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Human Rights Law, Refugees, International Law: History, Public Policy

MIGRANTS AND REFUGEES ARE ROUTINELY DENIED THE PROTECTION OF INTERNATIONAL HUMAN RIGHTS: WHAT DOES THE FUTURE HOLD?

VED P. NANDA*

I. INTRODUCTION

In a globalized world, it is no surprise that human mobility is on the rise. The number of international migrants¹ increased from approximately 173 million in 2000² to 214 million in 2010³ and stood at 244 million in 2015.⁴ This includes over 65 million forcibly displaced persons and more than 21 million refugees.⁵ In addition, although not a focus of this comment, 10 million stateless people⁶ and 40 million internally displaced persons⁷ also suffer varying deprivations of human rights.

While more migrants and refugees are on the move, they increasingly suffer from serious violations of their basic human rights en route, at the borders, and in the countries of transit as well as destination countries. This article discusses the challenges migrants and refugees face as they seek protection and the several recent efforts to find solutions to their plight. In Part II, I review the nature, magnitude, and complexity of the current international movement of migrants and refugees. Part III

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1. There is no universal or legal definition of a migrant. In common usage, an international migrant is a person who is outside the state of which he or she is a national or citizen and if a stateless person, he or she is outside the state of birth or habitual residence.

2. U.N. Secretary-General, *Report of the Special Rapporteur on the human rights of migrants*, ¶ 8, U.N. Doc. A/71/40767 (July 20, 2016) [hereinafter *Special Rapporteur's July 20, 2016 Report*], <http://www.ohchr.org/Documents/Issues/SRMigrants/DevelopingGlobalCompactOnMigration.pdf>;

U.N. Secretary-General, *In safety and dignity: addressing large movements of refugees and migrants*, ¶ 12, U.N. Doc. A/70/59 (Apr. 21, 2016), <http://www.undocs.org/A/70/59>.

3. U.N., Office of the High Commissioner for Human Rights [OHCHR], *Migration: a global governance issue* (Nov. 9, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/MigrationGlobalGovernanceIssue.aspx>.

4. G.A. Res. 71/1, ¶ 3 (Oct. 3, 2016) [hereinafter N.Y. Declaration], <http://www.unhcr.org/en-us/57e39d987>.

5. U.N. High Commissioner for Refugees [UNHCR], *Figures at a Glance* (2015), <http://www.unhcr.org/en-us/figures-at-a-glance.html> (I will often use the term migrants to include refugees. A refugee is officially defined under the 1951 Convention Relating to the Status of Refugees, *infra* note 180 and accompanying text).

6. *Id.*

7. UNHCR, *Internally Displaced People*, <http://www.unhcr.org/en-us/internally-displaced-people.html>.

discusses the challenges migrants face and recent efforts undertaken to protect their rights and find a more orderly, predictable, coordinated, and humane process to address these challenges, contrasted with the current unregulated and ad hoc approaches. Part IV presents the recent developments related to refugee admissions in the United States. Part V notes the applicable international law, including the international law of migrants and international refugee law. Part VI provides analysis, followed by conclusion in Part VII.

II. NATURE, MAGNITUDE, AND COMPLEXITY OF THE MIGRATION CRISIS

On September 19, 2016, the United Nations General Assembly aptly stated the reasons for voluntary movement and forced displacement:

Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change...or other environmental factors. Many move, indeed, for a combination of these reasons.⁸

Among the major pull factors is that destination states need migrant labor.

The number of displaced persons is indeed staggering and has grown dramatically, partially due to the continuing Syrian conflict, and also because of ethnic and religious tensions in several countries including Afghanistan, Eritrea, Iraq, Libya, and Somalia. More than a million refugees (those who flee across international borders because of war, violence, and persecution) and migrants crossed the Mediterranean in 2015, seeking safety,⁹ and the number of those who applied for asylum in Europe between July 2015 and May 2016, also stood at more than one million.¹⁰

The numbers of unaccompanied minors seeking asylum in Europe are on the rise, as well – 198,500 entered Europe between 2008 and 2015, and 48 percent arrived in 2015 alone.¹¹ UNICEF has stated in a recent report, *Hitting Rock Bottom: How 2016 Became the Worst Year for Syria's Children*, that Syria's children have suffered the most during their country's civil war, for, as, in 2016 at least 652 children were killed, 850 were recruited and used in the conflict; more than 1.7 million inside Syria are out of school, and nearly six million were dependent on humanitarian assistance.¹² The number of Syrian children living as refugees in Turkey, Lebanon, Jordan, Egypt, and Iraq is over 2.3 million.¹³ The report adds,

8. N.Y. Declaration, *supra* note 4, ¶ 1.

9. UNHCR, *Better Protecting Refugees in the EU and Globally*, at 2 (2016), <http://www.refworld.org/docid/58385d4e4.html> [hereinafter *Better Protecting Refugees*].

10. Phillip Connor & Jens Manuel Krogstad, *Key facts about the world's refugees* (PEW RESEARCH CENTER Oct. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/10/05/key-facts-about-the-worlds-refugees/>.

11. *Id.*

12. UNICEF, *Hitting Rock Bottom: How 2016 Became the Worst Year for Syria's Children*, at 2 (March 2017), <http://www.refworld.org/docid/58c6bdc24.html>.

13. *Id.*

“[s]ince the beginning of the conflict in 2011, thousands of children crossed Syria’s borders unaccompanied or separated from their families. The situation of more than 47,000 people stranded at the no man’s land near Syria’s southeastern border with Jordan continues to deteriorate.”¹⁴

The number of migrant arrivals to Europe by sea has slowed, due to the increased border restrictions on refugee and migrant movements toward and within Europe in 2016, and Turkey’s decision to end the irregular migration from Turkey to the European Union, as set out in the EU-Turkey statement of March 16, 2016.¹⁵ Nevertheless, during the first 73 days of 2017, 19,653 migrants, including refugees, still arrived in Europe.¹⁶

The perilous journeys resulted in the deaths of 7,763 migrants worldwide in 2016, an increase of 27 percent compared to 2015 and 47 percent compared to 2014; 5,085 of them died in the Mediterranean Sea in 2016, an increase of 34 percent from 2015.¹⁷ Despite increased search-and-rescue efforts, 788 migrants, including refugees, died during the first 71 days of 2017.¹⁸

The recognition of the variety of reasons for the movement of people mentioned above was in a resolution the General Assembly adopted on September 19, 2016, entitled the *New York Declaration for Refugees and Migrants* (Declaration);¹⁹ this was the outcome document of the High-Level Plenary Meeting on addressing large movements of refugees and migrants. The Heads of State and Government and High Representatives had assembled to address this topic. Earlier, in March 2016, a regional process in the Asia-Pacific Region, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, had charted a comprehensive regional approach to managing migration flows and combating people smuggling and human trafficking.²⁰

A day following the UN Summit, President Barack Obama opened the Leaders’

14. *Id.*

15. European Commission Press Release 144/16, Council of the European Union, EU-Turkey statement (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

16. International Organization for Migration [IOM], *Mediterranean migrant arrivals reach 19,653, Deaths: 525, MISSING MIGRANTS PROJECT* (Mar. 14, 2017), <https://missingmigrants.iom.int/mediterranean-migrant-arrivals-reach-19653-deaths-525> [hereinafter Missing Migrants].

17. *Migrant Deaths and Disappearances Worldwide: 2016 Analysis* (IOM Mar. 17, 2017), www.iom.int/news/migrant-deaths-and-disappearances-worldwide-2016-analysis.

18. Missing Migrants, *supra* note 16; *see, e.g.*, Declan Walsh, *Libyans Find Bodies of 74 Migrants on Coast*, N.Y. TIMES, Feb. 22, 2017, at A4 (from a shipwrecked inflatable raft boat found on the shore); Ben Hubbard & Shuaib Almosawa, *Somali Migrants’ Trek Becomes Scene of Horror*, N.Y. TIMES, Mar. 18, 2017, at A7 (killed by firing from a military helicopter on their boat).

19. N.Y. Declaration, *supra* note 4.

20. Sixth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, *Co-Chairs’ Statement* (Mar. 23, 2016), http://www.baliprocess.net/UserFiles/baliprocess/File/BPMC%20Co-chairs%20Ministerial%20Statement_with%20Bali%20Declaration%20attached%20-%2023%20March%202016_docx.pdf.

