [https://perma.cc/KU3J-WRXM].

41. Press Release, The Glob. Detention Project, *The Ukraine Crisis Double Standards: Has Europe’s Response to Refugees Changed?* (Mar. 2, 2022), <https://reliefweb.int/report/ukraine/ukraine-crisis-double-standards-has-europe-s-response-refugees-changed> [https://perma.cc/2BKD-J7Y4].

42. *Id.*

43. Elena Chachko & Katerina Linos, *Sharing Responsibility for Ukrainian Refugees: An Unprecedented Response*, LAWFARE BLOG (Mar. 5, 2022), <https://www.lawfareblog.com/sharing-responsibility-ukrainian-refugees-unprecedented-response> [https://perma.cc/SCK5-3MKL].

years which deny refugees access to the EU and outsource its protection obligations. When there was a mass influx of Syrian refugees, beginning in 2015, Hungary, Croatia, and Slovenia attempted to close their borders, and the member states of the EU rejected a European Commission proposal for burden sharing.<sup>44</sup> The EU then negotiated an agreement with Turkey to accept all of the Syrian refugees who had arrived in Greece by transiting Turkey.

The deal with Turkey—which broadly falls within the category of a “readmission” agreement since the migrants transited Turkey—has been employed by the EU with other countries.<sup>45</sup> In addition to such agreements, another strategy intended to keep refugees off EU soil includes “push-backs” at sea, most notably in the Mediterranean, which is the route often taken by asylum seekers from Sub-Saharan African countries.<sup>46</sup>

As a consequence of its geographic location, Italy was deeply engaged in these pushbacks. When a decision by the European Court of Human Rights ruled that its interception and repatriation of migrants at sea violated the European Convention of Human Rights,<sup>47</sup> it responded by financing Libya to do what it was not

---

44. See Rick Lyman, *Hungary Seals Border With Croatia in Migrant Crackdown*, N.Y. TIMES (Oct. 16, 2015), <https://www.nytimes.com/2015/10/17/world/europe/hungary-croatia-refugees-migrants.html> [<https://perma.cc/6K58-NB98>]; Aleksandar Vasovic & Marja Novak, *Croatia Diverts Migrants to Slovenia After Hungary Closes Border*, REUTERS (Oct. 17, 2015), <https://www.reuters.com/article/us-europe-migrants-slovenia-idUSKCN0SB06620151017> [<https://perma.cc/E7RY-L5S4>]; Sarah Almukhtar et al., *Closing the Back Door to Europe*, N.Y. TIMES (Oct. 16, 2015). See also Council Decision 1601, 2015 O.J. (L 248) 280 (EU) (establishing provisional measures in the area of international protection for the benefit of Italy and Greece, including support for burden sharing policies and mandatory quotas). Council Decision 1601 was replaced with 1754 a year later after pushback against a mandatory resettlement policy, in favor of a “voluntary arrangement” by EU member states. Council Decision 1754, 2016 O.J. (L 268) 82, ¶ 4 (EU). For further information regarding pushback against EU “burden-sharing” provisions, see Frelick et al., *supra* note 9, at 197 n.17, 206-08 (explaining the problem of “burden sharing” and discussing the failure of EU-wide agreements to address 2015 migrant crisis).

45. Frelick et al., *supra* note 9, at 206-07.

46. AZADEH ERFANI & MARIA GARCIA, NAT’L IMMIGRANT JUST. CTR., PUSHING BACK PROTECTION 20-21 (2021), [https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-08/Offshoring-Asylum-Report\\_final.pdf](https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-08/Offshoring-Asylum-Report_final.pdf) [<https://perma.cc/3ASM-CY26>] [hereinafter NIJC, PUSHING BACK PROTECTION].

47. Hirsi Jamaa and Others v. Italy, App. No. 27765/09, ¶¶ 156-58 (Feb. 23, 2012), <https://hudoc.echr.coe.int/eng?i=001-109231> [<https://perma.cc/6ZUU-L6CD>]. The Court

permitted to do. Under a formal agreement, Italy and the EU provide training and resources, which fund the Libyan Coast Guard to prevent migrants from arriving in any EU member state. The Coast Guard takes intercepted migrants to Libya where they have been subject to indefinite detention, torture, and slavery.<sup>48</sup>

Equally egregious to the pushbacks is the failure of EU member states to rescue unseaworthy vessels of migrants, while criminalizing non-governmental organizations carrying out search and rescue missions.<sup>49</sup> Between 2014 and 2021, twenty-two thousand migrants died in the Mediterranean and Atlantic while attempting to reach Europe.<sup>50</sup> In 2021, the Office of the High Commissioner for Human Rights issued a report condemning the EU member states for pushbacks and failure to rescue migrants at sea.<sup>51</sup>

### *III. THE MORAL AND ETHICAL DIMENSION OF MIGRATION POLICY*

A number of the policies described above plainly violate the legal obligation of non-refoulement; among them would be the direct return of Haitians to their home country.<sup>52</sup> Other policies may not constitute such a clear violation, but nonetheless are contrary to the overarching humanitarian objectives of the Convention and its Protocol. Building fences and walls, as well as establishing naval blockades to keep asylum seekers out, subvert the treaty's object and purpose—even if not rising to the level of actual “violations.”

But we should not assess the actions of nation states solely by reference to legal obligations. As political theorists and philosophers,<sup>53</sup> as well as faith-based leaders<sup>54</sup> have posited, there

---

held that Italy's actions violated the prohibition of collective expulsion under Art. 4 Protocol 4 of the European Convention of Human Rights.

48. NIJC, PUSHING BACK PROTECTION, *supra* note 46, at 20-21.

49. *Id.* at 22.

50. *Id.* at 21.

51. *Id.* at 22.

52. *See supra* notes 27-33 and accompanying text.

53. *See infra* notes 55-64 and accompanying text.

