

ANALYSIS OF THE U.S.A REFUGEE POLICY FROM INTERNATIONAL REFUGEES LAW PERSPECTIVE

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ABSTRACT

Under Trump's administration, U.S.A undergoes a drastic and radical change in immigration and refugee policy to make it harder for immigrants, asylum seekers, and refugees to enter the country. One of his many controversial moves was the signing of an Executive Order that bans the entry of citizens from 7 countries with predominantly a large Muslim population. The most controversial policy in regards to immigration and refugees is the dreadful condition of the Federal Immigration Detention Center which houses a large number of immigrants including children. Children detained in the Detention Center didn't have adequate health and sanitary access and facilities including no vaccination, no soap, no toothbrush, and no mattress to sleep. This article aims to answer the question about the "inhumanity" of Trump's policies from international law perspective and to determine whether the so-called "voluntary return" violates international treaties especially the UDHR, the ICCPR, and the Refugee Convention. This article will use the statute and case approach along with the library research method to collect all data necessary to address the issue. The collected data is analyzed further using the deductive syllogism method.

Keyword: Asylum Seekers, International Law, Refugees, Trump's Policy

1. INTRODUCTION

Since Trump took office as the 45th President of the United States of America replacing former President Obama, Trump and members of his administration have often issued controversial policies in various fields including immigration and asylum. One such policy that caused controversy was the signing of the Executive Order on January 27, 2017, which regulated a travel ban for citizens of 7 countries, which are predominantly Muslim. This Executive Order didn't only ban the individual from the seven countries from entering the US for 90 days but also ban individuals from entering the country as refugees for 120 days (Daugirdas & Mortenson, 2017). Apart from being criticized by the United States public, especially from the opposition and human rights activist, this policy also received a less positive response from many world leaders. Trump also issued various immigration policies that tightened and made it difficult for asylum seekers who came from Latin America through a policy called "Migration Protection Protocols" or popular as "Remain in Mexico Policy". The policy, which has been in effect since January 2019, has resulted in more than 50,000 asylum seekers from Latin

America having to return to Mexico with uncertain time limits while awaiting a decision on their asylum request.

Besides, Trump has been widely criticized because, under his administration, asylum seekers who are on the southern border are treated like criminals. The asylum seekers are being placed in holding facilities that the media and senators say are “more like a prison than a detention center” (Brustin, 2019). In September 2020, a nurse who worked at the Federal Immigration Detention Center in Irwin, Georgia, filed a whistleblower complaint, which detailed the circumstances of the asylum seekers and refugees who were held there (Barbato, 2020). She said, in her statement, that the adult women detained in the detention center were subject to hysterectomy and gynecological examination without her request or consent.

There are also problems regarding children who seek asylum being separated from their parents for administrative reasons (Wood, 2018). It should be noted that the number of unaccompanied children seeking asylum in the US reached more than 50,000 people in just between October 2017 and September 2018 (Kandel, 2019). In US immigration policy, these children, whether they come with a companion or not, must take legal proceedings to the Immigration Court which is under the supervision of the U.S. Department of Justice Executive Office for Immigration Policy (EOIR). However, while waiting for their asylum request to be processed by EOIR, the children are placed in an Immigration Detention Center managed by U.S. Custom and Border Protection. The condition of the Immigration Detention Center for children is not much different from the Detention Center for adults. Children, who are detained there, do not get the facilities they should get, such as toothbrushes, soap, and blankets. According to the Department of Justice lawyer statement made during the hearing to the Appeal Chamber of the 9th Circuit Court, the children could not be provided with such sanitary necessity because their detention period is short. However, the horror of the Detention Center didn't stop there. Apart from the absence of safe and sanitary facilities, children also didn't receive vaccines to prevent the spread of infectious diseases such as flu. The absence of vaccination has killed at least 6 children and this is the first time in the last 10 years where child asylum seekers die while being detained.

Problems as explained above are very contrary to the values and principles contained in International Refugee Law. The method of immigration law enforcement currently used in the US can be categorized as inhuman treatment stipulated in The Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) where the U.S. is a State Party to the Convention. Besides, it should be noted that the U.S. was actively involved in the negotiation and drafting process of the 1989 Child Convention, although it only recently became signatories to the convention and has yet to ratify it. However, the U.S. has ratified 2 Optional Protocols to the 1989 Child Convention which is the Optional Protocols on the Involvement of Children in Armed Conflict (OPAC) and the Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography (OPSC). The policy of separating child asylum seekers from their companions, according to the statement made by the U.S. Government, is carried out to ensure that these children are not victims of human trafficking that violate the OPSC provisions.

