

The Final Refugee Paradigm: A Historical Warning

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International refugee law is falling into desuetude. 21st-century refugees are increasingly viewed and treated as “security threats” to host countries. Once thought to be international, human rights and refugee protections on migrants fleeing persecution and conflict in their home countries have been gradually disarticulated through domestic, regional and institutional forms of suspicion, distrust, dehumanization, criminalization, rejection, and abandonment. Nevertheless, of the nearly 36 million refugees and asylum seekers in the world today, 13 million are children. Drawing on a comparative and historical analysis on host countries’ immigration laws and policies, this article explores the critical events that have determined such progression. The article argues that the rather ambivalent evolution of international refugee protection can be explained through three defining refugee paradigms: the Post-war Paradigm (victims of persecution entitled to human-rights and refugee protections), the Modern Paradigm (suspects subject to prosecutorial treatment and detention), and the Final Paradigm (criminalised and undesirable migrants subject to rejection and abandonment). The article concludes with a warning: the Final Refugee Paradigm does not merely describe an emerging trend but a point of no return.

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Le droit international des réfugiés est en train de tomber en désuétude. Les réfugiés du XXI^e siècle sont de plus en plus considérés et traités comme des “menaces pour la sécurité” des pays d’accueil. Autrefois considérés comme des protections juridiques certaines, les droits de l’homme et la protection internationale des migrants fuyant la persécution et les conflits dans leur pays d’origine ont été progressivement désarticulés par des formes de suspicion, de méfiance, de déshumanisation, de criminalization, de rejet et d’abandon au niveau national, régional et institutionnel. Pourtant, sur le près de 36 millions de réfugiés et de demandeurs d’asile dans le monde aujourd’hui, 13 millions sont des enfants. En s’appuyant sur une analyse comparative et historique des lois et politiques d’immigration des pays d’accueil, cet article explore les événements critiques qui ont déterminé cette progression. L’article fait valoir que l’évolution plutôt ambivalente de la protection internationale des réfugiés peut s’expliquer par trois paradigmes: l’après-guerre (les victimes de persécution protégées par les droits de l’homme et le droit des réfugiés), le paradigme moderne (les suspects soumis à des poursuites et à la détention) et le paradigme final (les migrants indésirables criminalisés, rejetés et abandonnés). L’article se termine par un avertissement: le Paradigme Final des Réfugiés ne décrit pas seulement une tendance récente, mais un point de non-retour.

I. Introduction: The Paradigms of Refugee Protection

“Invaders”,¹ “criminals”,² “terrorists”,³ “animals”,⁴ “rapists”,⁵ “disease-carriers”,⁶ “job stealers”,⁷ “bunch of migrants”,⁸ “the scum of the world”,⁹ “bad hombres”,¹⁰ “illegal infiltrators”¹¹ and “religious”,¹² “cultural”¹³ and “security threats”¹⁴ are only a few of the most recurrent expressions government officials in some of the world’s wealthiest host countries have used to describe forced and undocumented migrants and, in the process, justify more aggressive laws and policies towards refugees and asylum seekers in the 21st century. Nevertheless, there are nearly 36 million

¹ Philip Bump, “What Is and Isn’t Happening with the Migrant Caravan in Southern Mexico”, *Washington Post* (29 October 2018) (citing US President Donald Trump’s statements), online: <www.washingtonpost.com/politics/2018/10/29/what-is-isnt-happening-with-migrant-caravan-southern-mexico/> [perma.cc/57ZY-L85L].

² *Ibid.*

³ *Ibid.*

⁴ David A Graham, “Trump Says Democrats Want Immigrants to ‘Infest’ the U.S.”, *The Atlantic* (19 June 2018) (quoting US President Donald Trump), online: <www.theatlantic.com/politics/archive/2018/06/trump-immigrants-infest/563159/> [perma.cc/BE8N-3WC8].

⁵ Southern Poverty Law Center, “No End In Sight: Why Migrants Give Up on Their U.S. Immigration Cases” (2018) at 14 (describing dehumanizing rhetoric on migrants in the United States), online (pdf): SPLC <www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf> [perma.cc/7JPM-4HE2].

⁶ See Ibrahim Abubakar et al, “The UCL-Lancet Commission on Migration and Health: the Health of a World on the Move” (December 2018) 392:10164 *The Lancet* 2606 at 2612.