Summit on Refugees,²¹ at which donors increased the financial contributions made earlier to the United Nations and other international humanitarian organizations by approximately \$4.5 billion over the 2015 level.²²

As part of the Declaration, the Member States reaffirmed that they would “fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders.”²³ They added that their response would “demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.”²⁴

Among other commitments, the world leaders stated that they would recognize and...address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are traveling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.²⁵

Member States also committed to take measures to improve the integration and inclusion of migrants and refugees, as appropriate, with particular reference to access to justice.²⁶ They also “committed to implementing border control procedures in conformity with applicable obligations under international law, including international human rights law and international refugee law.”²⁷ In addition, they stated that they would “protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status,” and, referring to Article 3(1) of the Convention on the Rights of the Child, they would “giv[e] primary consideration at all times to the best interest of the child.”²⁸

Member States plan to adopt a global compact for safe, orderly, and regular migration and present it at an inter-governmental conference to be held in 2018.²⁹ They also plan to develop a comprehensive refugee response framework through the process of state negotiations and based on the principles of international cooperation and on the sharing of the burdens and responsibilities of refugees more equitably,

21. U.N. Summit for Refugees and Migrants 2016 (Sept. 19, 2016), <http://refugeesmigrants.un.org/summit>; U.S. Office of the Press Secretary, Fact Sheet on the Leaders' Summit on Refugees (Sept. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees>.

22. *Id.*; see also Ved Nanda, *The world's refugee system is broken, and solutions are elusive*, THE DENVER POST (Sept. 29, 2016), <http://www.denverpost.com/2016/09/29/the-worlds-refugee-system-is-broken-and-solutions-are-elusive/>.

23. N.Y. Declaration, *supra* note 4, ¶ 5.

24. *Id.*

25. *Id.* ¶ 23.

26. *Id.* ¶ 39.

27. *Id.* ¶ 24.

28. *Id.* ¶ 32.

29. *Id.* at Annex II ¶¶ 1, 9.

and which will be elaborated by UNHCR.³⁰

Along with these undertakings, the Declaration includes many more commitments by Member States. Human Rights groups have been critical of the Declaration, as will be evaluated later in this article. It should, however, be noted here that notwithstanding these glowing promises, state practices do not match those commitments.

III. CHALLENGES OF MIGRATION AND RECENT EFFORTS TO PROTECT MIGRANTS' HUMAN RIGHTS

Migrants increasingly face restrictive immigration policies by states, such as restricting the inflow of migrants and “push-backs” at land and sea as border control measures, interception practices, detention, and even deportation. Two recent examples are the detention law in Hungary and deportation law in Belgium. On March 7, 2017, the Hungarian Parliament adopted a new law calling for mandatory detention of all asylum seekers, including children, for the entire length of the asylum procedure.³¹ In a press briefing, the UNHCR spokesperson expressed deep concern that the asylum seekers “will be detained in shipping containers surrounded by high razor wire fence at the border for extended periods of time.”³² It should be noted that Hungary had already enacted legislative and policy obstacles in addition to the physical barriers it had erected, which had made it nearly impossible for asylum seekers to enter the country and apply for asylum. The spokesperson reminded Hungary that there are only a limited number of grounds to justify detention of refugees and asylum seekers and it must be “necessary, reasonable and proportionate” to do so. She reminded Hungary that failure to consider alternatives to detention could render detention arbitrary. Children, she said, should never be detained, for detention is never in a child’s best interest.³³

Under the law passed by Belgium’s Parliament, the government is given extraordinary powers to deport legal residents of foreign origin, of whom there are about 1.3 million;³⁴ however, the law excludes Belgian nationals and refugees. Under the law, foreigners legally resident in Belgium could be deported on the mere suspicion of engaging in terrorist activities, or for “presenting a risk to public order or national security.” Such action may be taken without a criminal conviction or even involving a judge. Several human rights groups protested this new law in a letter and the Belgian Human Rights League is planning to appeal. The fear of terrorism has already led several European countries – Hungary, Austria, and The Netherlands – to lower their threshold for deportation in recent years.³⁵

30. *Id.* at Annex I.

31. *UNHCR deeply concerned by Hungary plans to detain all asylum seekers*, UNHCR (Mar. 7, 2017), <http://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html>.

32. *Id.*

33. *Id.*

34. Milan Schreuer, *Rights Groups See Red Flag in Belgian Deportation Law*, N.Y. TIMES, Mar. 12, 2017, at A9.

35. *Id.*

The Special Rapporteur on the Human Rights of Migrants has described the migrants' plight in his report of July 26, 2016: "Unregulated migration in host countries has led to rising anti-migration sentiment, discrimination and violence, as migrants are portrayed as 'stealing' jobs and draining social services."³⁶ He notes that the rise of nationalist populist parties and the tragic terrorist attacks around the world, xenophobia and hate speech have increased, creating a significant trend in the negative perceptions of migrants, as well creating a stumbling block in the development of more efficient evidence-based and human rights-based policies.³⁷

The Special Rapporteur asserts that these negative perceptions persist notwithstanding immigrants' positive overall impact on employment generation and investment.³⁸ Referring to an OECD study³⁹ and another study by the OHCHR,⁴⁰ he states that migrants contribute to economic growth in the places they go and they contribute more in direct and indirect taxes than they take out.⁴¹

Migrants facing special challenges are those considered "irregular" migrants⁴² and migrants in a vulnerable situation; children, especially those unaccompanied or separate from their families; and women and girls migrant workers. Although there is no universally accepted definition of the term, "irregular migrants," it usually refers "to the movement of international migrants who enter or stay in a country without correct authorization."⁴³ They are also usually described as "undocumented," "unauthorized," "unlawful," and even "illegal."⁴⁴

According to the Global Migration Group, which is composed of 21 UN and other international entities working on migration, an "irregular migrant" is "every person who, owing to undocumented entry or the expiry of his or her visa, lacks legal status in a transit in a host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country."⁴⁵

36. *Special Rapporteur's July 20, 2016 Report*, *supra* note 2, ¶ 18.

37. *Id.*

38. *Id.* ¶ 19.

39. OECD, INTERNATIONAL MIGRATION OUTLOOK 2013 (OECD, 2013), http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2013_migr_outlook-2013-en. See also OECD, INTERNATIONAL MIGRATION OUTLOOK 2016 (OECD, 2016), http://www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2016_migr_outlook-2016-en (analyzing the economic impact of migration and how the OECD countries should respond).

40. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF MIGRANTS IN AN IRREGULAR SITUATION, at 4, U.N. Sales No. E.14.XIV.4 (2014), http://www.OHCHR.org/documents/Publications/HR-PUB-14-1_en.pdf [hereinafter 2014 OHCHR Report].

41. *Special Rapporteur's July 20, 2016 Report*, *supra* note 2, ¶ 19.

42. 2014 OHCHR Report, *supra* note 40, at 4.

43. *Id.*

44. *Id.*

45. Glob. Migration Grp., *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, at 7 (Oct. 2008), http://www.globalmigrationgroup.org/system/files/uploads/documents/Int_Migration_Human_Rights.pdf.

In the latest draft, in February 2017, OHCHR and the Global Migration Group provided a set of principles and guidelines on the human rights protection of migrants in vulnerable situations.⁴⁶ They state that the concept of a “migrant in a vulnerable situation” is to be understood as a range of the following intersecting factors which can exist simultaneously: a vulnerable situation arising from the reasons for leaving countries of origin; occurring in the context of the circumstances migrants encounter en route, at borders, and at reception; or related to a specific aspect of a person’s identity or circumstance.⁴⁷

It was no surprise that the rise in migration numbers led to greater national, regional, and international attention. International entities have, however, been actively involved with international migration issues for several decades. These include the United Nations and its various agencies, especially the Office of the UN High Commissioner for Human Rights,⁴⁸ the Special Rapporteur on the Human Rights of Migrants,⁴⁹ and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.⁵⁰ Two special initiatives by the UN are the Global Forum on Migration and Development, a “voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes,”⁵¹ and the Global Migration Group, an UN inter-agency group currently comprising 21 entities, which was established by the Secretary-General in 2006, and which promotes the wider application of all pertinent norms relating to migration and encourages “the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration.”⁵² Other organizations include the International Organization for Migration, which has now become a related organization to the United Nations,⁵³ and the Organization for Economic Cooperation and Development.⁵⁴

The major refugee organization is the United Nations Office of the High

46. Office of the High Comm’r of Human Rights & Glob. Migration Grp., *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, Draft (Feb. 2017), <http://www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx>.