This policy, aside from being contradictory to the provisions, value, and principles of UNCAT, the Child Convention, OPAC, and OPSC, also contradicts the principles and moral value of international refugee law enshrined in various international treaties.

Refugees, as humans, have the same basic right as other humans guaranteed in the Universal Declaration of Human Rights (UDHR). Everyone, as stated in Article 14 paragraph 1 of the UDHR, has the right to seek and to enjoy in other countries asylum from persecution. This article emphasizes that everyone who experiences persecution or fearing such an act to happen to themselves caused by a political reason has the right to seek and to enjoy asylum in other countries no matter what's your race, religion, color, etc. Not only do they have the right to seek and to enjoy asylum, but refugees also have the right to freedom of movement within the borders of each State and also the right to leave any country, including his own, and to return to his country. The same rights are also stipulated in Article 12 of the International Covenant on Civil and Political Rights (ICCPR). However, this right, in ICCPR, has an additional provision stating that "this right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Refugees also have specific rights, apart from rights stated in UDHR and ICCPR, guaranteed in the 1951 Geneva Convention Relating to the Status of Refugees such as the right to access to courts and the right to retain their status along with the right acquired previously. Their rights, as refugees, also include the right "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services". The right for adequate health service is also guaranteed in the International Convention on the Elimination of All Forms of racial Discrimination and the International Covenant on Economic, Social, and Cultural Rights.

Based on international provisions governing human rights, especially the rights of asylum seekers and refugees, mentioned above, the immigration and asylum policies created and implemented by Trump's administration are a violation of these provisions. However, the U.S. wasn't a State Party to several international treaties regulating asylum seekers and refugees, although it has sent a delegation in the process of discussing the contents of the agreement. This is something that deserves to be studied further because even though the U.S. is not a State Party if the provisions of the international treaties have reached at least an international customary level, the U.S. can be pressured to implement the provisions.

2. MATERIALS AND METHODS

This research is normative legal research conducted to answer questions related to Trump's administration policy on immigration and refugees especially the case where child asylum children get 'inhuman treatment' during their detention period and the so-called 'voluntary return' policy from an International Law perspective. To address this issue, we statute and case approach. Different from the statute approach method used to address domestic law issues that used national legislation, the statute approach used in this research will be using international treaties as primary sources as well as books, research articles, commentaries on international treaties, and the jurisprudence from international court judges in form of *opinio juris* as our secondary sources. Apart from using a legal-based source, we also utilize several sources from the field of politics, economy, and social to strengthen our legal based arguments.

Treaties used for this paper research may include but not limited to: (1) The United Nations Convention on the Rights of the Child and its Optional Protocol; (2) The Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or

Punishment; (3) International Convention on the Elimination of All Forms of Racial Discrimination; (4) International Covenant on Economic, Social, and Cultural Rights; (5) International Covenant on Civil and Political Rights; (6) The Geneva Convention Relating to the Status of Refugees and its Additional Protocol; and (7) The Universal Declaration of Human Rights.

The data from the sources will be collected using library research method which requires us to read, study, review, and analyze the related legal materials to gain a comprehensive view and possible solution to address the issues. The collected data then would be analyzed further using the deductive syllogism method which starts with the submission of the major premise followed with the minor premise and ends with the conclusion of the two premises.

3. RESULTS AND DISCUSSION

3.1 REFUGEE RIGHTS AND STATE RESPONSIBILITY

However, in practice, there is a problem with the fulfillment of the asylum-seekers or refugee basic human rights in many countries' national policy which derive from their unwillingness to share the same burden with other countries as stipulated in international law. It should be admitted, however, that States have indeed a right to decide which person to be granted asylum or accepted as refugees. However, in practice, the States will face limitations when exercising this right. Those limitations including but not limited to: *first*, whether the asylum-seekers are those who are persecuted because they belong to a particular social group; *second*, there is no definite requirement to be classified as a socially abused group; and *third*, what is meant by certain social groups must be read evolutionarily, namely asylum-seekers (Grover, 2018). This limitation is in line with the UNHCR's own policies and according to the UNHCR, a State would be categorized as "the first country of asylum" if they have an effective system to provide protection to be enjoyed for those individuals (The United Nations High Commissioner for Refugees, 2017a).