⁷ See Alberta Giorgi & Tommaso Vitale, “Migrants in the Public Discourse: Between Media, Policy and Public Opinion” in Stefania Marino et al, eds, *Trade Unions and Migrant Workers: New Contexts and Challenges in Europe* (Cheltenham, United Kingdom: Edward Elgar, 2017) 66 at 66–89 (exploring labels on “economic refugees”).

⁸ Rowena Mason & Frances Perraudin, “Cameron’s ‘Bunch of Migrants’ Jibe Is Callous and Dehumanising, Say MPs”, *The Guardian* (27 January 2016) (quoting British PM David Cameron), online: <www.theguardian.com/politics/2016/jan/27/david-cameron-bunch-of-migrants-jibe-pmq-s-callou-dehumanising> [perma.cc/5K94-3KB4].

⁹ *Jornal Opção*, “Bolsonaro Vê Imigrantes Como “Ameaça” e Chama Refugiados de “a Escória do Mundo”” (18 September 2015) (quoting President Jair Bolsonaro’s comments on refugees arriving to Brazil as, “a escória do Mundo” or “the scum of the world”), online: *Jornal Opcao* <www.jornalopcao.com.br/ultimas-noticias/bolsonaro-ve-imigrantes-como-ameaca-e-chama-refugiados-de-a-escoria-do-mundo-46043/> [perma.cc/ZQI7-FQC9].

¹⁰ Amien Kacou, “Trump’s Flailing Ratchet: From “Bad Hombres” to “Zero Tolerance”” (2 July 2018), online: *Harvard Law & Policy Review* <harvardlpr.com/2018/07/02/trumps-flailing-ratchet-from-bad-hombres-to-zero-tolerance/> [perma.cc/Q76F-ATMA].

¹¹ Harried Sherwood, “Israel PM: Illegal African Immigrants Threaten Identity of Jewish State”, *The Guardian* (20 May 2012) (quoting Israel PM Benjamin Netanyahu’s comments), online: <www.theguardian.com/world/2012/may/20/israel-netanyahu-african-immigrants-jewish> [perma.cc/MA4S-KENV].

¹² See e.g. IPSOS, SCI & MIC, Tim Dixon et al, “Attitudes Towards National Identity, Immigration and Refugees in Italy” (August 2018) at 5–9 (portraying critical disconnections on Italian Catholics and Muslim refugees vis-à-vis Italian identity), online (pdf): *More-in-Common* <www.moreincommon.com/media/3hnhssh5/italy-en-final_digital_2b.pdf> [perma.cc/7HXW-LS87].

¹³ *Ibid.*

¹⁴ *Ibid.*; Sigal Samuel, “‘There’s a Perception that Canada Is Being Invaded’”, *The Atlantic* (26 May 2018) (analysing far-right groups’ rhetoric affecting public perception on refugee reception in Canada), online: <www.theatlantic.com/international/archive/2018/05/theres-a-perception-that-canada-is-being-invaded/561032/> [perma.cc/LPL8-S5UD].

refugees and asylum seekers in the world today.¹⁵ More so, of the 26 million refugees around the globe, half are children.¹⁶

Images portraying the treatment of refugees and asylum seekers across the planet speak volumes. Children in cages, toddlers taken away from their parents' arms, the confiscation of asylum seekers' property, and the systematic detention, exclusion and deportation of forced migrants – this as thousands of refugees die during their journey for safety and millions of asylum seekers are exposed to migrant smugglers, human traffickers, labour exploitation, drug cartels, overcrowded facilities, sleep-deprivation, starvation, sexual abuse, psychological trauma, torture, and dire humanitarian conditions.¹⁷

This article explores the relationship between refugee and national-security protection from a historical and comparative perspective. It addresses a critical yet often neglected question: How did we get here? That is, how did host countries go from viewing refugees as victims of persecution to treating

¹⁵ The UN High Commissioner for Refugees indicated that the number of refugees and asylum seekers worldwide reached 30.5 million in 2020. See UN High Commissioner for Refugees (UNHCR), *Refugee Data Finder* (December 2020) (counting 26.3 million refugees and 4.2 million asylum seekers worldwide as of June 2020), online: [UNHCR <www.unhcr.org/refugee-statistics/>](http://www.unhcr.org/refugee-statistics/) [perma.cc/NT3Q-PXR7]. This figure, however, does not include the number of refugees produced by the Venezuelan crisis which as of April 2021 is estimated in 5.6 million. Regional Inter-Agency Coordination Platform (UN General-Secretary, UNHCR, IOM), “R4V: Coordination Platform for Refugees and Migrants from Venezuela” (accessed 28 April 2021) (counting 5,642,960 Venezuelan refugees and migrants as of 5 April 2021), online: [R4V <r4v.info/en/situations/platform>](http://info/en/situations/platform) [perma.cc/XSD7-9TDS].