47. *Id.* at 4–5.

48. U.N., Office of the High Comm’n for Human Rights, <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> (last visited Apr. 23, 2017).

49. U.N., Office of the U.N. High Comm’r for Human Rights, Special Rapporteur on the Human Rights of Migrants, <http://www2.ohchr.org/english/issues/migration/rapporteur> (last visited Apr. 23, 2017).

50. U.N., Office of the U.N. High Comm’r for Human Rights, Comm. on Migrant Workers, <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>.

51. Glob. Forum on Migration and Dev., *Background and Objectives*, <http://gfmnd.org/process/background>.

52. U.N., Glob. Migration Grp., <http://www.globalmigrationgroup.org/>.

53. INT’L ORG. ON MIGRATION, <http://www.iom.int>; Int’l Org. on Migration, IOM Becomes a Related Organization to the UN (Jul. 25, 2016), <https://www.iom.int/news/iom-becomes-related-organization-un>.

54. ORG. FOR ECON. COOPERATION AND DEV. [OECD], <http://www.oecd.org>.

Commissioner for Refugees (UNHCR), the UN Refugee Agency “dedicated to saving lives, protecting rights and building a better future for refugees, forcibly displaced communities and stateless people.”⁵⁵ Among the non-governmental organizations in the United States on migration, major actors include the Migration Policy Institute,⁵⁶ and the Population Reference Bureau.⁵⁷ The International Rescue Committee,⁵⁸ U.S. Committee for Refugees,⁵⁹ Refugee Council USA,⁶⁰ and Refugees International⁶¹ are among the major US NGOs active on refugee issues.

In 2015, European countries struggled to cope with the influx of migrants. Furious efforts were made to stem the tide of migrants entering Europe. These include the Valletta (Malta) Summit on Migration in November 2015,⁶² which brought together European and African heads of state and government and was designed to build upon the earlier successes of the Rabat and Khartoum processes on migration, and the EU-Africa Dialogue on Migration and Mobility so as to address the new challenges of migration and to strengthen cooperation. The outcome was a Political Declaration⁶³ and a Plan of Action.⁶⁴ After committing “to respond decisively and together manage migration flows...guided by the principles of solidarity, partnership and shared responsibility,” to respect international obligations and human rights, to make joint efforts against irregular migration, and for “preventing and fighting migrant smuggling, [and] eradicating trafficking in human beings,”⁶⁵ the participants agreed an Action Plan with five identified priority areas:

1. Development benefits of migration and addressing root causes of irregular migration and forced displacement;
2. Legal migration and mobility;
3. Protection and asylum;
4. Prevention of and fight against irregular migration, migrant smuggling and trafficking in human beings; and
5. Return, readmission and reintegration.⁶⁶

To ensure implementation of the Plan, the participants agreed to launch 16 ambitious initiatives, several under each priority area, by the end of 2016.⁶⁷

In March 2016, European leaders entered into an agreement with Turkey, under

55. U.N. Office of the High Comm'r for Refugees, *About*, <http://www.unhcr.org/en-us/about-us.html>.

56. MIGRATION POLICY INST., <http://www.migrationpolicy.org>.

57. POPULATION REFERENCE BUREAU, <http://www.prb.org>.

58. INT'L RESCUE COMM., <https://www.rescue.org/topic/refugees-america>.

59. U.S. COMM. FOR REFUGEES, <http://refugees.org>.

60. REFUGEE COUNCIL USA, <http://www.rcusa.org/>.

61. REFUGEES INT'L, <https://www.refugeesinternational.org>.

62. VALLETTA SUMMIT ON MIGRATION, www.consilium.europa.eu/en/meetings/international-summit2015/11/11-12/.

63. Valletta Summit on Migration, *Political Declaration* (Nov. 11-12, 2015).

64. Valletta Summit on Migration, *Action Plan* (Nov. 11-12, 2015).

65. Valletta Summit, *supra* note 63, at 1, 3.

66. Valletta Summit *Action Plan*, *supra* note 64.

67. *Id.* at 1.

which Turkey will accept the return of all migrants crossing from Turkey to Greece who do not need international protection and all irregular migrants intercepted in Turkish waters.⁶⁸ The EU agreed to provide financial assistance to Turkey as part of the deal. Both countries also agreed to strengthen measures against migrant smugglers.⁶⁹ The accord sharply reduced crossings into Greece.

As the EU-Turkey agreement was considered a great success, the EU introduced in 2016 a New Migration Partnership Framework (MPF) aimed at fully integrating migration in the its foreign policy, with the stated objective of “saving lives and breaking the business model of smugglers, preventing illegal migration and enhanc[ing] cooperation on returns and readmission of irregular migrants, as well as stepping up investments in partner countries.”⁷⁰ Long-term measures of the New MPF include addressing the root causes of irregular migration and forced displacement by supporting partner countries’ political, social and economic development, and improving opportunities for sustainable development.⁷¹ To implement it, the EU and member countries would strengthen the existing EU Emergency Trust Fund for Africa and provide eight billion euros over the period 2016-2020.⁷²

Nearly four months after the launching of the MPF, the Commission presented the first progress report, stating that “the collective work is starting to bear fruit and is resulting in tangible outcomes.”⁷³ The first group of countries in Africa part of this partnership were Ethiopia, Mali, Niger, Nigeria, and Senegal, and Jordan and Lebanon in the Near East.⁷⁴ Similar cooperation agreements are likely to follow with other countries.

Subsequently, EU heads of state or government met on February 3, 2017,⁷⁵ and agreed on measures aimed at reducing the flow of irregular migrants from Libya to Italy, whose numbers had reached 181,000 in 2016.⁷⁶ The outcome of the meeting, the Malta Declaration,⁷⁷ states that “[a] key element of a sustainable migration policy is to ensure effective control of our external border and stem illegal flows into the EU.”⁷⁸ It further states that “[t]he Partnership Framework and the Valletta Action

68. European Council Press Release 144/16, EU-Turkey statement (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-cu-turkey-statement/>.

69. *Id.*

70. European Comm’n, *Migration Partnership Framework: A New Approach to Better Manage Migration* (June 6, 2016), https://ec.europa.eu/sites/eeas/files/factsheet_ec_format_migration_partnership_framework_update_2.pdf.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Better Protecting Refugees*, *supra* note 9, at 4.

75. European Council, *Informal Meeting of EU Heads of State or Government, Malta, 03/02/2017*, <http://www.consilium.europa.eu/en/meetings/european-council/2017/02/03-informal-meeting/>.

76. *Id.* at 4.

77. European Council Press Release, *Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route* (Feb. 3, 2017).

78. *Id.* ¶ 2.

Plan have allowed us to deepen long-term cooperation with a number of partner countries, including on root causes of migration, through a solid partnership based on mutual trust. This work is already yielding results and will be intensified.”⁷⁹ Acknowledging that “[e]fforts to stabilize Libya are now more important than ever, and the EU will do its utmost to contribute to that objective,” the EU leaders decided on several priorities aimed at strengthening capacity-building efforts⁸⁰ and allocating resources to address those priorities.⁸¹

To take stock of the progress made under the joint Valletta Action Plan and Declaration, Senior Officials met in Malta on February 8-9, 2017.⁸² Delegations from Africa and Europe participated and the meeting adopted a set of joint conclusions reiterating their commitment to the principles of “solidarity, partnership, and shared responsibility” in the areas of mobility and migration management.⁸³ Recognizing the benefits of well-managed migration to countries of origin, transit and destination, they reiterated their commitment to pursue the aims of the Valletta Action Plan, which requires cooperation, coordination, and partnership among all stakeholders.⁸⁴

Among the key messages, the participants called for addressing the root causes of migration⁸⁵ and efforts to promote legal migration.⁸⁶ They also recognized the need to strengthen international protection,⁸⁷ and for “a stronger focus on measures aimed at fighting trafficking in human beings and migrant smuggling, as well as implementing integrated border management and cross-border cooperation.”⁸⁸

In a statement at the Senior Officials’ meeting, the Director of the Europe Bureau on behalf of UNHCR, Vincent Cochetel, stressed the need to provide differentiated responses between refugees and asylum seekers, who cannot return to their home countries, and migrants.⁸⁹ He warned against the potential risk of a fragmented approach to the funding for activities carried out under the joint Valletta Action Plan and the Declaration because several bilateral actions and projects by EU Member States since the Valletta Summit were not coordinated with the EU funded programs and projects under the Emergency Trust Fund for Africa. Thus, he called for “comprehensive, integrated and better coordinated approaches across all EU

79. *Id.* ¶ 4.