The United Nations High Commissioner for Refugees (UNHCR), based on the 1951 Geneva Convention and its 1967 Additional Protocol, has set the basic rights which the asylum-seekers or refugees shall enjoy as part of their human rights. That rights also include the protection from refoulement action taken by States which could jeopardize their safety and lives as upheld in Article 33 paragraph 1 of the 1951 Geneva Convention. Refugee, according to Article 3 and Article 4 of the 1951 Geneva Convention, shall be protected from discriminatory action based on race, religion, country of origin, or their social group. In regards to refugees' status, the State has the responsibility to respect the law from their country of domicile or if they don't have any domicile by the law from their country of residence which governs their status. Refugees' rights to moveable and immovable property along with the right to artistic rights and industrial property are also protected under Article 13 and Article 14 of the 1951 Geneva Convention. Other basic rights such as the right of association, the right to wage-earning employment, self-employment, liberal professions, and public education that was already being accepted under different international provision also being upheld by the 1951 Geneva Convention.

Many child asylum-seekers or refugees who flee their country of origin sometimes didn't come with their parent or adult companion which raises a question on how States shall fulfill their rights. In the 1951 Geneva Convention, there's no distinction of

treatment received by an adult refugee and child refugee. However, the physical and psychological conditions of children are very different from adults and because of that, they need to be provided with better treatment from their host or transit countries. Therefore, the UNHCR in its own guidelines always emphasizes that the treatment received by the child shall be “in the best interest of the child”. Therefore it could be interpreted as an obligation for States to provide the children asylum-seekers or refugees a more preferable treatment than those adult asylum-seekers or refugees received. This treatment wasn’t based solely on the standard made by the UNHCR, but also derived from the provision on the 1989 Convention on the Right of Child (Child Convention or CRC). The establishment of the Child Convention bring a tremendous change on how the world sees children and their rights. There’s a debate on how children rights should be addressed when they, in many countries domestic law, are viewed as a non-bearer of rights. This view is changed since the establishment of the Child Convention which recognizes the child as the bearer of rights entrenched in a binding international instrument, comprising various categories of rights including protection and participation rights (Rena, 2007). Among many provision in the Child Convention, there are 4 distinguished provision accepted of being the general principle which include the non-discrimination principle (Article 2 paragraph 1), the best interest of the children (Article 3 paragraph 1), the right to survival and development (Article 6 paragraph 2), and the views of the child principle (Article 12 paragraph 1) (The United Nations High Commissioner for Refugees, 2009).

The Child Convention didn’t only set and regulate the rights of children in a time of peace but also set and regulate their rights in a time of turmoil and conflict. In regards to the child fleeing their home country because of conflict or disaster, the country hosting those fleeing children shall, under the provision of Article 22 paragraph 1: *first*, take appropriate measures to ensure those children receive appropriate protection and humanitarian assistance; and *second*, enjoy the applicable rights set in the Child Convention and other international human rights or humanitarian instrument. In the cases of children being separated from their parents, family, or companion, the host country are to assist such a child in tracing their parents or other members of their family for family reunification. If the host country can’t find the child’s parents or other family members, they shall be entitled to the same protection as any other child permanently or temporarily deprived of his or her family. All these things must be done in a friendly and professional manner per applicable law.

3.2 U.S.A “INHUMANE TREATMENT” OF CHILD ASYLUM SEEKERS AND REFUGEES

U.S.A Immigration and Customs Enforcement have at least 54,000 people who are refugees, asylum-seekers, and migrants under custody and held in ICE-run detention center until today (Sukin, 2019). However the number is still not final because other government bodies and law enforcement agencies also detain refugees, asylum-seekers, and migrants. For example, U.S. Customs and Border Protection held approximately 20,000 people in their custody with 11,000 more was held in the custody of the U.S. Department of Health and Human Services (Sukin, 2019). With this high number of refugees, asylum-seekers, and migrants being detained, the U.S. government is ought to give them adequate treatment that is in line with the guidelines provided by the United Nations High Commissioner for Refugees (UNHCR). However, the actual condition of the detention center or the treatment or facilities provided for the detainee is far from the bare minimum set by the guidelines. Michelle Bachelet, the U.N. High Commissioner for

Human Rights, in one of her statement made in July 2019 said she “is deeply shocked that children are forced to sleep on the floor in overcrowded facilities [and] without access to adequate healthcare or food and with poor sanitation conditions’ (UN News, 2019). She also stated that the U.S. policy to detaining children in such condition, according to several UN human rights bodies, may constitute cruel, inhuman, or degrading treatment that is prohibited under international law especially the 1987 Convention Against Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment or known as Convention Against Torture (CAT) (UN News, 2019).