54. Judaism, Christianity, and Islam all express a broad obligation to offer a safe haven to the oppressed. A little-known historical fact is that Convention Article 33 was drafted by Rabbi Isaac Lewin who, addressing the UN Ad Hoc Committee on Statelessness in 1950, cited Bible precedent in arguing for the legal prohibition against sending someone

are moral and ethical considerations that should also inform issues of migration in general, and refugee protection specifically. In other words, even if a country has the sovereign right to close its borders, and exclude non-citizens, it may not be the moral or ethical thing to do.

Among those who have questioned the “morality of territorial boundaries”<sup>55</sup> are philosophers John Rawls and Joseph Carens.<sup>56</sup> They pointed to the vast differences in “wealth and power” between nations.<sup>57</sup> Rawls and Carens argued that the “inequality of opportunity that flows from the mere fact of one’s place of birth is arbitrary and unjustifiable.”<sup>58</sup>

In her eloquently written 2017 article, Professor Rebecca Sharpless connects the perspectives of philosophers such as Rawls and Carens with the democratic political theory of “cosmopolitanism.” The central beliefs of this theory are that “each person is of equal worth” and that “a person’s life opportunities should not be dictated by where she was born.”<sup>59</sup> Cosmopolitanism

---

into danger. See Gilad Ben-Nun, *How Jewish is International Law?*, 23 J. HIST. INT’L L. 249, 258-60 (Dec. 4, 2020). Pope Francis has repeatedly invoked the Biblical mandate to welcome the stranger, expressing his “particular concern for the lamentable situation of many migrants and refugees fleeing from war, persecution, natural disasters and poverty.” Pope Francis, Message of His Holiness Pope Francis for the 104th World Day of Migrants and Refugees 2018 (Jan. 14, 2018), [https://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco\\_20170815\\_world-migrants-day-2018.html](https://www.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20170815_world-migrants-day-2018.html) [https://perma.cc/Y995-W23X]. In his 2018 message, Pope Francis expressly called for policies which offer “broader options for migrants and refugees to enter destination countries safely and legally.” *Id.* Islam also calls for the protection of vulnerable individuals, and “[a]ccording to Islamic migration law (*hijrah*) individuals have the right both to seek and be granted asylum in any Muslim state,” and “it is the duty of Muslims to accept and protect refugees for as long as they seek protection.” U.N. HIGH COMM’R FOR REFUGEES, HIGH COMMISSIONER’S DIALOGUE ON PROTECTION CHALLENGES, ISLAM AND REFUGEES, ¶ 1 (Nov. 20, 2012), <https://www.unhcr.org/en-us/protection/hcdialogue%20/50ab90399/islam-refugees.html> [https://perma.cc/627R-RXZA]. Asylum is “an integral part of the islamic [sic] conception of human rights.” *Id.* ¶ 2.

55. Sharpless, *supra* note 12, at 28.

56. Rawls and Carens are by no means the only ones who have made these and similar arguments. Sharpless references others such as Phillip Cole, Teresa Hayter, Satvinder Singh Joss, Thomas Christiano, and Chandran Kukathas. See *id.* at 28 n.55.

57. Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 INT’L MIGRATION REV. 171, 174 (1996).

58. Sharpless, *supra* note 12, at 28.

59. *Id.* at 22-23.

affirms the concept of universal human dignity, which transcends borders.<sup>60</sup>

Sharpless traces the origins of the theory we now call cosmopolitanism to ancient Greek philosophers, the German philosopher Immanuel Kant, and in more contemporary times Martha Nussman—who “popularized a form of liberal cosmopolitan political theory . . . in which she argued that people have ‘moral obligations to the world.’”<sup>61</sup> However, it is the political theorist Seyla Benhabib that Sharpless draws from most extensively. Benhabib recognizes the tensions between claims to sovereignty (the right to exclude) and universal human dignity (the argument for open borders) and ends up calling for “increasingly porous, but not open borders.”<sup>62</sup>

Although Sharpless’ focus is not on asylum seekers *per se* (her interest is in understanding the shifting family detention policies under the Obama administration), her application of cosmopolitanism to migration issues is welcome and illuminating. If we are willing to accept the principle of universal human dignity, then we have to query the morality of the walls, naval blockades, and fictional borders (externalization) put in place in order to keep desperate asylum seekers at bay. These exclusionary measures may not technically violate the norm of non-refoulement, but at their core, they are an abdication of commitment to the principle of universal dignity and our human responsibility toward one another.

Furthermore, if we accept the cosmopolitan belief that we owe “allegiance . . . to the worldwide community of human beings,”<sup>63</sup> then how much greater is that moral responsibility when we have contributed mightily to the conditions that cause people to flee? Even scholars who reject the idea of a “more universal moral obligation”<sup>64</sup> to those fleeing persecution have acknowledged a greater responsibility when we have created

---

60. *Id.* at 24.

61. *Id.* at 22.

62. *Id.* at 23.

63. *Id.* at 23 (quoting Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 4 (Joshua Cohen ed., 1997)).

64. David Steinbock, *The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement*, 36 U. MICH. J. L. REFORM 951, 977 (2003).

harmful situations. Among them is Michael Walzer, who spoke of the obvious obligations that we have “to any group of people whom we have helped turn into refugees.”<sup>65</sup> Walzer had the Vietnamese refugees in mind when he made this observation.<sup>66</sup> In contemporary times, claims of heightened US responsibility to Afghan refugees have been made, in light of the United States’ invasion of the country and its two-decade involvement there.<sup>67</sup>

The widely known and well understood role of the United States in Vietnam and Afghanistan may make it easier for some to accept the appeal to moral responsibility. In contrast, US involvements in countries such as Haiti, Guatemala, El Salvador, and Honduras—which are a major source of asylum seekers at our southern border—may be less well known, making it more difficult to lay claim to moral responsibility.<sup>68</sup> This final section will attempt to fill in that possible gap in knowledge and discuss the ways in which US policies and interventions were major contributors to the root causes of refugee flight from these countries today.