80. *Id.* ¶ 6.

81. *Id.* ¶ 7.

82. *Senior Officials’ Meeting (SOM) held in Malta, on 8 and 9 February 2017*, RABAT PROCESS, <https://processus-de-rabat.org/en/rabat-process-in-action/208-senior-officials-meeting-som-valletta-2.html>.

83. Joint Conclusions, Joint Valletta Action Plan, *Senior Officials’ Meeting (SOM) in Malta 8-9 February 2017* at 1.

84. *Id.* at 2, ¶ 4.

85. *Id.* at 3, ¶ 1.

86. *Id.* at 3, ¶ 2.

87. *Id.* at 3, ¶ 3.

88. *Id.* at 3, ¶ 4.

89. UNHCR, *Statement delivered by Vincent Cochetel, Director of Europe Bureau on behalf of UNHCR, Senior Officials Meeting of the Valletta Summit on Migration 8–9 February 2017* (Feb. 10, 2017), <http://www.refworld.org/docid/589dc9e34.html>.

funded actions, including those undertaken bilaterally to ensure maximum impact.”⁹⁰ He underlined the importance of increasing available safe legal pathways to protection, specifically for refugees.

Mr. Cochetel added:

Despite the direct link between family reunification and successful local integration, refugees still experience unnecessary hardship in ensuring that their families can join them. Resettlement quotas remain limited, almost virtual. As an example, less than 2,000 refugees have been resettled from Ethiopia and Sudan to Europe over the last three years. Labor mobility or overseas educational schemes for refugees from their region of flight also remain almost inexistent. Combatting the business models of traffickers will only be truly successful if such legal pathways for refugees are accessible to them.⁹¹

With 25,000 unaccompanied and separated children having arrived in Italy, he called on states to address this challenge through a child protection dialogue and take decisions based on the best interest of the children, which may be best served by “family reunion” and reintegration assistance with relatives in their country of origin and [or] local integration or legal transfers to a third country,”⁹² rather than channeling them into asylum or other enforcement-related procedures.

Earlier, in December 2016, the UNHCR had proposed in a study entitled *Better Protecting Refugees in the EU and Globally*,⁹³ a common, principled and pragmatic approach for the EU to migration and asylum, which builds on the New York Declaration.⁹⁴ The study called for a comprehensive EU asylum and refugee policy, both in its internal and external dimensions, which should have the capacity to address and respond to movements of people effectively.⁹⁵ It elaborated further under four headings: an EU that 1) is engaged beyond its borders to protect, assist and find solutions by developing sustainable asylum systems;⁹⁶ 2) is prepared to respond to possible future arrivals in significant numbers;⁹⁷ 3) protects through a well-managed common asylum system that ensures access to territory;⁹⁸ and 4) integrates refugees in their communities.⁹⁹

The effectiveness of the EU’s MPF initiative, which is debatable, will be evaluated in part VI.

Long before the mass migration crisis caused by the large-scale and uncontrolled influx of migrants, EU countries had been developing a Common

90. *Id.*

91. *Id.*

92. *Id.*

93. *Better Protecting Refugees*, *supra* note 9.

94. *Id.* at 2; N.Y. Declaration, *supra* note 4.

95. *Better Protecting Refugees*, *supra* note 9, at 2.

96. *Id.* at 4.

97. *Id.* at 8.

98. *Id.* at 10.

99. *Id.* at 19.

European Asylum System.¹⁰⁰ After the adoption of several legislative measures harmonizing common minimum standards over the years, and several reforms,¹⁰¹ in May and July 2016, the European Commission presented proposals for another major reform “based on common rules, a fairer sharing of responsibility, and safe legal channels for those who need protection to get it in the EU.”¹⁰² The Commission stated that the reform

establishes a fully efficient, fair and humane asylum policy which functions effectively both in times of normal and in times of high migratory pressure. It ensures a fair allocation of asylum applications among Member States and provides for a common set of rules at EU level to simplify and shorten the asylum procedures, discourage secondary movements and increase the prospect of integration.¹⁰³

The European Commission describes the main legislation on asylum in the EU:

Asylum Procedures Directive: establishes common standards of safeguards and guarantees to access a fair and efficient asylum procedure.

Reception Conditions Directive: establishes minimum common standards of living conditions for asylum applicants; ensures that applicants have access to housing, food, employment and health care.

Qualification Directive: establishes common grounds for granting international protection and foresees a series of rights for its beneficiaries (residence permits, travel documents, access to employment and education, social welfare and healthcare).

Dublin Regulation: determines which Member State is responsible for examining a given asylum application.

EURODAC Regulation: establishes an EU asylum fingerprint database. When someone applies for asylum, no matter where in the EU, their fingerprints are transmitted to the EURODAC central system.¹⁰⁴

It is noteworthy that under the Dublin Mechanism, the responsible Member State is usually the state through which the asylum seeker first entered the EU, and thus the responsibility is primarily left to the Member States located at the external borders of the EU. As Greece was overwhelmed with the migrants crossing to its shores from Turkey and the responsibility was not shared, especially by the Northern European countries, the Dublin regime has seemingly failed. In Part VI, I will elaborate further.

100. *Common European Asylum System*, EUROPEAN COMMISSION (June 12, 2016), https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

101. *Id.*

102. *The Common European Asylum System (CEAS)*, EUROPEAN COMMISSION, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf.

103. *Id.*

104. *Id.*

IV. RECENT DEVELOPMENTS RELATED TO REFUGEE ADMISSIONS IN THE UNITED STATES

The movement of refugees and migrants has recently become a major, central area of contention in the United States, beyond its usual place as merely important. Within the first three months of its existence, the new Trump administration ordered an abrupt halt to the processing of refugees and asylum-seekers. The expressed intention was to avert potential terrorist attacks within the US. This Order was promptly rebuffed by the courts. The Trump administration then scaled back its Order, and was again rebuffed. At issue was the motivating intent of the action and its justifiability under the US Constitution and international refugee regimes.

During his presidential election campaign, Donald Trump voiced the anxiety of many Americans over refugees entering America from predominantly Muslim countries. Accordingly, within a week following his inauguration as President, Trump announced a ban on refugees or migrants from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.¹⁰⁵

Executive Order 13769 of January 27, 2017,¹⁰⁶ entitled *Protecting the Nation*

105. Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states> [hereinafter EO-1].

106. *Id.* In the parts relevant to this article, the Order provides:

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

.....

Sec. 3. ... (c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. § 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. § 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017. (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are

from *Foreign Terrorist Entry into the United States*, reduced to less than half the number of refugees who would be accepted into the US and suspended for four months processing of refugees under the US Refugee Admissions Program.¹⁰⁷ Under this program, refugees and asylum seekers are generally processed into the country under recognized criteria and are given assistance and opportunities for settlement. The Order also suspended processing of refugees from Syria until further notice and suspended entry of persons from countries whose vetting standards do not meet US requirements.

Executive Order 13769 cited pertinent US law,¹⁰⁸ which authorizes the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate,” if he finds that their entry “would be detrimental to the interests of the United States.” This language from the Immigration and Nationality Act of 1952¹⁰⁹ was amended by the Immigration and Nationality Act of 1965,¹¹⁰ which provides,

adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. § 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

...

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

107. Memorandum for the Secretary of State on the Refugee Admissions for Fiscal Year 2017, THE WHITE HOUSE; OFFICE OF THE PRESS SECRETARY (Sept. 28, 2016), (“In accordance with section 207 of the Immigration and Nationality Act...(8 U.S.C. § 1157), and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions: The admission of up to 110,000 refugees to the United States during Fiscal Year...2017 is justified by humanitarian concerns or is otherwise in the national interest; ...”), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/28/presidential-determination-refugee-admissions-fiscal-year-2017>.

108. 8 U.S.C. § 1182(f).