The prohibition of cruel, inhuman, or degrading treatment didn’t stand only as a treaties provision that only binding the parties to the treaties, it’s already recognized and accepted as a peremptory norm of international law that trumps even treaty obligations; hence all countries must uphold this provision irrespective of their consent (Weissbrodt & Heilman, 2011). The U.S. as part of the international community has been outlawed cruel, inhuman, or degrading treatment in its domestic law. In regards to an individual that was being detained or in the custody of the U.S. government, they are guaranteed by the Detainee Treatment Act of 2005 “... not to be subject to cruel, inhuman, or degrading treatment.” However, looking at the condition of the U.S. Immigration Detention Center run by various U.S. bodies and law enforcement agencies, it could be said that the refugees, asylum-seekers, and immigrants detained there were being subjected to cruel, inhuman, or degrading treatment.

First of all, the right to health is an inclusive right and part of basic human rights with the purpose to lead a person to a healthy life. This right was first recognized under international law in Article 25 of the Universal Declaration of Human Rights. Article 25 stated that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”. This article also specifies the item needed to achieve what’s called adequate health and well-being, which include food, clothing, housing, and medical care and necessary social services. Furthermore, Article 25 also stated that the right to health also includes the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his or her control. The importance of the right to health was then reaffirmed in Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 12 of the ICESCR did not only recognize that every people has the right “to the enjoyment of the highest attainable standard of physical and mental health” but it also takes it to another level by specifying the steps needed to attain the full realization of this right. Furthermore, the Committee on Economic, Social, and Cultural Rights, the body tasked to monitor the implementation of the ICESCR provision, use several elements as “underlying determinants of health” including adequate sanitation, adequate housing, and healthy environmental conditions among other elements (OHCHR & WHO, 2008).

According to the U.S. Commission on Civil Rights 2019 reports titled *Trauma at the Border: the Human Cost of Inhumane Immigration Policies*, thousands of children detained by the Department of Homeland Security are being placed in cages in former warehouses or in building with little if any natural light and must sleep on a cement floor in cold temperatures using only aluminum blankets to cover their body (The United States Commission on Civil Rights, 2019). This condition didn’t only befall those who are being detained by the Department of Homeland Security but also those transferred from the Department of Homeland Security to other facilities run by other U.S. government

bodies and law enforcement agencies. This condition was contrary to the standard of care for children in the immigration detention system that derived from the *Flores* Agreement where it mandated all detention facilities that house children must be, safe and sanitary, complete with suitable toilets, sinks, drinking water, food, medical assistance for emergencies, and other necessary elements to make it safe and sanitary (The United States Commission on Civil Rights, 2019). However the most important provision ruled in this agreement is that the Department of Homeland Security to, quote, “treat each child with dignity, respect, and with special concern for their particular vulnerabilities as children”.

Not only the current condition was contrary or in violation of the provision from the *Flores* Agreement, but it also undermines the ICE’s (Immigration and Customs Enforcement) own standard in its guideline titled “*Performance-Based National Detention Standards 2011*”. It is written in Chapter 5 on the Personal Hygiene section that each detainee must be provided with clothing, special uniforms and protective equipment, personal hygiene items, and many items that are needed to make the condition of the detention center “safe and sanitary” (The U.S. Immigration and Customs Enforcement, 2016). Department of Justice in their argument during an appeal inquiry at the 9th Circuit Court in 2019 stated that the interpretation of what qualifies as “safe and sanitary” doesn’t need to include item such as a blanket, soap, and toothbrush to qualify a detention center condition as “safe and sanitary” given the time they are being detained is short. This statement was rebuked by Judge A. Wallace Tashima who stated, “If you don’t have a blanket, soap, or toothbrush it was in a common understanding that it’s not safe and sanitary” (The United States Commission on Civil Rights, 2019). Judge Tashima was right to rebuke the Department of Justice statement because ICE’s own standard required each detained to receive personal hygiene items including soap, comb, toothpaste, toothbrush, shampoo, and skin lotion (The U.S. Immigration and Customs Enforcement, 2016).