#### IV. THE UNITED STATES’ ROLE IN HAITI, GUATEMALA, EL SALVADOR, AND HONDURAS

In describing his book *Harvest of Empire*,<sup>69</sup> the award-winning Latinex journalist Juan Gonzalez explains that Americans can only understand the large Latino presence in the United States if they understand America’s anti-democratic role in the region, thereby seeing the resulting migration as the “harvest of empire.”<sup>70</sup> *The*

---

65. *Id.* at 978.

66. *Id.*

67. See, e.g., Luke Savage, *America Has a Moral Obligation to Allow Afghan Refugees In*, JACOBIN (Aug. 20, 2021), <https://www.jacobinmag.com/2021/08/moral-obligation-afghan-refugees-afghanistan-war-biden> [<https://perma.cc/UC6B-5JHW>].

68. Sarah Sherman-Stokes discusses the US role in El Salvador, Guatemala, and Honduras, examines the “decades of prejudice” that have confronted asylum seekers from these countries, and concludes that they are entitled to “reparation” in the form of legislation that would “carve out special tailored protection.” See generally Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENVER L. REV. 585 (2019).

69. JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* 234 (2011).

70. See *Democracy Now!: “Harvest of Empire”: New Film Recounts How U.S. Intervention Caused Mass Latin American Migrations* (PBS television broadcast Sept. 25, 2012); see also GONZALEZ, *supra* note 69; *Harvest of Empire: A History of Latinos in America (Book)*, ZINN EDUC. PROJECT, <https://www.zinnedproject.org/materials/harvest-of-empire> (last visited Mar. 14, 2022). In her article, *Migration as Decolonization*, Tendayi Achiume



*Uses of Haiti*<sup>71</sup> by Paul Farmer, a renowned champion of global health,<sup>72</sup> strikes a similar note, detailing how US policies toward Haiti have led to the conditions of extreme poverty and governmental dysfunction that drive its citizens into exile. This concluding Part highlights some of the most consequential and harmful policies of the United States in each of the four countries.

#### A. Haiti

The relationship between the United States and Haiti goes back to the 1800s. When enslaved black people in Haiti rose up against their French colonizers, the United States supported the colonists in their unsuccessful attempts to put down the revolution.<sup>73</sup> The Haitians prevailed, and the country became the first free black republic in the hemisphere in 1804, as well as the “first modern state” to abolish slavery.<sup>74</sup> This frightened the Southern plantation owners who tried to keep their enslaved individuals from learning of the revolution and advocated against the US recognition of Haiti.<sup>75</sup> It would not be until 1862, after the South seceded from the Union, that the United States recognized Haitian independence;<sup>76</sup> notably, it had imposed an economic embargo against the country in the interval.<sup>77</sup>

---

takes the recognition of migration as the “harvest of empire,” one step further by arguing for a new theory of sovereignty that “obligates former colonial powers to open their borders to former colonial subjects.” Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019).

71. See generally PAUL FARMER, *THE USES OF HAITI* (2005).

72. See *id.* (About the Author); see also *Remembering Dr. Paul Farmer*, PARTNERS IN HEALTH (Feb. 21, 2022), <https://www.pih.org/article/remembering-dr-paul-farmer> [https://perma.cc/UY8Y-2Y2Y].

73. P.R. Lockhart, *Trump is Ignoring One Huge Factor in the Current Status of Haiti: US Foreign Policy*, VOX (Jan. 12, 2018), <https://www.vox.com/policy-and-politics/2018/1/12/16883224/trump-shithole-foreign-policy-haiti> [https://perma.cc/H5GC-HLDG].

74. Ann Crawford Roberts, *A History of United States Policy Towards Haiti*, MODERN LATIN AMERICA: WEB SUPPLEMENT FOR 8TH EDITION (Thomas E. Skidmore et. al eds., 2013), <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-14-the-united-states-and-latin-america/moments-in-u-s-latin-american-relations/a-history-of-united-states-policy-towards-haiti/> [https://perma.cc/MAS4-HEM3] (last visited Apr. 19, 2022).

75. *Id.*

76. *Id.*

77. Lockhart, *supra* note 73.

In 1915, during a period of political instability in Haiti in which a number of presidents were assassinated or removed, President Woodrow Wilson deployed the US Marines to Haiti.<sup>78</sup> They occupied Haiti until 1934 and were responsible for the deaths of thousands of Haitians,<sup>79</sup> many of whom were killed with extreme brutality.<sup>80</sup> The United States confiscated money from the Haitian National Bank and instituted a system of forced labor.<sup>81</sup> Rather than strengthening the country's democracy, the United States established Haiti's armed forces, notorious for its long record of involvement in coups and human rights violations.<sup>82</sup>

The United States' ignominious role in Haiti did not end with the occupation. The United States supported the dictatorship of Francois Duvalier<sup>83</sup> and his son Jean Claude Duvalier, under whose reign "thousands of people were killed, tortured, arbitrarily arrested, and disappeared."<sup>84</sup> In 1990, Jean Bertrand Aristide, a former priest and proponent of liberation theology, became the first democratically elected president of Haiti.<sup>85</sup> He was overthrown by the military in a coup in 1991. He returned to power in 1994 to serve out the remainder of his term and was

---

78. *Id.* Reportedly the occupation was prompted by Citi Bank's fears that Haiti could not pay its debts. See Jeff Abbott, *The Other Americans: U.S. Policy Is Deeply Implicated in Haiti's Crisis*, PROGRESSIVE (July 28, 2021), <https://progressive.org/latest/us-policy-implicated-in-haiti-crisis-abbott-210728/> [<https://perma.cc/4ZSZ-7NE9>].

79. Lockhart, *supra* note 73.

80. Abbott, *supra* note 78 ("The early years of the occupation were met by an insurgency led by Charlemagne Peralte, who was captured in 1919 and nailed to a door, resembling a crucifixion, by U.S. Marines in a grotesque warning to the population."); see also David Suggs, *The Long Legacy of the U.S. Occupation of Haiti*, WASH. POST (Aug. 6, 2021), <https://www.washingtonpost.com/history/2021/08/06/haiti-us-occupation-1915/> [<https://perma.cc/T8QG-F8UR>] ("U.S. forces executed political dissidents and implemented a system of forced labor that ravaged Haiti's peasant population ... The Haitian rebels who opposed the U.S. invasion were subjected to brutal repression.").