109. Immigration and Nationality Act of 1952 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. ch. 12).

110. Immigration and Nationality Act of 1965 Pub. L. No. 89-236, 79 Stat. 911 (1968) (codified at 8 U.S.C. ch. 12).

inter alia: “No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹¹¹

Thus, despite the administration’s protestations to the contrary, President Trump’s campaign promises, banning immigration of Muslims and people from predominantly Muslim countries, were found to evidence the administration’s intent when lawsuits challenging the Executive Order were brought in numerous federal courts. Those courts thus rejected the administration’s argument that the Order was necessitated only by security concerns.

In nearly 50 lawsuits challenging the Order after it was announced, between January 28 and January 31, federal courts granted temporary relief, including a temporary restraining order (TRO) barring enforcement of core elements of the Order, including its provisions suspending entry for nationals from the seven listed countries for 90 days and limiting the acceptance of refugees.¹¹² The courts often highlighted the special priority that had been promised for “certain religious minorities,” as had been stated by President Trump in an interview on the day he signed the order, that Syrian Christian refugees would be given priority status in the United States.¹¹³

On February 3, District Judge James Robart of the Western District of Washington at Seattle granted the first TRO in *Washington* [later joined by Minnesota] v. *Trump*.¹¹⁴ The court stated:

The proper legal standard for preliminary injunctive relief [and temporary restraining order] requires a party to demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.’ [Citations omitted.]¹¹⁵

In the alternative, Judge Robart noted,

[A]n injunction is appropriate if “serious questions going to the merits were raised and the balance of the hardships tips sharply in the plaintiff’s favor,” thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation, [provided] the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. [Citations omitted.]¹¹⁶

111. 8 U.S.C. § 1152(a).

112. The following section considers a few of the actions.

113. See Glenn Kessler, *Trump’s Claim that it is ‘Very Tough’ for Christian Syrians to get to the United States*, WASH. POST: FACT CHECKER (Jan. 28, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/28/trumps-claim-that-it-is-very-tough-for-christian-syrians-to-get-to-the-united-states/?utm_term=.e147c7cd1fb4.

114. *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017), *appeal dismissed sub nom. Washington, et al., v. Donald J. Trump, et al.*, (Feb. 4, 2017).

115. *Id.* at 3.

116. *Id.* at 3–4.

The court found in favor of the plaintiffs, ordered that sections 3(c)¹¹⁷ and 5(a), (b), (c), and (e)¹¹⁸ not be enforced, and found further that, under the legislative imperative that the immigration laws be administered uniformly throughout the country, this order enjoining enforcement must be effective nationwide and thus could not be limited to the plaintiff states.¹¹⁹ The government filed its appeal and an emergency motion to stay the TRO in the Ninth Circuit Court of Appeals, which denied the motion on February 9, 2017.¹²⁰

On February 14, Judge Leonie Brinkema of Virginia issued a similar ruling, granting the plaintiffs a preliminary injunction against the travel ban.¹²¹ She found the Order clearly discriminatory and emphasized its violation of the First Amendment Establishment Clause.¹²² Looking at the proliferation of evidence against the ban as showing clear intent to ban Muslims, she stated, *inter alia*, that “[i]t is a discriminatory purpose that matters, no matter how inefficient the execution.”¹²³ She ultimately found, “[E]njoining unconstitutional action by the Executive Branch is always in the public’s interest.”¹²⁴

The administration’s appeal in the Ninth Circuit was subsequently voluntarily dismissed by the administration¹²⁵ when it issued Order 13780 (EO-2) on March 6, 2017, similarly entitled *Protecting the Nation From Foreign Terrorist Entry into the United States*.¹²⁶

On March 15, Judge Theodore Chuang of the District of Maryland blocked section 2(c)¹²⁷ of the revised order, which purported to ban travel into the US by citizens from Iran, Libya, Somalia, Sudan, Syria, and Yemen, Iraq having been exempted from the list in Order 13780.¹²⁸ And on March 17, Washington’s Judge Robart, in a new case, *Ali v. Trump*,¹²⁹ stayed the action allowing the Hawaii ruling to govern the matter across the country.¹³⁰

Later in March, some 13 states joined together to support the Trump travel ban. On March 24, 2017, US District Court Judge Anthony Trenga found that the March 6 travel ban was sufficiently different from the initial one and thus the plaintiffs were

117. EO-1, *supra* note 105, at § 3(c).

118. *Id.*, §§ 5(a), (b), (c), and (e).

119. *Washington v. Trump*, *supra* note 114, at 6.

120. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, No. 17-35105, (9th Cir. Mar. 15, 2017).

121. *Aziz v. Trump*, No. 117cv00116LMBTCB (E.D. Va., Feb. 13, 2017) [hereinafter *Aziz*].

122. See Rachel Weiner, *Federal judge in Virginia issues strong rebuke of Trump travel ban*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/local/public-safety/judge-in-virginia-grants-preliminary-injunction-against-travel-ban/2017/02/13/a6164bfe-f255-11e6-a9b0-ecce7ce475fc_story.html?tid=a_inl&utm_term=.c41f3e0de8eb.

123. *Aziz*, *supra* note 121, at 9.

124. *Id.* at 11.

125. *Washington v. Trump*, No. cv-0141JLR (W.D. Wash. Mar. 8, 2017) *dismissed*.

126. Exec. Order No. 13,780, 82 FR 13209 (Mar. 6, 2017) [hereafter EO-2].

127. *Intl. Refugee Assistance Project v. Trump*, CV TDC-17-0361, (D. Md. Mar. 16, 2017).

128. See EO-2, *supra* note 126.

129. *Ali v. Trump*, No. C17-0135JLR (W.D. Wash. Mar. 17, 2017).

130. *Id.*

“no longer likely...[to] succeed on their claim that the predominate purpose of EO-2 is to discriminate against Muslims based on their religion and that EO-2 is a pretext or a sham for that purpose.”¹³¹ He thus denied the TRO requested by the plaintiff.¹³²

However, on March 29, Judge Watson of Hawaii granted the plaintiffs’ motion to convert the temporary restraining order he had previously entered to a Preliminary Injunction enjoining the enforcement or implementation of sections 2¹³³

131. *Sarsour v. Trump*, Case No. 1:17cv00120, 12 (E.D. Va., Mar. 24, 2017).

132. *Id.* at 32.

133. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017),

Sec. 2.(a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security’s determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. §§ 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney

and 6¹³⁴ of the second Executive Order across the nation.¹³⁵ He found that the new Order was indeed a “sanitize[d]”¹³⁶ version of the prior Executive Order and noted that the events leading up to the “adoption of the challenged Executive Order are as

General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.”)

134. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017),

Sec. 6. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017. (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

135. *Hawaii v. Trump*, No. 17-00050 (D. Haw., Mar. 29, 2017) (order granting motion to convert TRO to a preliminary injunction) [hereinafter *Watson 2*].

136. *Id.* at 18.

full of religious animus, invective, and obvious pretext as is the record here, it is no wonder that the Government urges the Court to altogether ignore that history and context.”¹³⁷

Judge Watson declined to stay this ruling or hold it in abeyance should an appeal of this Order be filed¹³⁸ and that next day, March 30, the administration filed its appeal of Judge Watson’s decision to the Ninth Circuit Court of Appeals.¹³⁹

While the travel ban saga continued in the courts, the provisions directed at the US Refugee Admissions Program in Section 6¹⁴⁰ violate America’s commitments under international refugee law, which is incorporated in US domestic law. It also runs afoul of the US commitment under the New York Declaration on Refugees and Migrants.¹⁴¹

Experts and advocacy groups took issue with the President’s premise that refugees from the listed countries were especially likely to commit terrorist attacks within the United States because those groups had been responsible for previous attacks; this was factually inconsistent with the actual record of such attacks. To illustrate, terrorism scholar Charles Kurzman of the University of North Carolina has stated that there had been no terrorist killing in the US by any person who had emigrated or whose parents had emigrated from the seven listed countries since September 11, 2001, and that only two of the 9/11 attackers would have been identified to fall within the restricted countries because of their national origin, and they had resided in the US for several years.¹⁴²

Another expert asked:

Had this temporary prohibition been in effect since 9/11, how many lives would have been saved? Not one. None of the fatalities resulted from attacks by individuals from the seven countries named in the directive. The directive also would not have prevented the 9/11 attacks. This is not an argument for adding to the list of proscribed countries.¹⁴³

The same conclusion was stated by the Department of Homeland Security Intelligence and Analysis Unit in an internal report which found that people from the countries listed in the ban “pose no increased terror risk,”¹⁴⁴ and that “country of

137. *Id.* at 16.