The impact of this administration detention policies on refugees, asylum-seekers, or immigrants including children has a very big price to pay. Never in the past have had few decades had children died while being detained in immigration detention centers (The United States Commission on Civil Rights, 2019). The 2019 report of the U.S. Commission on Civil Rights writes down the name of the children who died while in U.S. custody along with the condition they faced leading up to their death. Those cases have many similarities which are that the children who die in U.S. custody die from illness or related health issues during their detention period. It is believed, according to this record, that those children didn’t detain with adequate health facilities to meet the requirement of “safe and sanitary” as described in the ICE’s standard. The lack of adequate health facilities inside or around the detention center did contribute to the decline of the child’s health condition which ultimately leads to their death. There are many cases to prove the claim in the previous statement, such as the death of a sixteen-year-old Guatemalan boy named Juan de Leon Guterrez after being transferred to a medical facility 160 miles away from his migrant shelter only after officials at his migrant shelter realize that he was sick or the death of Carlos Gregorio Hernandez, a sixteen-year-old boy who died after being detained twice as long as federal law allows, diagnosed with flu, and prescribed with Tamiflu but never hospitalized (The United States Commission on Civil Rights, 2019).

All of the information mentioned above shows how the current administration treatment refugees, asylum-seekers, or migrants, regardless of race, age, or gender. Although the previous administration has set a basic detention standard as a guideline

that is in line with the detention guidelines made by the UNHCR to preserve the right of refugees, asylum-seekers, or immigrants that being detained, the reality is different. The evidence mentioned above is more than enough to prove how Trump's administration undermining the detention standard used for so long by the U.S. government and law enforcement bodies which originated from the *Flores* Agreement and then manifested in any form of U.S. law. The evidence also proves that the minimum condition of "safe and sanitary" for children detained in an immigration detention center hasn't been met. Basic elements such as a blanket, soap, adequate housing, toothbrush, or adequate health service and facilities are absent resulting in the death of children. This can't be let to continue, the administration must reform its approach and conduct before these present practices claim another life or put other children in this abhorrent condition in the land where one's rights must be upheld.

3.3 "VOLUNTARY RETURN" POLICY AS THREAT TO REFUGEES RIGHTS

The term Voluntary Return policy, also known as Administrative Voluntary Departure was developed for non-citizen accepts removal from the United States without a formal removal order. This is not to be confused with the form of voluntary departure that granted by an immigration judge during or after a formal hearing. Instead, a voluntary return is issued by an immigration officer and bypasses the immigration court system completely. According to statistics from the Department of Homeland Security, U.S. Immigration and Customs Enforcement ICE, that 23,455 voluntary returns took place in 2013 (The United States Immigration and Customs Enforcement, 2013).

Under The Administrative Voluntary Departure Statute, an individual who accepts voluntary return has up to 120 days to leave the United States. The actual amount of time allotted may vary, as the implementing federal regulations permit an "authorized officer" to set the time frame for departure, so long as it is within 120 days of the non-citizens, having some period of time to arrange their affairs in the United States. Currently, voluntary return, which is reserved for non-citizens with a limited or no criminal history, is often considered to be an immigration "benefit" because the recipient does not receive a formal removal order. That does not mean there are no consequences that accompany voluntary departure. For instance, a person who has been unlawfully present in the United States for one year or more and take voluntary departure thereafter "inadmissible" for a period of ten years. A person unlawfully present for over 180 days but less than one year is inadmissible for a period of three years if he or she takes voluntary departure. Some individuals get a waiver of this inadmissibility bar, but such waivers are entirely discretionary and available only to individuals who can demonstrate "extreme hardship" to U.S citizen or lawful permanent resident spouse or parent. If the waiver is denied, there is no way to appeal or have that denial reviewed. A person who reenters the United States before the time bar has run will be subject to an even more severe ground of inadmissibility and will be disqualified from most forms of relief from deportation (American Civil Liberties Union, 2014).

The relative informality of voluntary return has led to a common misconception that there are no penalties for reentry. Similarly, the lack of formal process in expedited removal leads many immigrants to assume they have been granted voluntary departure when, in fact, they have an expedited removal order. The Voluntary return may act as a benefit for some individuals, but for immigrants with strong claims to relief from removal, voluntary departure is not a rights-protective process. As in other forms of summary proceedings that bypass the courtroom, voluntary return denies an individual the opportunity to apply for relief from deportation, by means the ways to remain in the

United States. For instance, a person who takes voluntary return cannot apply for cancellation of removal, and once he or she has been returned to Mexico cannot apply for programs like Deferred Action for Childhood Arrivals (DACA) that require an individual be in the United States at the time of the application.