81. Suggs, *supra* note 80.

82. See Roberts, *supra* note 74.

83. See Abbott, *supra* note 78.

84. *Haiti: The Truth Must Not Die With Jean-Claude Duvalier*, AMNESTY INT'L (Oct. 7, 2014), <https://www.amnesty.org/en/latest/news/2014/10/haiti-truth-must-not-die-jean-claude-duvalier/> [<https://perma.cc/9MDL-JVP2>]; See also *Factbox: Haiti's Aristide a Champion of Poor Reviled by Elite*, REUTERS (Mar. 18, 2011), <https://www.reuters.com/article/us-haiti-aristide-factbox/factbox-haitis-aristide-a-champion-of-poor-reviled-by-elite-idUSTRE72H67H20110318> [<https://perma.cc/7CCM-2HAC>].

85. See Roberts, *supra* note 74.

reelected in 2000, but in 2004 was once again forced from power.<sup>86</sup> Although it is a matter of dispute, many believe that the United States was behind the two coups.<sup>87</sup>

During the last decade, the United States has supported two successive corrupt Haitian presidents, Michel Martelly<sup>88</sup> and Jovenel Moïse, who was assassinated on July 20, 2021.<sup>89</sup> Martelly surrounded himself with individuals accused of committing serious crimes; he “empowered” them, establishing an “environment of corruption, abuse of power, and impunity.”<sup>90</sup> The corruption included Martelly’s attempts to derail prosecutions by pressuring prosecutors and judges not to proceed in cases against his allies and friends.<sup>91</sup>

Jovenel Moïse was Martelly’s hand-picked successor.<sup>92</sup> Corruption swirled around him as well, and he supported armed gangs<sup>93</sup> to carry out his bidding. In 2019, government audits revealed that his government had stolen millions of dollars from a fund provided by the Venezuelan government to assist the poor; this revelation led to major street protests.<sup>94</sup> Throughout his time in office, Moïse tried to consolidate his power even further by

86. *Id.*

87. *Id.*

88. Frances Robles, *Haitian Leader’s Power Grows as Scandals Swirl*, N.Y. TIMES (Mar. 16, 2015), <https://www.nytimes.com/2015/03/17/world/americas/haitian-president-tightens-grip-as-scandal-engulfs-circle-of-friends.html> [<https://perma.cc/KN7D-JV55>].

89. See Abbott, *supra* note 78.

90. See Robles, *supra* note 88.

91. A judge who complained that Martelly had “meddled” in a corruption case against Sophia Martelly, his wife, died several days later. See *id.*

92. See *Jovenel Moïse*, GLOB. SEC., <https://tinyurl.com/2p9fed4h> [<https://perma.cc/4ZQH-2VVF>] (last visited Mar. 14, 2022); *Jovenel Moïse: Haiti’s President Assassinated at Age 53*, AL JAZEERA (July 7, 2021), <https://www.aljazeera.com/news/2021/7/7/jovenel-moise-haiti-president-assassinated-at-age-53> [<https://perma.cc/EHB7-APM5>] (outlining Moïse’s rise to power and biography).

93. Monique Clesca, *My Group Can Save Haiti. Biden is Standing in Our Way*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/opinion/haiti-commission-government.html> [<https://perma.cc/6FF4-54RP>].

94. Merrit Kennedy, *Protesters Demand Resignation of Haitian President Over Corruption Allegations*, NPR (June 11, 2019), <https://www.npr.org/2019/06/11/731640235/protesters-demand-resignation-of-haitian-president-over-corruption-allegations> [<https://perma.cc/XU5G-8E35>].

suspending the parliament<sup>95</sup> and attempting to change the constitution so that he could run for two consecutive terms.<sup>96</sup>

There has yet to be a definitive answer as to who is responsible for Moise's assassination. But the pattern of US interference meanwhile continues. Immediately after the killing of Moise, the US Embassy tweeted its support for Ariel Henry to become acting prime minister.<sup>97</sup> US officials did not engage meaningfully with Haitian civil society organizations, such as the broadly representative Commission to Search for a Haitian Solution to the Crisis.<sup>98</sup> Monique Clesca, one of its members, wrote in a New York Times editorial<sup>99</sup> that the Commission "can create a free, secure, [and] democratic Haiti," but it needs "the United States and other nations to abandon the status quo."<sup>100</sup> The status quo to which Clesca is referring is a history of their interference and belief in the right to control the destiny of the Haitian people.

### B. Guatemala

Guatemala has long been characterized by gross inequality in its "distribution of resources and capital."<sup>101</sup> Indigenous Guatemalans, who make up a majority of the population, have been

---

95. See Abbott, *supra* note 78.

96. See Sarah Marsh, *Exclusive: Haiti's Moise Plans to Use New Powers to Overhaul Constitution*, REUTERS (Jan. 16, 2020), <https://www.reuters.com/article/us-haiti-politics-exclusive/exclusive-haitis-moise-plans-to-use-new-powers-to-overhaul-constitution-idUSKBN1ZG0A5> [<https://perma.cc/MG2Z-EHBF>]; Marc Santora & Catherine Porter, *President of Haiti, Jovenel Moise, Assassination Updates: The President was Engaged in a Sweeping Effort to Overhaul the Country's Constitution*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/07/07/world/americas/jovenel-moise-death.html> [<https://perma.cc/4SG2-3TFW>]; Maria Abi-Habib, *A Go-It-Alone President Wants to Reshape Haiti. Some Are Skeptical*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/world/americas/haiti-jovenel-moise-constitution.html> [<https://perma.cc/9CPS-NUPA>].