¹⁶ Amnesty International, “The World’s Refugees in Numbers” (April 2021), online: amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/global-refugee-crisis-statistics-and-facts/ [perma.cc/58JZ-5XN8].

¹⁷ See Doctors Without Borders, “Asylum Seekers Strained and Exposed to Violence in Mexico”, *DWB News* (18 October 2019), online: www.doctorswithoutborders.org/what-we-do/news-stories/story/asylum-seekers-stranded-and-exposed-violence-mexico [perma.cc/P6V8-8ST9]; “More than 3,500 Attacks on Refugees in Germany in 2016: Report”, *DW* (26 February 2017), online: www.dw.com/en/more-than-3500-attacks-on-refugees-in-germany-in-2016-report/a-37719365 [perma.cc/7FHL-QAN8]; J Mauricio Gaona, “Is the US Committing Crimes Against Humanity on its Southern Border?”, *New York Daily News* (5 July 2019) (analyzing human rights violations of migrant children in the United States), online: www.nydailynews.com/opinion/ny-oped-crimes-against-humanity-southern-border-20190705-ttwha2f43nefbdy7ozmabadii-story.html [perma.cc/48QV-JHF5]; UN High Commissioner for Refugees (UNHCR), “Amid Rising Xenophobic Attacks in South Africa, UNHCR Ramps Up Aid for Refugees, Calls Urgent Action”, *UNHCR News* (20 September 2019), online: www.unhcr.org/en-us/news/briefing/2019/9/5d848f694/amid-rising-xenophobic-attacks-south-africa-unhcr-ramps-aid-refugees-calls.html [perma.cc/QFL5-QPW6]; Hajar Habbach, Kathryn Hampton & Ranit Mishori, “You Will Never See Your Child Again: The Persistent Psychological Effects of Family Separation” (February 2020) at 8, 27 (describing psychological implications of family separation and detention of migrant children in the United States), online (pdf): [PHR <phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf>](http://phr.org/wp-content/uploads/2020/02/PHR-Report-2020-Family-Separation-Full-Report.pdf) [perma.cc/B7Y3-B5WQ]; International Organization for Migration (IOM), “Improving Data on Missing Migrants” (2017) 3:1 Fatal Journeys at 1, online (pdf): [UN Global Pulse <www.unglobalpulse.org/wp-content/uploads/2019/03/fatal_journeys_volume_3_part_1.pdf>](http://www.unglobalpulse.org/wp-content/uploads/2019/03/fatal_journeys_volume_3_part_1.pdf) [perma.cc/HRA7-UAYV]; UN High Commissioner for Refugees (UNHCR), “Refugees and Migrants Face Heightened Risks While Trying to Reach Europe”, *UNHCR News* (2017), online: www.unhcr.org/news/press/2017/2/58b458654/refugees-migrants-face-heightened-risks-trying-reach-europe-unhcr-report.html [perma.cc/XJ48-SEYV]; Office of the United Nations High Commissioner for Human Rights (OHCHR), “Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya” (2018) at 27–28, online (pdf): [OHCHR <www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf>](http://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf) [perma.cc/6AAW-7X45].

them as security threats? More particularly, what does history tell us about the increasingly conflicting relationship between refugee and national security protection?

This article argues that this trend can be explained through three defining refugee paradigms depicting a move from regressive legal protection towards endemic legal protection in which refugees, initially viewed as victims fleeing persecution and conflict, are increasingly viewed instead as criminals. Firstly, the Post-war Refugee Paradigm saw the construction of the international legal order (institutions, conventions, mechanisms) and is characterized by the protection of minorities fleeing persecution in the first half of the 20th century. This paradigm enframed the principles of human dignity, liberty and equality.

Secondly, the Modern Refugee Paradigm saw evolving sociopolitical tensions (mistrust, extremism, racism) arising out of the Cold War and the development of international terrorism in the second half of the 20th century, which is further characterized by State supervision and a diluted legal protection of foreign citizens and immigrants. The conceptual underpinnings of the Modern Refugee Paradigm were influenced by legal restrictions on the liberty and equality of those viewed as suspect immigrants or dangerous migrants vis-à-vis national security protection.