Unlike expedited removal, voluntary departure is not confined to the border zone, nor is it applied only to recent border crossers. Moreover, advocates interviewed for this report expressed concern that people eligible for relief from removal and/or eligible to adjust status and remain in the United States are instead being coerced to take voluntary return by immigration officers without knowing the rights they are waiving or penalties they will incur. As immigration enforcement officers are generally not trained to screen for and evaluate a person's immigration claims which often requires sophisticated legal analysis they are not in a position (nor should they be) to advise immigrants whether a voluntary departure is a benefit. Given the speed of this process and the fact that most people are not represented by or even able to contact an attorney and by default rely on the arresting or interrogating officer to explain their rights, there is a significant risk that individuals with strong claims to remain in the United States will and have been coerced to give those rights up. The administrative voluntary departure process is supposed to include procedural protections to ensure that the person who agrees to voluntary departure and waives the right to go to court and defend their claims is making a truly voluntary decision and authorize a grant of voluntary departure only when the non-citizen has requested it and accepted its terms (Ataiants et al., 2018). In practice, however, these procedural requirements are not always fulfilled and, indeed, this form is not even used.

Recently, under the Trump administration, the Border Patrol reported apprehending almost 60,000 unaccompanied children during 2012-2016 and considered the second-highest number of apprehensions (The United States Customs and Border Protection, 2016). Also, more than 50,000 unaccompanied children seeking asylum during 2017-2018 (Kandel, 2019). As we knew the number of unaccompanied children was escalated along the years during the Obama administration until it gets worsen during the Trump administration. The same question that all of us have been thought about it for a while is, what is the reason for the apprehension? And what is the relation towards voluntary return Policy? The unaccompanied children who are apprehended without family or caregivers are the responsibility of the United States government. Therefore, the United States government establish legal provisions set by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). However, Report by United Nations High Commissioner for Refugees (UNHCR) found that the Department of Homeland Security, U.S. Customs and Border Protection (CBP) is unable to complete this mandate, as most agents appear unfamiliar with many of the issues they are screening that analyze the risk of trafficking, asylum claims, and ability or inability to consent to voluntary return. The mandatory screening forms, the UNHCR found, were not only inscrutable to the children, but also to the officers doing the questioning, often in public settings and sometimes without an interpreter. Overall, the investigation concluded, "The majority of the interviews observed by UNHCR involved what was merely perfunctory questioning of potentially extremely painful and sensitive experiences for the children. And in the remainder, the questioning, or lack of questioning, was poorly executed" (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014).

The "virtual automatic voluntary return" of Mexican unaccompanied children, the UNHCR found, was not due to officer callousness but a lack of education and systematic

failures to understand and implement the TVPRA screening. According to the UNHCR report, CBP officers failed to ask several of the required screening questions; sometimes conducted an interview without an interpreter; by default, interviewed children in public places about sensitive issues; had no training in child-sensitive interviewing techniques, and did not understand the legal background and rationale for the screening activities. In some cases, children were told to sign forms that had already been filled out (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014). Perhaps most disturbingly, the investigation found that CBP officers do not understand what human trafficking means and are unable to identify child victims of human trafficking, which includes recruitment and coerced participation in the human trafficking industry. Although the U.S. Department of State recognized Mexico as one of the top countries of origin for victims of human trafficking in FY 2012, according to the UNHCR, “None of the agents or officers interviewed said they had ever identified a child trafficking victim or one at risk of trafficking.” Rather, the UNHCR found, some officers expressed concern that they could not refer these children, who may have been coerced by gangs to participate as guides in the human trafficking industry, for criminal prosecution (American Civil Liberties Union, 2014).

Human rights law recognizes the vulnerability of child migrants, particularly those traveling alone. Under the U.N. Convention on the Rights of the Child, which the United States has signed but not ratified, states are obliged to provide protection and care for unaccompanied children and to take into account a child’s best interests in every action affecting the child (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2014). The decision to return a child to his or her country of origin, under international law, must take into account the child’s best interests, including his or her safety and security upon return, socio-economic conditions, and the views of the child. If a child’s return to their country of origin is not possible or not in the child’s best interests, under human rights law states must facilitate the child’s integration into the host country through refugee status or other forms of protection (The United Nations Committee on the Rights of the Child, 2005).

While human rights law, in general, limits the use of detention for immigration violations, the U.N. High Commission for Refugees has specifically advised that unaccompanied children “should not be detained” (The United Nations High Commissioner for Refugees Regional Office Washington D.C. for the United States and the Caribbean, 2012). In exceptional circumstances where children are in detention, detention must be used only as a last resort, for the shortest appropriate time, and with additional safeguards to ensure a child’s safety and welfare (MacPherson, 1989). To ensure that unaccompanied children can seek asylum, human rights law recognizes that states must provide a meaningful way for children to seek protection and that children must be screened by officers with particular training. Examining Portugal’s treatment of unaccompanied minors, the U.N. Committee on the Rights of the Child specifically expressed concern that unaccompanied children face “lengthy and inadequate procedures” conducted by persons without adequate training to address the specialized needs of unaccompanied minors (The United Nations Committee on the Rights of the Child, 2014). The Committee has also raised concerns where unaccompanied children with possible international protection needs are automatically turned away as “economic migrants” based on national origin and without assessment of the risks they may face thus potentially violating non-refoulement obligations (The United Nations Committee on the Rights of the Child, 2014).