138. *Id.*

139. *Hawaii v. Trump*, No. 17-00050 (D. Haw. Mar. 30, 2017) (Notice of Appeal).

140. Exec. Order 13780 § 6, *supra* note 134.

141. N.Y. Declaration, *supra* note 4.

142. CHARLES KURZMAN, MUSLIM-AMERICAN INVOLVEMENT WITH VIOLENT EXTREMISM 2, Triangle Ctr. on Terrorism and Homeland Sec., Uni. of N.C. Chapel Hill. (Jan. 26, 2017).

143. Brian Michael Jenkins, *Why a Travel Restriction Won't Stop Terrorism at Home*, THE RAND BLOG (Feb. 10, 2017), www.rand.org/blog/2017/02/why-a-travel-restriction-wont-stop-terrorism-at-home.html.

144. Vivian Salama & Alicia A. Caldwell, *AP Exclusive: DHS report disputes threat from banned nations*, THE BIG STORY: ASSOCIATED PRESS (Feb. 24, 2017, 6:36 PM), <http://bigstory.ap.org/article/39f1f8e4ceed4a30a4570f693291c866/dhs-intel-report-disputes-threat-posed-travel-ban-nations>.

citizenship is unlikely to be a reliable indicator of potential terrorist activity.”¹⁴⁵

Under Executive Order 13780, the most recent US commitment to admit 110,000 refugees in 2017 has been reduced to 50,000, with a stay of 120 days on further processing and imposition of numerous further restrictions on their eligibility, beyond the very stringent vetting process already in place for refugee admissions.¹⁴⁶

V. APPLICABLE INTERNATIONAL LAW

As human rights apply to all persons, irrespective of their migration status or their nationality, migrants and members of their families, as well as refugees, enjoy the protection of international human rights law. Migrants also enjoy international labor standards and, more specifically, protection under the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention), adopted by the UN General Assembly in 1990. In addition, several International Labor Organization (ILO) instruments apply to migrants in general, while several apply specifically to migrant workers. Refugees are specially protected under the current international refugee regime – the 1951 Convention and the 1967 Protocol.

Selected applicable instruments are noted here, without elaboration, with the only exceptions being the Refugee Regime, the 1990 Migrant Workers Convention, and two ILO Conventions.

A. Selected International Human Rights Instruments

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966.¹⁴⁷

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 10, 2008.¹⁴⁸

International Covenant on Civil and Political Rights, Dec. 16, 1966.¹⁴⁹

Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966.¹⁵⁰

Second Optional Protocol to the International Covenant on Civil and Political

145. Ron Nixon, *People From 7 Travel-Ban Nations Pose No Increased Terror Risk, Report Says*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/us/politics/travel-ban-nations-terror-risk.html?_r=0; see also Eric Tucker, *AP Fact Check: No arrests from 7 nations in travel ban?*, ASSOCIATED PRESS (Feb. 6, 2017), <https://apnews.com/cf244d096e084e7a943b45168deafc5f/AP-FACT-CHECK:-No-arrests-from-7-nations-in-travel-ban?-Nope>.

146. EO-2, section 6, *supra* note 126.

147. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

148. G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (Dec. 10, 2008).

149. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

150. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

Rights, aiming at the abolition of the death penalty, Dec. 15, 1989.¹⁵¹

International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965.¹⁵²

Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979.¹⁵³

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999.¹⁵⁴

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 1, 1984.¹⁵⁵

Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002.¹⁵⁶

Convention on the Rights of the Child, Nov. 20, 1989.¹⁵⁷

Optional Protocol to the Convention on The Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000.¹⁵⁸

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000.¹⁵⁹

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children on a Communications Procedure, Dec. 19, 2011.¹⁶⁰

Convention on the Rights of Persons with Disabilities, Dec. 13, 2006.¹⁶¹

Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006.¹⁶²

151. G. A. Res. 44/128, at 206, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (Dec. 15, 1989).

152. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 212.

153. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

154. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 Oct. 6, 1999, 2131 U.N.T.S. 83.

155. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 85 U.N.T.S. 1465, <http://www.refworld.org/docid/3ae6b3a94.html>.

156. Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Jan. 9, 2003, A/RES/57/199, <http://www.refworld.org/docid/3de6490b9.html>.

157. Convention on the Rights of the Child, Nov. 20, 1989, 3 U.N.T.S. 1577, <http://www.refworld.org/docid/3ae6b38f0.html>.

158. G.A. Res. 54/263, annex II, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Mar. 16, 2001), <http://www.refworld.org/docid/3ae6b38bc.html>.

159. G.A. Res. 54/263, Annex I, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Mar. 16, 2001).

160. Human Rights Council, U.N. Doc. A/HRC/RES/17/18, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (July 14, 2011).

161. G.A. Res. 61/106, Annex I, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

162. G.A. Res. 61/106, Annex II, Optional Protocol to the Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

International Convention for the Protection of all Persons from Enforced Disappearance, Dec. 20, 2006.¹⁶³

Universal Declaration of Human Rights, Dec. 10, 1948.¹⁶⁴

Declaration of the High-level Dialogue on International Migration and Development, 2013.¹⁶⁵

B. International Labor Organization Instruments

The 1998 ILO Declaration on Fundamental Principles and Rights at Work¹⁶⁶ –

1) Freedom of Association and the Effective Recognition of the Right to Collective Bargaining;¹⁶⁷

2) Elimination of All Forms of Forced or Compulsory Labor;¹⁶⁸

3) Effective Abolition of Child Labor;¹⁶⁹ and

4) Elimination of Discrimination in Respect of Employment and Occupation.¹⁷⁰

It should be noted that migrant workers' needs are specially mentioned in the Declaration's Preamble.

ILO Convention Number 189 – Domestic Workers' Convention, 2011.¹⁷¹

ILO Convention Number 97 – Migration for Employment Convention

163. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 48088.

164. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) 217 A (III).

165. G.A. Res. 68/4, ¶¶ 11-12, UN General Assembly, Declaration of the High-level Dialogue on International Migration and Development (Jan. 21, 2014) (The Declaration recognized “[t]hat women and girls account for almost half of all international migrants at the global level, and the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into policies and strengthening national laws, institutions and programmes to combat gender-based violence, including trafficking in persons and discrimination against girls.” The General Assembly emphasized “the need to establish appropriate measures for the protection of women migrant workers in all sectors, including those involved in domestic work.”).

166. *ILO Declaration on Fundamental Principles and Rights at Work*, ILO (June 18, 1998), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf.

167. *Freedom of Association and Protection of the Right to Organise Convention*, No. 87, ILO (July 9, 1948), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C087.

168. *Forced Labour Convention*, No. 29, ILO (June 28, 1930), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312174:NO.

169. ILO, *Freedom of Association and Protection of the Right to Organise Convention*, *supra* note 167, ¶ 2(a).

170. *Convention Concerning Discrimination in Respect of Employment and Occupation*, No. 111, ILO (June 4, 1958), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111.

171. *Domestic Workers Convention*, No. 189, ILO (June 16, 2011), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C189.

(revised), 1949.¹⁷²

ILO Recommendation Number 86 – Migration for Employment Recommendation (revised), 1949.¹⁷³

ILO Convention Number 143 – Migrant Workers’ (Supplementary Provisions) Convention, 1975.¹⁷⁴

ILO Recommendation Number 151 – Migrant Workers’ Recommendation, 1975.¹⁷⁵

C. *Migrant Workers Convention*¹⁷⁶

As a core landmark international human rights treaty, this is the most comprehensive international treaty on 1) the rights of migrant workers and their families, 2) migration regulation, and 3) interstate cooperation. The Convention explicitly states that all fundamental rights articulated in the international bill of rights and all international human rights instruments apply to all migrant workers. The Convention’s provisions to protect undocumented migrant workers in an irregular situation are premised on the recognition in the Preamble that such workers face even more serious human problems than those faced by persons in a regular situation (documented migrant workers). Also, these migrant workers “are frequently employed under less favorable conditions of work than other workers.”¹⁷⁷ Thus, in Part III (arts. 8-35), all migrant workers and their families, including undocumented workers, are granted civil and political rights,¹⁷⁸ as well as economic, social and cultural rights.¹⁷⁹

D. *ILO Convention No. 97 & Recommendation No. 86 and ILO Convention 143*

In 1966, the ILO adopted Convention No. 97 and Recommendation No. 86 concerning Migration for Employment (Revised).¹⁸⁰ Under these instruments, the

172. *Migration for Employment Convention (Revised)*, No. 97, ILO (June 8, 1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C097.