Thirdly, the Final Refugee paradigm is structured on four factors in the 21st century: the post-9/11 re-characterization of the relationship between immigration and national security, the ascension and expansion of radical populist governments in host countries, the net increase of both terrorist attacks in host countries and refugee crises across the world, and the systematic exclusion of refugees and asylum seekers due to the COVID-19 pandemic. This paradigm is characterized by the disarticulation of international legal protections of asylum seekers and refugees both at domestic and at regional levels. This paradigm is further defined by the mischaracterization of forced migrants as security and cultural identity threats as well as by practices, policies, and regulations promoting the exclusion, rejection, and relocation of those viewed as undesirable migrants.

However, while these paradigms describe global trends on refugee protection, each country has interacted with these trends in their own way. For instance, though there is an identifiable shift of paradigm from the protection to the abandonment of refugees, some countries' legal systems, policies and practices still maintain prior international human rights and refugee law commitments (e.g. Uganda, Jordan, Brazil). Furthermore, 9/11's triggering of an acceleration into the Modern Refugee Paradigm (entwining immigration, terrorism, and national security) has varied in every country.

This article adds to modern literature on the evolution of international refugee law by providing a novel categorization on the reception and

treatment of refugees while uncovering a contradicting progression beyond any particular refugee crisis or immigration policy. More so, this article shows that security concerns used to justify the rejection of migrants and refugees in particular have persisted throughout history in different forms, focusing at different times on race, religion, safety, or public health. Though there have been notable accounts (both legal and interdisciplinary)¹⁸ exploring forced migration through different periods of history and in relation to different refugee crises, none examines – much less classifies – specific trends that identify the way refugee protection has evolved throughout modern history and the possible outcome of these trends: namely, the end of international refugee protection.

Accordingly, this article argues that depriving forced migrants of basic human rights and core international refugee protections will not necessarily lead to another paradigm but instead to the very end of international refugee protection. In this context, the article concludes that the realization of the Final Refugee Paradigm represents a point of no return.

I begin by analysing historical references of exclusion and events leading to the emergence of international refugee law and the consolidation of the Post-war Refugee Paradigm. I continue with the study of the Modern Refugee Paradigm through identifiable drivers of exclusion and prosecution fostering the gradual yet regressive characterization of migrants as “security threats”. The article ends with a legal and comparative analysis on the benchmarks preceding and defining the Final Refugee Paradigm, which promotes the gradual, domestic and regional disarticulation of both basic human rights and international refugee protections as well as systematic forms of social and legal exclusion.

¹⁸ Traditionally, scholarly works on the evolution of international refugee protection either focus more on the emergence of international refugee law or on specific political and legal changes concerning a particular time of history. See Gilbert Jaeger, “On the History of the International Protection of Refugees” (2001) 83:843 *International Review Red Cross* 779 (providing a descriptive account on the emergence of international refugee protection); Julie Mertus, “The State and the Post-Cold War Refugee Regime: New Models, New Questions” (1998) 20:1 *Michigan J Intl L* 59 at 60–61 (reflecting on refugee Cold War and Post-Cold War paradigms through notions of sovereignty, globalization, and individualism); see also James Hathaway, “A Reconsideration on the Underlying Premise of Refugee Law” (1990) 31:1 *Harv Intl LJ* 129 at 139–42 (reflecting on the historic rationale of refugee protection). Some scholars, moreover, have advanced the idea of a single policy paradigm (“deterrence paradigm”). See Tomas Gammeltoft-Hansen & Nikolas F Tan, “The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy” (2017) 5:1 *J on Migration & Human Security* 28 at 29 (analysing institutionalized and deterrence policy responses in the context of global refugee protection). More recent works are concentrated on the evolution of asylum law from a regional perspective and within the contours of its theoretical foundations. See Liv Feijen, *The Evolution of Humanitarian Protection in European Law and Practice* (Cambridge, England: Cambridge University Press, 2021) at 55–85 (offering a critique on the humanitarian basis of asylum law in Europe).

II. The Post-War Refugee Paradigm: Victims of Persecution and Conflict

The genesis of refugee protection reached its peak upon the development of the Post-war Refugee Paradigm of the 20th century (*highest ebb*) whereby refugees are viewed as victims fleeing persecution or conflict. This paradigm is characterized by the construction of international refugee protection alongside the persecution of minorities and political dissidents in the first half of the 20th century (Armenian Genocide,¹⁹ Russian Civil War,²⁰ World War I²¹ and II²², and the emergence of international refugee law²³).