For Mexican children who are summarily repatriated without a hearing, the right to be free from discrimination based on national origin should ensure those children have an equal opportunity to claim protection in the United States and are not unfairly expelled based on national origin. This issue of unfair treatment in access to immigration relief, based on national origin, has previously been considered by the Inter-American Commission for Human Rights (IACHR). Evaluating the interdiction and summary return of Haitians by U.S. authorities, the IACHR held that the United States had violated their right to freedom from discrimination, as a significantly more favorable policy was applied to Cubans and Nicaraguans (Atkinson et al., 2016). For children who are able to get an immigration hearing, U.S. law provides insufficient safeguards to ensure they can actually present their case and defend against deportation, although U.S. constitutional law acknowledges that children need additional assistance and protections when interacting with the legal system. As the U.S. Supreme Court has stated, in addressing the right to appointed counsel in juvenile delinquency proceedings, a child “needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him’ (Sterling, 2013). Although international human rights law requires that unaccompanied children be provided with legal assistance (The United Nations Committee on the Rights of the Child, 2005), in U.S. immigration proceedings there is no right to appointed counsel under domestic law. As a result, many children are alone, without representation, while facing incredibly complex legal proceedings. Without legal assistance, even children who have strong asylum claims may be unjustly deported and unlawfully returned to danger if they cannot express and defend their claims in court.

3.4 POSSIBLE SOLUTIONS

Seeing how the Trump’s administration has undermined various treaties provision as well as international values, norms, and principle when it comes to the treatment of children seeking asylum or refuge, the international community must stand up to remind and demand the U.S. government to uphold and fulfill its obligation to provide a better treatment towards refugee, especially children. As mention before, the policy of placing children seeking asylum or refuge in the detention center has been proven not beneficial to the child but rather put them in a condition that can cause trauma. Detention also didn’t have any research that proves it as successful immigration control strategies (Wood, 2018). By not giving an adequate health service and facilities for the detained children, the Trump administration has ignored and neglected their obligation under international law to give and provide refugees, asylum-seekers, or immigrants the same treatment its citizens receive including the fulfillment of the right to health. The right to health didn’t only stand as part of basic human rights upheld in various international treaties, it also being upheld by U.S. own domestic law. The *Flores* Agreement has set a strict regulation and standard regarding the detention and treatment of children in federal custody including the need for detention centers to have and provide adequate health facilities and services for the detainee to fulfill the requirement of a “safe and sanitary” environment. The same standard also being upheld and enforced in ICE’s detention guidelines that make it very clear that every detention center detaining a child must provide them with “a safe and sanitary” environment.

There are several steps that the international community can take to ensure the U.S. government fulfillment and compliance with international laws especially when it comes

to the treatment receive by child detain in immigration detention children. We need to remember how international law works was very different from how domestic law works and enforces. Domestic law operates with a chain of command, with a top-bottom approach, whereas international law depends on the cooperation between each subject. International law provision has a very different character than domestic law, where international law provision takes a really long time and patience to be accepted, recognized, implemented, and reinforced while a domestic law provision can be or must be implemented right after it was recognized as a law. In other words, the international community needs to keep advocating for the country's obligation to provide refugees, asylum-seekers, or immigrants with the same or better treatment than its citizen get especially the detained child. The international community also need to continue its works and efforts on campaigning that even in the event of child detention, the detention standard must take the best interest of the child as the primary consideration as affirmed by Article 3 of the Convention on the Rights of the Child (The United Nations High Commissioner for Refugees, 2017b). UN bodies such as UNHCR and UNICEF must try to approach the U.S. government to find an alternative to child detention measures. Such alternative measures can be made by using family-based alternative care options or other suitable alternative care arrangements made while bearing the child's best interest in mind (The United Nations High Commissioner for Refugees, 2017b).