173. *Migration for Employment Recommendation (Revised)*, No. 86, ILO (June 8, 1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R086.

174. *Migrant Workers (Supplementary Provisions) Convention*, No. 143, ILO (June 4, 1975), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C143.

175. *Migrant Workers Recommendation*, No. 151, ILO (June 4, 1975), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R151.

176. G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Dec. 18, 1990); see also Ved P. Nanda, *The Protection of the Rights of Migrant Workers: Unfinished Business*, 2 ASIAN & PACIFIC MIGRATION J. 161, 161 (1993).

177. G.A. Res. 45/158, *supra* note 177, at Annex, Preamble.

178. *Id.* at pt. III, arts. 8–24.

179. *Id.* at arts. 25–35.

180. Convention (No. 97) Concerning Migration for Employment (Revised 1949) art. 6, ¶ 1, July 1,

principle of equal treatment was further elaborated. Subsequently, in 1975, the ILO adopted Convention No. 143, concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions).¹⁸¹ In Part I, this Convention obligates each State Party to respect the "basic human rights of all migrant workers,"¹⁸² including those who are not legal migrants, and to adopt all measures that are "necessary and appropriate" to suppress the clandestine movement of workers and illegal employment of migrants. States are required to provide sanctions against employers of illegal immigrants, with the aim to prosecute those trafficking in labor.¹⁸³

Part II of Convention No. 143 applies only to legal migrants and States Parties are obligated to declare and pursue national policies to promote equality of treatment between migrant workers and nationals pertaining to employment and occupation, social security, cultural rights and trade union rights, and individual and collective freedoms.¹⁸⁴

E. The International Refugee Regime

Under the 1951 Convention¹⁸⁵ and the 1967 Protocol relating to the Status of Refugees,¹⁸⁶ a person officially referred to as a "refugee" is one who has lost the protection of the government of his/her nationality or permanent residence and has fled that state seeking refuge and assistance in another country. The refugee must have fled the state due to persecution or a well-founded fear of being persecuted for reasons of "race, religion, nationality, membership in a particular social group, or political opinion." Under the system, individual claims are addressed for protection and the system is not responsive to situations of mass influx. Those who have fled or attempted to flee but who have not been allowed to leave or have not been able to leave the country are generally referred to as "internally displaced persons." In light of the current refugee crisis, this definition of a refugee is rather inadequate to meet the needs of those fleeing war, famine, economic deprivation and natural disasters.

To fill the gap in the 1951 Convention's narrow definition of a refugee, regional efforts took place in Africa and Latin America to widen the definition. In 1969, the Organization of African Unity (now the African Union) adopted the Convention on the Specific Aspects of Refugee Problems in Africa.¹⁸⁷ It expanded the definition in

1949, 120 U.N.T.S. 71; International Labour Organization, *supra* note 174, at annex, art. 17.

181. ILO, *Migrant Workers Recommendation*, *supra* note 175.

182. *Id.* at pt. 1, art. 1.

183. *Id.* at pt. 1, art. 3.

184. *Id.* at pt. 2, arts. 10-14.

185. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

186. U.N. General Assembly, *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267, <http://www.refworld.org/docid/3ae6b3ae4.html>.

187. Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1(2), 1000 U.N.T.S. 45, 8 I.L.M. 1288, Sept. 10, 1969 (entered into force June 20, 1974), <http://www.refworld.org/docid/3ae6b36018.html>.

the Convention by accepting as refugees those who are compelled to flee because of external aggression, occupation, foreign domination, or events seriously disturbing public order. Subsequently, in 1984, ten Central American states adopted a similar approach in the non-binding Cartagena Declaration,¹⁸⁸ expanding the definition further by adding flight from generalized violence, internal conflicts, and massive violation of human rights.

VI. ANALYSIS

Despite several international and regional attempts to address the complex challenges of migrants and refugees, the problem persists. And since 2014 it has indeed worsened with rising xenophobia and anti-immigration violence in several countries. The UN General Assembly declaration addressing the problem, the New York Declaration, discussed above, brought the world's leaders together to explore common ground aimed at protecting the rights of migrants and refugees. The outcome, however, was mixed. While UNHCR officials considered the Declaration a "game changer for refugee protection and for migrants"¹⁸⁹ and "nothing short of a miracle,"¹⁹⁰ the fact remains that it was not legally binding and lacked tangible outcomes.

As the first General Assembly declaration specifically on refugees and migrants, it acknowledged the high level of human mobility and its magnitude and complexity. This evidently shows that the world cares about refugees and migrants. This expression, in itself, is laudable, as are the principles and commitments agreed by world leaders and enshrined in it. These include: "We . . . will fully protect the human rights of all refugees and migrants, regardless of status;"¹⁹¹ and "We declare our profound solidarity and support" for migrants and their families.¹⁹² The leaders expressed their determination "to find long-term and sustainable solutions,"¹⁹³ and "to address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy."¹⁹⁴ The Declaration also contains specific provisions for the protection of migrant women and children and for supporting countries affected by migration.

However, this lofty rhetoric and these lofty principles notwithstanding, the Declaration did not adequately and effectively address the enormous challenges the

188. 1984 Cartagena Declaration on Refugees, OAS / Ser. L/V/II.66, doc. 10, Rev. 1, 190-3 <http://www.refworld.org/pdfid/51c801934.pdf>.

189. *UN Summit seen as "game changer" for refugee and migrant protection*, UNHCR (Sept. 6, 2016), <http://www.unhcr.org/en-us/news/latest/2016/9/57ceb07e4/un-summit-game-changer-refugee-migrant-protection.html>.

190. Volker Türk, *The New York Declaration: Once-in-a-lifetime opportunity to enhance refugee protection*, UNHCR (Oct. 12, 2016), <http://www.unhcr.org/admin/dipstatements/57fe577b4/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection.html>.

191. N.Y. Declaration, *supra* note 4, at 5.

192. *Id.* at 8.

193. *Id.* at 10.

194. *Id.* at 12.

world community faces with the current migration crisis. As the Declaration is a voluntary and non-binding document, the commitments are not measurable, there is no obligation to implement the commitments and there is no concrete plan of action. But for the goal two years hence to develop a global compact on refugees,¹⁹⁵ there is and a global compact for “safe, orderly and regular migration”¹⁹⁶ there is no timeline for action in the Declaration. Alexander Betts, the head of Oxford’s Refugee Studies Center, called the Declaration “thin on content and connections to practice.”¹⁹⁷

The Declaration also suffers from several gaps, such as excluding from its agenda the challenge of Internally Displaced Persons (IDPs) – it simply mentions in passing that there are more than 40 million IDPs¹⁹⁸ and notes that the needs of such persons along with those of refugees and migrants are explicitly recognized in the 2030 Agenda for Sustainable Development.¹⁹⁹ The Declaration also fails to include the protection of vulnerable migrants and does not explicitly prohibit the detention of children.

The Declaration fails to provide guidelines on protection for migrants in vulnerable situations, offering instead just assistance, as it states:

We will consider developing non-binding guiding principles and voluntary guidelines, consistent with international law, on the treatment of migrants in vulnerable situations, especially unaccompanied and separated children who do not qualify for international protection as refugees and who may need assistance.²⁰⁰

It is appropriate to ask why migrants who flee humanitarian crises, severe violence, famine, gangs, would not receive protection, but only assistance. The Member States should be considering developing principles and guidelines for their actual protection and not merely assistance.

The Declaration also stops short of committing to end the immigration detention of children. Although Member States said in the Declaration that they would pursue alternatives to detention while the assessment of the migrants’ legal status, entry, and stay is being considered, the leaders added:

Furthermore, recognizing that detention for the purpose of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we

195. *Id.* at 21.

196. *Id.* at annex II(1).