A. Excluded Migrants: Race, Ethnicity, Religion, Ideology

Prior to the emergence of international refugee law, countries were not obligated to offer legal protection in their territory to foreign citizens fleeing persecution or conflict. In fact, migrants often found themselves excluded due to race, ethnicity, religious beliefs, or political opinion. The sociopolitical context that the first forced migrants, not yet characterised as “refugees”, encountered involved the persecution of racial, ethnic and political minorities.

In the United States, one of the first legal references on migrant exclusion based on political inclinations likely to affect the host country’s government stability occurred under the administration of President John Adams with the enactment of *the Sedition Act* and *the Alien Friends Act of 1798* (“Acts”).²⁴ The Acts were viewed as an attempt by the Federalists to countervail the political aspirations of the Democratic-Republican candidate Thomas Jefferson by making migrant naturalization more difficult and thus reducing potential Democratic-Republican migrant voters.²⁵ The Acts conferred upon the President the authority to arrest and deport aliens considered dangerous

¹⁹ See Taner Akçam, *The Young Turks’ Crime Against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (New Jersey: Princeton University Press, 2012) at 29–62 (describing the motifs and circumstances triggering the Armenian Genocide).

²⁰ See Robert Conquest, *The Great Terror: A Reassessment* (Oxford: Oxford University Press, 2008) book I, chapter 1 (analysing the institutional persecution of political dissidents).

²¹ See e.g. Eric C Steinhart, *The Holocaust and the Germanization of Ukraine* (New York: Cambridge University Press, 2015) at 29 (describing the persecution of Jews and German-speakers in Ukraine during World War I).

²² See Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (New York: Oxford University Press, 2010) at 133 (describing the Nazi persecution of Jews during World War II).

²³ See Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (London: Routledge, 2012) at 1–22 (portraying the emergence of international refugee both institutional and legal framework).

²⁴ *The Alien Friends Act*, c 58, § 1, 1 Stat 566 (1798); *The Sedition Act*, c 74, § 1, 1 Stat 596 (1798).

²⁵ Immigrants were mostly aligned with the Democratic-Republican Party. *The US Alien Act* increased the residence requirement to apply for citizenship from 5 to 14 years. At the time, critics saw the *Act* as a voting suppression mechanism. See Constitutional Rights Foundation, “The Alien and Sedition Acts: Defining American Freedom” (2003), online: *CRF* <www.crf-usa.org/bill-of-rights-in-action/bria-19-4-b-the-alien-and-sedition-acts-defining-american-freedom.html> [perma.cc/6D2P-ZSH2].

to government stability (“immigrants from hostile nations and foreigners making false statements against the federal government”).²⁶ Even though the *US Alien and Sedition Acts* expired in 1980 and in 1981 respectively, the stability/security component has transcended through legislation (*The Alien Enemies Act*) to the present day (50 USC 3, § 21).²⁷

Historic references show patterns of socioeconomic, political and legal exclusion of immigrants based on their race. Following US President William McKinley Jr’s assassination during his second term in September 1901 by a second-generation US citizen of Polish descent,²⁸ the US Congress passed the *Anarchist Exclusion Act of 1903*,²⁹ enabling immigration authorities to remove “anarchists” from the United States. In his speech to Congress, President Theodore Roosevelt underscored this concern, stating “I earnestly recommend to the Congress that in the exercise of its wise discretion it should take into consideration the coming to this country of anarchists or persons professing principles hostile to all government.”³⁰

After a British national challenged the constitutionality of the statute before the Southern District of New York, the US Supreme Court (“the Court”) ascertained the constitutionality of the immigration powers vested in Congress (*US ex rel Turner v Williams*, 1904).³¹ The Court, moreover, stressed the power of Congress to exclude migrants based on their race, stating that “No limits can be put by courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens.”³²

Though Canada has historically been a country of immigrants,³³ the Cabinet of Prime Minister Sir Wilfrid Laurier approved an immigration ban in 1911 excluding immigrants of African descent:

²⁶ *Ibid.* The *Acts* further established systematic controls on immigrants’ statements and public declarations criticizing the federal government.

²⁷ *Alien Enemies Act*, 50 USC § 21 (1918).

²⁸ President McKinley was shot on September 6 and died on September 14, 1901. See History, “The Assassination of President William McKinley” *History Stories* (6 September 2016), online: <www.history.com/news/the-assassination-of-president-william-mckinley> [perma.cc/68NE-44ZH]. See also LeRoy Parker, “The Trial of the Anarchist Murderer Czolgosz” (1901) 11:2 *Yale LJ* 80 at 83–94.