97. See Secretary Anthony Blinken (@SecBlinken), TWITTER (July 22, 2021, 2:08 PM), <https://twitter.com/secblinken/status/1418271690119843840> [<https://perma.cc/V6HY-FQ6Y>] ("Pleased to speak today with Haitian Prime Minister Ariel Henry on how we can support Haiti in addressing their pressing challenges. The U.S. is committed to working with Haiti's government to respond to the Haitian people's needs and support Haiti's democratic institutions.").

98. See Clesca, *supra* note 93.

99. *Id.*

100. *Id.*

101. *Guatemala Profile*, INSIGHT CRIME (Feb. 28, 2021), <https://tinyurl.com/bx8rh98x> [<https://perma.cc/GA4U-KPGY>].

“systematically marginalized socially and politically since colonial times.”<sup>102</sup> Land ownership has been concentrated in the hands of a few—in the mid-1900s, two percent of the population owned seventy-two percent of the land.<sup>103</sup> United Fruit, an American company, was a major land owner, and grew to have overwhelming economic and political power in Guatemala.<sup>104</sup> It enjoyed “unlimited use of much of the country’s best land, complete access to Guatemala’s resources, exemption from nearly all taxes and duties, and unlimited profit remittances.”<sup>105</sup>

Two democratically elected Guatemalan presidents Juan Jose Arevalo and Jacobo Arbenz—elected in 1944 and 1950, respectively—saw land reform as means of addressing the existing gross societal inequalities.<sup>106</sup> Arevalo proposed a reform under which only land not in cultivation would be taken and owners would be compensated.<sup>107</sup> Opposition was so strong that he was unable to carry out this plan, but his successor, Arbenz, pushed through the land reform that Arevalo had proposed.<sup>108</sup> By way of a decree, 500,000 peasants became the recipients of land redistributed by the Guatemalan government.<sup>109</sup>

Arbenz’s land reform drew the ire of the United Fruit Company and the US government. The immediate response by the US government was to cut off aid, but a plan was covertly put under way to remove Arbenz.<sup>110</sup> The ouster of Arbenz ushered in a long period of repressive governments that maintained power through unbridled violence.<sup>111</sup> A thirty-six year civil war ensued, arising out

---

102. *Id.*

103. Billy Perrigo, *The Devastating Effects of American Intervention in Guatemala*, PANOPTIC (Nov. 19, 2015), <https://thepanoptic.co.uk/2016/11/19/american-intervention-guatemala/> [<https://perma.cc/MHR9-V465>].

104. Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 ‘Surge’ of Central American Women and Children at the US-Mexico Border*, 5 *JMHS* 137, 153 (2017).

105. *Id.* at 153 n.20 (quoting Mark Gibney, *United States’ Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1996*, 77 *J. TRANSNAT’L L. & POL.* 77, 82 (1997)).

106. Perrigo, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

110. Gibney, *supra* note 104, at 84.

111. Irma Alicia Velasquez Nimatuj, *Guatemala Suffered for U.S. Foreign Policy*, N.Y. TIMES: THE OPINION PAGES – ROOM FOR DEBATE (May 19, 2013),

of opposition to the repression and desire to transform “the economic, social and political systems which had left the mostly indigenous population impoverished and virtually disenfranchised.”<sup>112</sup>

Throughout the war, the United States provided hundreds of millions of dollars to the brutal Guatemalan government, which committed massive human rights violations,<sup>113</sup> implementing a scorched earth policy constituting genocide. The military burned hundreds of indigenous villages to the ground, and between 200,000 to 250,000 Guatemalans either died or were disappeared. Torture, rape, and sexual violence were pervasive.<sup>114</sup>

The civil war came to an end in 1996, but the peace process did not resolve any of the underlying core problems.<sup>115</sup> Guatemala continues to suffer from high levels of poverty, violent crimes, and inequality, with ongoing marginalization of the indigenous population.<sup>116</sup> The country’s democratic institutions are plagued by corruption at the highest levels.<sup>117</sup> Successful efforts to address corruption and impunity through the establishment of an independent UN-backed commission<sup>118</sup> were brought to an end when the work of the Commission threatened to uncover the sitting president’s crimes.<sup>119</sup> Most recently, judges and prosecutors previously involved with the now defunct

---

<https://www.nytimes.com/roomfordebate/2013/05/19/what-guilt-does-the-us-bear-in-guatemala/guatemala-suffered-for-us-foreign-policy#:~:text=The%20inequalities%20that%20led%20to,exclusion%2C%20contempt%20and%20structural%20racism> [<https://perma.cc/746F-B5T6>].

112. Musalo & Lee, *supra* note 104, at 153; *Timeline: Guatemala’s Brutal Civil War*, PBS NEWS HOUR (Mar. 7, 2011), [https://www.pbs.org/newshour/health/latin\\_america-jan-june11-timeline\\_03-07](https://www.pbs.org/newshour/health/latin_america-jan-june11-timeline_03-07) [<https://perma.cc/76GG-MY3B>].

113. Musalo & Lee, *supra* note 104, at 153.

114. *Id.*

115. See *Guatemala Profile*, *supra* note 101101.

116. MAUREEN TAFT-MORALES, CONG. RSCH. SERV., R42580, *GUATEMALA: POLITICAL AND SOCIOECONOMIC CONDITIONS AND U.S. RELATIONS* 1 (2019).

117. *Id.* at 2-3.

118. The International Commission against Impunity in Guatemala (La Comisión Internacional Contra la Impunidad - CICIG) was “created in 2007 in response to advocacy by Guatemalan civil society organizations who feared that government complicity with organized crime networks would imperil Guatemala’s consolidation of democracy following the 1996 peace agreement.” Musalo, *El Salvador: Root Causes*, *supra* note 29 at 208 n.138.