While trying to approach the U.S. government to request a reform for their detention practices, the international community could also begin to develop and strengthening the current international guideline, framework, and treaties related to the protection of refugees. It can't be denied that the current Refugee Convention, the 1951 Geneva Convention, and its Protocol can't use its provision to the fullest when addressing the fast-changing global refugee problem. Although some of its provision has been enshrined and accepted as international customary law or even *Jus Cogens*, there are still some loopholes in the Convention especially its relation with refugee's detention. To cover for these loopholes, there's a need for further development of the international refugee law through the restatement of existing rules or through the formulation of new rules (The United Nations & The United Nations Office of Legal Affairs, 2012). Such a move wasn't new to the international community since Jeremy Bentham have proposed such an idea in the last quarter of the eighteenth century (The United Nations & The United Nations Office of Legal Affairs, 2012). This idea outlived Bentham and was finally culminated in the establishment of the International Law Commission (ILC) since the adoption of General Assembly Resolution A/RES/174 (II) which establish the ILC along with the approval of its Statute. As the promotion of the progressive development of international law was the mandate of the ILC as set in Article 1 paragraph 1 of the Statute of the ILC, the Member State of the United Nations can submit proposals or draft of multilateral conventions for the purpose of the progressive development of international refugee law either through the General Assembly or other principles organs of the United Nations pursuant to Article 16 and Article 17 of the Statute of the ILC. The submitted proposal or draft shall be focused on setting a holistic and comprehensive standard of refugee rights protection either by adding another Additional Protocol to the 1951 Geneva Convention or by adopting a guideline or framework as an additional Annex to the Convention.

In regards to the U.S. so- called "voluntary return" policy for detained asylum-seekers, refugees, or immigrant, although it is the U.S. government obligation to respect their will to choose the U.S. as their destination country after fleeing their country of

origin. The administrative voluntary departure process is supposed to include procedural protections to ensure that the person who agrees to voluntary departure and waives the right to go to court and defend their claims is making a truly voluntary decision. For example, federal regulations governing voluntary departure require that “every decision regarding voluntary departure shall be communicated in writing on Form that will result from Notice of Action voluntary departure” and authorize a grant of voluntary departure only when the non-citizen has requested it and accepted its terms.

4. CONCLUSION

As mentioned and discussed above, the current U.S. policy on asylum and refugee under the Trump administration was, from a law and human rights perspective, indeed in violation not only the U.S. domestic law but also the values and principles of international law. The policy of so-called “voluntary return” and immigrant detention, among others policy, was the most controversial one since in the field this policy is not being carried out under the international law principles of non-refoulement, same and humane treatment, and best interest of the child. These principles were generally accepted by the international community and have overcome the boundaries of just being a treaties-binding provision. Many rights are entitled to refugees, asylum-seekers, or immigrants derived from these principles and, because of that, must be fulfilled by all countries regardless of the age, gender, race, or religion of the bearer. The aggressive yet discriminative character of the Trump administration policy doesn’t reflect the soul of America that the U.S. was always proud of which is freedom. By barring and made it harder for the entry of thousands of refugees, asylum-seekers, or immigrants in their Southern border or any entry point to the U.S., the U.S. government has violated the right to flee fearing oppression or persecution based on race, politics, or religion. Not to mention that after crossing the border refugees, asylum-seekers, or immigrants would be forced to be separated from their family and put in a detention center with inadequate or non-existence facilities to keep them “safe and sanitary”. This horrible condition happens in almost all of the U.S. detention centers including those used to detain children. Many countries including the U.S. always emphasizes the importance of providing children with adequate facilities and service to support the children growth and development. However, when it comes to the child detained in the detention center because of their status as refugees, asylum-seekers, or immigrants, those facilities and services weren’t provided although they are entitled to receive the same treatment from their host country.

Practices and policies such as mentioned above need to be stopped and the international community needs to act for it. Other than keeping urging the U.S. government to fulfill its obligation to the refugees, asylum-seekers, or immigrants coming to its territory, the international community can try to develop a more comprehensive and holistic treaty or amend the existing one by proposing it to the International Law Commission or the United Nations 6th Committee to know if such proposal is possible and acceptable. The current legal framework or guidelines for the protection of refugees and asylum-seekers are made and written separately with the related treaties. It would be better if such a legal framework or guidelines to be written along with the drafting of the treaties and adopted as annex so it would be binding to the State Parties. The lack of binding power of the current legal framework or guidelines was due to this particular reason and to adopt it as an annex to the related treaties would give it more binding power and at some point can be used to urge any State Parties to fulfill its obligation. On

the domestic level, persons such as NGOs, activists, or individuals should try to build pressure on the U.S. government. This pressure is important as it will show that the people want to see reform on U.S. refugee and asylum policy.

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