²⁹ *Anarchist Exclusion Act*, Pub L No 57-162, 32 Stat 1213 (1903).

³⁰ See President Theodore Roosevelt, “December 3, 1901: First Annual Message” (last visited 15 January 2021), online: *Miller Center* <millercenter.org/the-presidency/presidential-speeches/december-3-1901-first-annual-message> [perma.cc/T5PT-PA9B].

³¹ *US ex rel Turner v Williams*, 194 US 279 (1904).

³² *Ibid.* at 291 (quoting Justice Shiras’ opinion in *Wong Wing v United States*, 163 US 228 (1896)).

³³ After the Confederation, the first census in Canada reported 3.5 million people in 1871. According to the last census (2016), Canada’s population has reached more than 35 million. 1 in 5 persons in Canada are immigrants with roots in more than 200 countries. Statistics Canada, “Population Size and Growth in Canada: Key Results from the 2016 Census” (8 February 2017), online (pdf): *Statistics Canada* <statcan.gc.ca/n1/en/daily-quotidien/170208/dq170208a-eng.pdf?st=NUR0xhMh> [perma.cc/68JN-2BCP]; Statistics Canada, “Immigrant Population in Canada, 2016 Census of Population” (25 October 2017), online: *Statistics Canada* <statcan.gc.ca/n1/pub/11-627-m/11-627-m2017028-eng.html> [perma.cc/VW5B-XPNM] [Fact sheet/infographics].

His Excellency in Council, in virtue of Sub-Section (c) of Section 38 of the Immigration Act, is pleased to Order and it is hereby Ordered as follows: ... For a period of one year from and after the date hereof the landing in Canada shall be and the same is prohibited of any immigrants belonging to the Negro race, which race is deemed unsuitable to climate and requirements of Canada.³⁴

During the 19th and 20th centuries, the White-European dominant group in the United States used immigration laws (“Exclusion Acts”) to preclude immigrants from China, Japan, South Asia, and Latin America,³⁵ while adopting racially oriented policies (“Segregation”) to dilute their constituency power as minority groups (e.g. education).³⁶

In Canada, the White-European dominant social group instead used immigration policies of selection, quarantine, integration³⁷ in pre-selected areas where Chinese migrants and immigrants were allowed to live and work, while enacting public policies that fostered legal and social inequalities (e.g. authorising that Chinese migrants be paid far less than Canadian citizens).³⁸

The first shift on immigration law and policy (associated to the security of States) in Europe and North America took place within the sociopolitical context of World War I. As the number of migrants arriving to the United States and Canada decreased during this period, the exclusion of migrants from certain nations increased (e.g. Germany and China).³⁹ Controlling the population entering the host country gradually became a critical security asset, leading to racially and politically oriented immigration systems.⁴⁰

³⁴ Order in Council - Décrets du Conseil (12 August 1911), Library and Archives Canada (RG 2-A-1-a, vol 1021, PC 1911-1324), online: <pier21.ca/research/immigration-history/order-in-council-pc-1911-1324> [perma.cc/MT3E-6CPG].

³⁵ See Department of Commerce and Labor, *Facts Concerning the Enforcement of the Chinese Exclusion Laws* (Washington, DC: Government Printing Office, 1906) at 8, online: *Harvard Library* <curiosity.lib.harvard.edu/immigration-to-the-united-states-1789-1930/catalog/39-990067798120203941> [perma.cc/P3RP-AXVN]; Erika Lee, “The ‘Yellow Peril’ and Asian Exclusion in the Americas” (2017) 76:4 *Pacific Historical Rev* 537 at 537, 556 (describing exclusion of Chinese, Japanese, and South Asians in the United States and the Americas); Marc R Rosenblum & Kate Brick, “US Immigration Policy and Mexican/Central American Migration Flow: Then and Now” *Migration Policy Institute* (August 2011) at 3, 5 (describing US immigration policies restrictions on Mexican and Central American immigrants in the 20th century).

³⁶ See David Theo Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (Oxford: Wiley-Blackwell, 2009) at 6, 351 (describing migration as “racial Latinoamericanization” and “racial Europeanization”) [Goldberg].