119. See *Guatemala Profile*, *supra* note 101101.

commission, or working with a special anti-impunity prosecutors office,<sup>120</sup> have been wrongfully accused of crimes, and arrested, in an attempt to silence and intimidate them.<sup>121</sup>

To what degree is the United States responsible for the current conditions that exist in Guatemala today? As I have written in a prior reflection on this question:

[I] do not purport to draw a straight line of causation between [U.S.] interventions and current conditions of violence, inequality, and social exclusion that prevail in Guatemala. However, there is no doubt that US actions caused untold suffering and setbacks to the struggle for justice and democracy; one can only speculate what Guatemala would be like today if the US government had not forced Arbenz out of office or supported the repressive Guatemalan military during the country's civil war.<sup>122</sup>

On a trip to Guatemala in 1999, President Clinton apologized for the US support for the country's brutal military in its thirty-six-year-long civil war.<sup>123</sup> He made the statement a month after an independent Guatemalan truth commission released a report attributing the "vast majority of human rights abuses during the war, including torture, kidnapping and the murder of thousands of rural Mayans" to the US-backed security forces.<sup>124</sup>

Notably, Clinton's statement did not include any reference to the US intervention in 1954, which brought an abrupt end to Arbenz's presidency and his promise of land reform. But of even greater significance within the context of this Article is that Clinton's apology was not accompanied by any proposals—modest or grand—to make right by the Guatemalan people. In fact, in that

120. *See id*101.

121. European Union External Action Service Press Release 220211\_13, Guatemala: Statement by the Spokesperson on the Rule of Law Situation (Feb. 11, 2022).

122. Musalo & Lee, *supra* note 112, at 154.

123. John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES (Mar. 11, 1999), <https://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html> [<https://perma.cc/68RQ-7Q8X>].

124. Charles Babington, *Clinton: Support for Guatemala was Wrong*, WASH. POST (Mar. 11, 1999), <https://www.washingtonpost.com/wp-srv/inatl/daily/march99/clinton11.htm> [<https://perma.cc/6U37-X55>]; Guatemala — Memory of Silence: Report of the Commission for Historical Clarification: Conclusions and Recommendations (Feb. 1999), [https://www.jstor.org/stable/pdf/23778631.pdf?refreqid=excelsior%3A019d81f84e85f727bf2277a639f00b27&ab\\_segments=&origin=](https://www.jstor.org/stable/pdf/23778631.pdf?refreqid=excelsior%3A019d81f84e85f727bf2277a639f00b27&ab_segments=&origin=) [<https://perma.cc/UDN9-TCTF>].

same trip he rejected a request from the region's leaders—including Guatemala's—to "cease or slow [the] deportation" of undocumented citizens from their countries. This raises the question that has run throughout this Article: what moral responsibility do we owe to the people and nations we have harmed?

### C. El Salvador

Although unique in some respects, the history of El Salvador is not dissimilar from that of Guatemala. After the Spanish conquest, indigenous Salvadorans were forced off their communally owned lands, property ownership became concentrated in the hands of monied interests, and state repression was deployed to maintain these deep inequalities.<sup>125</sup> Organizing against exploitative conditions was met with unrestrained violence; seared into the memory of Salvadorans is the 1932 *Matanza* (Massacre), during which the country's National Guard slaughtered around thirty thousand, mostly indigenous coffee plantation workers who had gone on strike to demand better living and working conditions.<sup>126</sup>

In the 1970s, in response to the defeat of modest land reform efforts and electoral fraud, civil society groups began organizing.<sup>127</sup> The Catholic teachings of liberation theology, which validated the rights of the poor and oppressed to ask for justice, were an influential force.<sup>128</sup> The movement of popular organizations—peasants, students, and unions—was met with state repression.<sup>129</sup>

Unable to make progress through non-violent popular organizing, groups fighting for economic and societal equality took up arms.<sup>130</sup> The response of the Salvadoran state was brutal and did not distinguish between armed combatants and unarmed

---

125. Karen Musalo, *El Salvador—A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 *YALE J. L. & FEMINISM* 3, 8-9 (2018), [hereinafter Musalo, *El Salvador—A Peace Worse than War*].

126. Jan. 22, 1932: *La Matanza ("The Massacre") Begins in El Salvador*, ZINN EDUCATION PROJECT, <https://www.zinnedproject.org/news/tdih/la-matanza> [https://perma.cc/8PH4-JDRC] (last visited Apr. 19, 2022).

127. Musalo, *El Salvador—A Peace Worse than War*, *supra* note 125, at 10.

128. *Id.*

129. *Id.*

130. Musalo, *El Salvador: Root Causes*, *supra* note 29, at 185.



civilians who simply supported the cause. The military carried out massacres resulting in the deaths of thousands of peasants; priests and nuns were targeted and killed, and torture and disappearances were commonplace.<sup>131</sup>

Even though it had knowledge of the pervasive and gross atrocities being carried out by the Salvadoran security forces, the United States provided a high level of funding. During the Reagan administration, the United States was “dumping more than a million dollars a day of military aid into El Salvador.”<sup>132</sup> By the end of the conflict, the United States had provided more than \$5 billion in assistance.<sup>133</sup>

El Salvador’s civil war lasted from 1980 to 1992. An estimated 75,000 people were killed, 500,000 were displaced, and many others were disappeared.<sup>134</sup> The war came to an end with the signing of peace accords in 1992.<sup>135</sup> The economic inequalities which had brought about the conflict were not addressed, amnesty laws provided impunity for those who had committed human rights violations,<sup>136</sup> and a significant number of former military and guerrilla combatants held on to their weapons and ultimately incorporated themselves into criminal enterprises.<sup>137</sup>

In addition to the harm inflicted by its funding of the brutal military, the United States was not a positive force in the aftermath of the conflict. It pressured the Salvadoran government to adopt neoliberal economic policies which deepened poverty and societal marginalization.<sup>138</sup> Harsh immigration laws led to the deportation of Salvadoran youths who had fled the civil war and gotten involved with gangs in the United States. They became the seeds of the well-established gangs that have grown and have become a

---

131. Musalo, *El Salvador—A Peace Worse than War*, *supra* note 125, at 10.

132. Nelson Rauda & John Washington, *The U.S. Role in the El Mozote Massacre Echoes in Today’s Immigration*, WASH. POST (May 12, 2021), <https://www.washingtonpost.com/outlook/2021/05/13/us-role-el-mozote-massacre-still-echoes-immigration-today/> [<https://perma.cc/B4ED-HGNP>].