197. Alexander Betts, *U.N. Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis: In the first of a two-part prelude to the U.N. summit, Alexander Betts, the head of Oxford's Refugee Studies Centre, plots the flawed origins of a meeting some states celebrate having sabotaged*, NEWS DEEPLY (Sept. 12, 2016), <https://www.newsdeeply.com/refugees/community/2016/09/12/u-n-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis>.

198. N.Y. Declaration, *supra* note 4, at 3.

199. *Id.* at 16.

200. *Id.* at 52.

will work towards the ending of this practice.²⁰¹

Notwithstanding all these qualifications, it bears repeating: detention is never in the best interest of the child. As the Council on Community Pediatrics has stated,

The conditions in which children are detained [in the United States] and the support services that are available to them are of great concern to pediatricians and other advocates for children. In accordance with internationally accepted rights of the child, immigrant and refugee children should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them. The Department of Homeland Security [DHS] facilities do not meet the basic standards for the care of children in residential settings.²⁰²

The Council recommends: “DHS should discontinue the general use of family detention and instead use community-based alternatives to detention for children held in family units.”²⁰³ Earlier, in June 2014, a Human Rights Watch researcher had spoken at a hearing of the US House of Representatives Committee on Homeland Security: “The US government’s policy of detaining large numbers of children harms kids and flouts international standards.”²⁰⁴ She added, “Congress should be exploring alternatives to detention that other countries facing spikes in border crossings have used successfully.”²⁰⁵

In the New York Declaration, Member States did commit to promoting international cooperation on border control and management but noted that “[s]tates are entitled to take measures to prevent irregular border crossings.”²⁰⁶ This raises the concern that states may feel empowered to resort to taking especially harsh border control measures aimed at deterring migrants and refugees from entering.

That is exactly what has happened in many European countries which, when faced with an unprecedented flow of migrants into the continent, built fences and used many deterrence measures and strict border controls to keep migrants from entering. As for the European Union initiatives, it undertook the MPF initiative mentioned above²⁰⁷ and further reformed the Common European Asylum System.²⁰⁸ The MPF and the Malta Declaration reflect Europe’s desire to control and secure its borders, but this will likely be achieved at the cost of violating its obligations under

201. *Id.* at 33.

202. Julie M. Linton, et al., *Detention of Immigrant Children*, 139 *PEDIATRICS* 4, 1 (2017), <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf>.

203. *Id.* at 8.

204. Clara Long, *US: Surge in Detention of Child Migrants: Congress Should Protect, Not Punish, Unaccompanied Children*, HRW (June 25, 2015), <https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants>.

205. *Id.* See also François Crépeau, *Any detention of migrant children is a violation of their rights and must end*, *THE CONVERSATION* (co-published with UNICEF) (Sept. 7, 2016), <http://theconversation.com/any-detention-of-migrant-children-is-a-violation-of-their-rights-and-must-end-64985>.

206. N.Y. Declaration, *supra* note 4, at 24.

207. Migration Partnership Framework, *supra* text accompanying note 71.

208. See European Commission: Migration and Home Affairs, *Common European Asylum System*, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en (last updated Apr. 22, 2017).

international law toward migrants, refugees, and asylum seekers, primarily the obligation to protect their human rights.

Although the EU is providing development aid to partner countries, many partner countries lack the wherewithal to fulfill their own obligations under the MPF, because of weak government institutions and frail political situations; Libya is a clear example. Thus, Europe will have to make substantial investments toward capacity building and improving the living conditions in its partner countries to ensure a significant reduction in migrant flows.²⁰⁹ As to the reform of the Common European Asylum System, it has been aptly criticized as aimed at externalizing protection and reinforcing the EU's policy of containing refugees outside the EU through migration control and by sending asylum seekers to third states without examining their protection claims.²¹⁰

The Dublin mechanism has been often reformed but remains broken, as only member states located at the external borders of the EU assume responsibility for migrants entering Europe. Also, it does not take into account the asylum seekers' preference. A November 2016 report by Human Rights Watch, entitled *EU Policies Put Refugees at Risk*,²¹¹ states that the European Commission's reform of the Common European Asylum System is more informed by a logic of deterrence than a commitment to basic human rights. Far from insuring the right to family reunification, over the past year numerous EU countries have restricted the right to bring family members to safety, and there is a discernible trend towards granting subsidiary – temporary – protection over refugee status. Proposed changes to the EU directives governing procedures, qualifications for asylum, and reception conditions include some positive measures but also measures to punish asylum seekers for moving from one EU country to another, obligatory use of “safe country” and “internal flight alternative” concepts to deny protection, and compulsory reviews to enable revoking refugee status and subsidiary protection.²¹²

The urgent need is to protect the fundamental human rights of migrants and refugees during transit and within the receiving state's territory, without discrimination. We find the current protection gap is created as a result of 1) crises in the home country of migrants and refugees and 2) stringent border controls by receiving states. An urgent reform on collective responsibility-sharing is essential because currently there is no equitable distribution of responsibility; the global south

209. For critical comments, see Olivia Akumu, *The EU's Ethical Dilemma: The scramble to stem the refugee and migrant flow into Europe*, MARTIN PLAUT WORDPRESS (Feb. 13, 2017), <https://martinplaut.wordpress.com/2017/02/27/the-eus-ethical-dilemma-the-scramble-to-stem-the-refugee-and-migrant-flow/>; Elizabeth Collett, *New EU Partnerships in North Africa: Potential to Backfire*, MIGRATION POLICY (Feb. 2, 2017), www.migrationpolicy.org/news/new-eu-partnerships-north-africa-potential-backfire; Bob Van Dillen, *The EU Agenda Behind the Migration Partnership Framework*, CARITAS (June 29, 2016), <http://www.caritas.eu/news/the-eu-agenda-behind-the-migration-partnership-framework>.

210. Vincent Chetail, *Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System*, 5 EUR. J. HUM. RTS. 584, 587–88 (2016).

211. Human Rights Watch, *EU Policies Put Refugees at Risk*, HRW (Nov. 23, 2016), www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk.

212. *Id.*

carries a disproportionately large share. Similarly, an urgent need is to expand the number of legal pathways for refugee admission and settlement in third countries with access to jobs, as well as a prohibition on the detention of children and access for children to education and preservation of family unity. Only then will the smuggling of people stop.

Furthermore, humanitarian efforts and development must be linked. The private sector, the World Bank, and the current initiative regarding the Sustainable Development Goals and the 2030 Agenda,²¹³ will be essential so that refugees can become contributing members of society.

VII. CONCLUSION

The challenge indeed is formidable. A series of efforts has been ongoing for over a decade to find a solution. But the goal of comprehensive and effective global governance for migration through international cooperation has yet to be achieved.²¹⁴ In this state-centered international system, states are empowered to decide who enters their territory and on what terms. Given that reality, what is ultimately required is implementation of international human rights and labor standards that protect migrants and refugees' human rights, which states have already voluntarily accepted. However, what is in evidence is the states' efforts to manage migration to serve their interests. This they do by connecting policies such as those of deterrence, strict border controls, and meeting their labor needs. The two global compacts – one each on refugees and migrants – must aim for a human rights-based framework to inform the various provisions for inclusion in those compacts, such as shared responsibility, finance, resettlement, and other matters related to refugees' and migrants' protection.

We do not lack norms. But what is severely lacking is the political will to translate these norms into concrete, operational outcomes.

213. While adopting the Sustainable Development Goals and the 2030 Agenda for Sustainable Development, the World Leaders at the UN Summit stated: "We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. ... Such cooperation should also strengthen the resilience of communities hosting refugees, particularly in developing countries." G.A. Res. 70/L.1, Transforming Our World: the 2030 Agenda for Sustainable Development, at 29 (Sept. 25, 2015). Goal 8.8 states: "Protect labour rights and promote safe and secure working environmental for all workers, including migrant workers, in particular women migrants, and those in precarious employment." *Id.* at 8.8. Goal 10.c states: "By 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 percent." *Id.* at 10.c.

214. See generally Inter-Parliamentary Union, *Migration, Human Rights and Governance: Handbook for Parliamentarians* No. 24 (2015), http://www.ohchr.org/Documents/Publications/MigrationHR_and_Governance_HR_PUB_15_3_EN.pdf; see also François Crépeau & Idil Atak, *Global Migration Governance: Avoiding Commitments on Human Rights Yet Tracing a Course for Cooperation*, 34/2 NETH. Q. OF HUM. RTS. 113, 113–146 (2016).