³⁷ Huhua Cao & Olivier Dehoorne, “Changing Territorial Strategies: Chinese Immigrants in Canada” in Huhua Cao & Vivian Poy, eds, *The China Challenge: Sino-Canadian Relations* (Ottawa: University of Ottawa Press, 2011) at 222 (describing Canada’s immigration laws on Chinese migrants during the 20th century).

³⁸ Beverly-Jean M Daniel, “Critical Discussion of Terms” in Beverly-Jean M Daniel, ed, *Diversity, Justice, and Community: The Canadian Context* (Toronto: Canadian Scholars’ Press, 2016) 9 at 19.

³⁹ Following the US Declaration of War to Germany in 1917, public opinion and policy shifted in the United States with respect to immigrants. This led Congress to pass the *Emergency Quota Act of 1921* and the *Immigration Act of 1924* creating a system of quotas to admit foreigners based on the existing population (using census data of 1910 and 1890, respectively), while promoting immigration from North-western Europe and deterring it from Asian and Eastern Europe. See *Emergency Immigration Act of 1921*, Pub L 52-5, 42 Stat 5 (1921); *Immigration Act of 1924*, Pub L 68-139, 43 Stat 153 (1924) [Act of 1924].

⁴⁰ See Goldberg, *supra* note 36 at 71-73. Immigrants were controlled not merely at the point of entry (admissibility) but also through segregation as members of ethnic minorities within host countries. See

Both the number of Chinese migrants and the likelihood of immigrants from enemy states settling in the United States and Canada shaped these countries' immigration systems.

In due course, migrants from certain regions (West Europe and North America) and races (White European descent) were preferred by western countries while the entry of immigrants from Latin America, East Europe, Africa, and Asia was restricted.⁴¹ Although some restrictions appeared legitimate and relatively justified based on national security concerns (foreign nationals from enemy countries in times of war, e.g. Japanese citizens living in the US during World War II),⁴² legal restrictions on immigrants and refugees appeared nonetheless steadily intertwined with racially oriented public-policy controls to prevent migrants from threatening not merely the security of the State but also the legal, political, electoral, economic and social interests of the dominant group in the host country.⁴³

The conceptualization of refugees as a distinct legal and sociopolitical phenomenon finds its roots in the first ethnic persecutions of the 20th century.

The Armenian Genocide constitutes the first historic event to influence the legal construction of the Post-war Refugee Paradigm, propelling the newly established international legal order under the League of Nations to provide an institutional response to a relatively novel type of migrants: persecuted minorities and political dissidents. The Armenian Genocide was defined as the massive atrocities against, as well as ethnic annihilation and deportation of, the Armenian Christians and other minorities (Greeks and Assyrians) living across the Ottoman Empire. The Armenian Genocide aimed to carry out the Turkification of Anatolia and the sociopolitical and cultural rejection

also Douglas S Massey, "Confronting the Legacy of American Apartheid" in Susan M Wachter & Lei Ding, eds, *Shared Prosperity in America's Communities* (Philadelphia: University of Pennsylvania Press, 2016) at 91 (comparing different levels of segregation on European immigrants during the late 19th century).

⁴¹ *Act of 1924*, *supra* note 39. Setting an annual cap of 154,227 immigrants for the Eastern Hemisphere.

⁴² In World War II, President F D Roosevelt ordered the confinement of 100 thousand Japanese citizens living in the United States. Congress further passed an Act authorizing the establishment of military areas to hold Japanese nationals. National Archives, Executive Order 9066 (19 February 1942), Washington, DC, National Archives and Records Administration, online: *National Archives Catalog* <catalog.archives.gov/id/5730250> [perma.cc/DX4E-D5GH]; *Military Zones Act*, Pub L No 77-503, 56 Stat 173 (1942) [codified as amended at 18 USC 97(a)]. See also *Korematsu v United States*, 323 US 214 (1944), 65 S Ct 193 (refuting the claim whereby seclusion of Japanese nationals was motivated on racial grounds, while affirming the constitutionality of "rational concern" provisions in times of war).