133. Musalo, *El Salvador—A Peace Worse than War*, *supra* note 125, at 5.

134. *Id.* at 4-5.

135. *Id.* at 13.

136. *Id.*

137. *El Salvador Profile*, INSIGHT CRIME (Sept. 15, 2020), <https://insightcrime.org/el-salvador-organized-crime-news/el-salvador/> [<https://perma.cc/Z95H-MBH6>].

138. Musalo, *El Salvador—A Peace Worse than War*, *supra* note 125, at 24.

major source of the high levels of violence in El Salvador today.<sup>139</sup> As with Haiti and Guatemala, the United States should acknowledge its contributions to the conditions of violence and inequality which persist in El Salvador, and accept the concomitant moral obligations that accompany such recognition.

#### *D. Honduras*

Many of the same patterns which characterize the historical relationship between the United States and Guatemala are repeated in Honduras. Beginning in the 1890s, US banana companies began setting up their operations, possessing nearly one million acres of prime land in Honduras by 1914.<sup>140</sup> These companies owned so much of the best lands that Honduran peasants “had no hope of access to their nation’s good soil.”<sup>141</sup> None of the money generated from the banana plantations benefited the Honduran people, but was taken out of the country.<sup>142</sup> American companies also controlled Honduras’ banking and mining sectors.<sup>143</sup> The United States was so protective of its interests that it engaged in “political and military interventions” in 1907 and 1911 to secure them.<sup>144</sup>

The United States continued to wield significant influence over political and military matters in Honduras, resulting in the country being disparagingly referred to as the “U.S.S. Honduras” and the “Pentagon Republic.”<sup>145</sup> During the Reagan presidency, the United States used Honduras as a launchpad for its interventionist efforts in both Nicaragua and El Salvador.<sup>146</sup> In Nicaragua, Reagan’s goal was to overthrow the leftist Sandinista government, and in El

---

139. CLARE RIBANDO SEELKE, CONG. RSCH. SERV., R43616, EL SALVADOR: BACKGROUND AND U.S. RELATIONS 7 (2020).

140. Joseph Nevins, *How U.S. Policy in Honduras Set the Stage for Today’s Migration*, CONVERSATION (Oct. 31, 2016), <https://theconversation.com/how-us-policy-in-honduras-set-the-stage-for-todays-migration-65935> [<https://perma.cc/VS2F-KCKM>].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. PETER J. MEYER, CONG. RSCH. SERV., RL34027, HONDURAS: BACKGROUND AND U.S. RELATIONS, 12 (2020).

Salvador, it was to support the brutal Salvadoran military.<sup>147</sup> The Honduran military was handsomely rewarded for its role, with a tenfold increase in funding during the Reagan administration.<sup>148</sup> The building up of the military was at the expense of democratic institutions and civil society,<sup>149</sup> and was especially troubling because of the military's involvement in both human rights abuses and drug trafficking.<sup>150</sup>

During the 1980s, international drug trafficking got its foothold in Honduras with the establishment of routes between Colombia and Mexico to transport cocaine to the United States.<sup>151</sup> High-level political actors have been implicated in drug trafficking,<sup>152</sup> including the former president Juan Orlando Hernandez, who was recently arrested on drug charges. Hernandez's brother is also currently serving a life sentence in the United States for drug trafficking.<sup>153</sup>

Due to the activities of drug cartels and street gangs, Honduras has one of the highest homicide rates in the world.<sup>154</sup> It is also one of the poorest countries in Latin America, with almost half the population living below the poverty level and more than a third living in conditions where they cannot meet their "basic nutritional needs."<sup>155</sup> Corruption is rampant with public officials embezzling millions.<sup>156</sup> An anti-corruption initiative backed by the Organization of American States—the Mission to Support the Fight against Corruption and Impunity in Honduras—was having some success in investigating and prosecuting high-level cases, but its

---

147. *Id.*

148. Philip L. Shepherd, *The Tragic Course and Consequences of U.S. Policy in Honduras*, 2 *WORLD POL'Y* J. 109, 116 (1984).

149. *Id.* at 135.

150. Jose Miguel Cruz, *Criminal Violence and Democratization in Central America: The Survival of the Violent State*, 53 *LATIN AM. POL. & SOC'Y* 1, 17-18 (2011).

151. *Honduras Profile*, *INSIGHT CRIME* (Feb. 15, 2021), <https://tinyurl.com/46a6pwtr> [<https://perma.cc/QG29-MFGR>].

152. MEYER, *supra* note 146, at 5-6, 10.

153. *Juan Orlando Hernández: Police Arrest Honduran Ex-leader on Drugs Charges*, *BBC* (Feb. 15, 2022), <https://www.bbc.com/news/world-latin-america-60387156> [<https://perma.cc/HW38-C53W>].

154. MEYER, *supra* note 146, at 12.

155. *Id.* at 8.

156. *Id.* at 5.

continued operation was opposed by the Honduran Congress and was shut down by the then-president Hernandez.<sup>157</sup>

Discontent with the levels of violence, corruption, and economic insecurity led to the 2005 election of Manuel Zelaya, who campaigned on a platform of raising the minimum wage and combatting crimes that plagued the country.<sup>158</sup> Once in office, Zelaya began instituting promised reforms: “[u]nder his leadership, Honduras raised the minimum wage by 60 percent, offered subsidies to small farmers, and lowered interest rates.”<sup>159</sup> These and other actions he took, such as the prohibition of open pit mining, angered conservatives and business interests both inside and outside the country.<sup>160</sup>

Zelaya was ousted in a military coup, prompted by his calls for a referendum to decide whether a vote should take place during the upcoming general election on a constitutional amendment.<sup>161</sup> The amendment would have permitted him to stand for reelection.<sup>162</sup> The international community viewed the coup as unlawful and illegitimate.<sup>163</sup> The Organization of American States (“OAS”) issued an “ultimatum” to restore Zelaya to office.<sup>164</sup> Joining the OAS in condemnation of the coup was the European Union,<sup>165</sup> the United Nations,<sup>166</sup> the World Bank, and the International Monetary Fund.<sup>167</sup> The United States initially opposed the coup

---

157. *Id.* at 5-6.

158. See Nevins, *supra* note 140; *Honduras Profile*, *supra* note 151.

159. *Dancing with Monsters: The U.S. Response to the 2009 Honduran Coup*, HARV. POL. REV. (Apr. 13, 2015), <https://harvardpolitics.com/us-honduran-coup/> [<https://perma.cc/EX26-V56K>] [hereinafter *Dancing with Monsters*].

160. *Id.*

161. *Id.*

162. *Honduras Profile*, *supra* note 151.

163. Thomas Legler, *Learning the Hard Way: Defending Democracy in Honduras*, 65 INT’L J. 601, 605-06 (2010).

164. *Id.* at 605; see also Jim Wolf, *OAS Suspends Honduras Over Coup Against Zelaya*, REUTERS (July 4, 2009), <https://www.reuters.com/article/idINIndia-40812020090705> [<https://perma.cc/JM3F-62JB>].

165. *EU to Warn Honduras of Further Sanctions Over Coup*, REUTERS (Sept. 10, 2009), <https://www.reuters.com/article/uk-eu-honduras/eu-to-warn-honduras-of-further-sanctions-over-coup-idUKTRE58948520090910> [<https://perma.cc/S8YD-FFXW>].

166. Press Release, General Assembly, General Assembly, Acting Unanimously, Condemns Coup d’État in Honduras, Demands Immediate, Unconditional Restoration of President, U.N. Press Release GA/10842 (June 30, 2009).

167. Legler, *supra* note 163, at 605-06.

and joined other inter-governmental organizations and countries in imposing sanctions.<sup>168</sup> However, influential business interests,<sup>169</sup> as well as Republican senators were highly supportive of the de facto post-coup government.<sup>170</sup> The senators took a number of actions to reduce the “international isolation” of Honduras, and to put pressure on the Obama administration,<sup>171</sup> including holding up votes on Obama appointments for high-ranking diplomatic positions.<sup>172</sup> They also heavily lobbied Secretary of State Hillary Clinton. The United States, which had stated it would not recognize the results of a Honduran election if Zelaya was not returned to office,<sup>173</sup> changed its position and stated it would—a position seen as “legitimizing the post-coup government.”<sup>174</sup> The change in the US position “had a divisive effect” on the international consensus not to recognize an election held after Zelaya’s unlawful removal from office, and ultimately the election was recognized by a “critical mass of countries.”<sup>175</sup>

In accepting the ouster of Manuel Zelaya, the United States was repeating the pattern that has characterized its relationship with the other three countries discussed in this Part and many more outside the scope of this piece. It has “incited, encouraged, and supported coups”<sup>176</sup> when they served US priorities of “preserv[ing] the free market and protect[ing] American corporate interests”<sup>177</sup> and it has tolerated corrupt and repressive governments when their policies were aligned with US interests. These truths are hard to deny in light of the historical facts. And if

---

168. *Id.*; see also *Dancing with Monsters*, *supra* note 159 (“[T]he United States took diplomatic and economic measures [against the coup-led government.]”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-9R, REVIEW OF U.S. RESPONSE TO THE HONDURAN POLITICAL CRISIS OF 2009 2 (2011). This included the termination of a number of “security, economic, and development assistance programs in Honduras.” *Id.*; see also Jake Johnston, *How Pentagon Officials May Have Encouraged a 2009 Coup in Honduras*, INTERCEPT (Aug. 29, 2017), <https://theintercept.com/2017/08/29/honduras-coup-us-defense-departmentnt-center-hemispheric-defense-studies-chds/> [<https://perma.cc/KP6F-QP4>].

169. *Dancing with Monsters*, *supra* note 159.

170. Legler, *supra* note 163, at 615-16. See also *Dancing with Monsters*, *supra* note 159.

171. Legler, *supra* note 163, at 615-16.

172. *Id.* at 616; see also *Dancing with Monsters*, *supra* note 159.

173. Legler, *supra* note 163, at 616.

174. Nevins, *supra* note 140.

175. Legler, *supra* note 163, at 616.

176. *Dancing with Monsters*, *supra* note 159.

177. *Id.*

we acknowledge that the United States has wielded its considerable military and economic strengths to further its own agenda at the expense of the rights and dignity of the citizens of other countries, then can we continue to deny a moral obligation to those who live with the consequences?

#### V. CONCLUSION

Non-refoulement—the prohibition of returning a refugee to persecution—is the core obligation that the 1951 Convention and its 1967 Protocol imposes on state parties. Regrettably, the violation of the norm of non-refoulement has become so common in the global north that it risks becoming normalized. The consequences are not simply abstract but result in the suffering or deaths of those in the direst of circumstances. This Article argues that we must not tolerate the normalization of practices which return refugees to harm. Beyond the clear legal obligation that prohibits such action are the moral and ethical considerations arising from both religious and secular systems of thought.

A country's ethical obligations should be seen to be greater when it has caused or contributed to the conditions which cause individuals to flee. I use the examples of Haiti, Guatemala, El Salvador, and Honduras as illustrative of situations where US interventions indisputably caused harm.

Discussions of asylum protection for nationals from these four countries and others where the United States has intervened detrimentally would benefit from an acknowledgement of the role the United States has played over centuries in each one of them, accompanied by a change in policy. And although extending protection now does not undo the harm wrought in the past, it would constitute a long-overdue form of reparations.<sup>178</sup>

---

178. See generally Sherman-Stokes, *supra* note 68.