⁴³ Social sciences studies offer ample proof on racially oriented laws and public policies designed by the dominant social group (institutional power) to control racial-groups' interaction (acceptable migrants/immigrants) and racial-groups' development (acceptable minority rights). See Claudia Goldin, "The Political Economy of Immigration Restriction in the United States, 1890 to 1921" in Claudia Goldin & Gary D Libecap, eds, *The Regulated Economy: A Historical Approach to Political Economy* (Chicago: University of Chicago Press, 2014) at 223-38 (describing institutional and policy restrictions on immigrants); Grace Wambu & Zandile P Nkabinde, "Immigrants' Participation in American Elections" (2017) 18:1 *The Academic Forum* 20 at 23 (analysing political restrictions on immigrants); Frances Henry & Carol Tator, *The Colour of Democracy: Racism in Canadian Society* (Toronto: Thomas Nelson, 2010) at 60 (analysing the interplay of racism vis-à-vis Chinese Canadians).

of a multi-ethnic society (1915-1916).⁴⁴ It is estimated that one-and-a-half million Armenians were killed as over two million⁴⁵ fled their homeland to seek protection in more than 20 countries.⁴⁶ The atrocities committed by the Young Turks were described as “race extermination”. A telegram from US Ambassador Henry Morgenthau to US State Secretary Robert Lansing (16 July 1915), states that “Deportation of and excesses against peaceful Armenians is increasing and from harrowing reports of eye witnesses it appears that a campaign of race extermination is in progress under a pretext of reprisal against rebellion.”⁴⁷

The Russian Civil War (1918-1921) was akin to the emergence of international refugee law. This war is described as the systematic exclusion and gradual expulsion of dissidents and minorities opposing the Bolshevik Government that ended the Romanov Empire in 1917, which led at least one-and-a-half million Russians to flee the country. The scale of the atrocities committed, along with the forced migration of millions of Russians and Armenians led to an empirical reference to “refugees” as an identifiable group of people fleeing ethnic, religious and political persecution whose legal protection by other countries had not been recognised by law.

In 1921, the recently created League of Nations stated that Russians who had left their home country did not thereby acquire another nationality but instead a migratory condition known as “refugee” status.⁴⁸ It is estimated that

⁴⁴ Atrocities against the Armenian Christian population included executions, rape, abduction, torture and starvation, which were categorized as crimes against humanity and civilization (“Genocide”). These atrocities have been officially recognized by Uruguay (1965), Italy (2000), France (2001), the Netherlands, Argentine, Canada (2004), United States (2007), and Germany (2015). See Europe, “La Reconnaissance du Genocide Armenien dans le Monde”, *Le Monde* (5 March 2010), online: <lemonde.fr/europe/article/2010/03/05/la-reconnaissance-du-genocide-armenien-dans-le-monde_1315138_3214.html> [perma.cc/46CH-CYR5]; France 24, “France Marks First National Commemoration of Armenian Genocide”, *France 24* (24 April 2019), online: <france24.com/en/20190424-france-national-commemoration-armenian-genocide> [perma.cc/4GE5-HTFR]; “Lammert on the 100th Anniversary of the Armenian Massacre” (24 April 2015), online: *Deutscher Bundestag* <www.bundestag.de/en/documents/textarchive/kw17_armenier-371446> [perma.cc/XZ84-4GFJ]; US President Joe Biden, “Statement by President Joe Biden on Armenian Remembrance Day” (24 April 2021), online: *The White House* <whitehouse.gov/briefing-room/statements-releases/2021/04/24/statement-by-president-joe-biden-on-armenian-remembrance-day/> [perma.cc/TF3Z-TLFB]. See also Committee on Foreign Affairs, “Affirmation of the United States Record on the Armenian Genocide Resolution” (22 September 2010) at 5 (describing human rights violations committed), online (pdf): *Congress* <www.congress.gov/111/crpt/hrpt622/CRPT-111hrpt622.pdf> [perma.cc/69W3-C5F6] [Committee on Foreign Affairs]; Najwa Nabti, “Legacy of Impunity: Sexual Violence against Armenian Women and Girls during the Genocide” in Alexis Demirdjian, ed, *The Armenian Genocide Legacy* (New York: Palgrave Macmillan, 2016) 118 at 122.

⁴⁵ Committee on Foreign Affairs, *ibid* at 4.

⁴⁶ See Rouben Paul Adalian, “Armenian Genocide (1915-1923)”, online: *Armenian Genocide* <www.armenian-genocide.org/genocide.html> [perma.cc/L3AV-CA79].

⁴⁷ See “US Department of State Remarks on the Armenian Genocide” (1983) at 5, online (pdf): *Ronald Reagan Presidential Library* <www.reaganlibrary.gov/public/digitalibrary/smf/nsc-politicalandmilitaryaffairs/fortierd/R19/turkisharmenianfile.pdf> [perma.cc/SA3Q-QDRG].

⁴⁸ League of Nations, “Conference on the Question of Russian Refugees” (1921) 2:8 League of Nations Official Journal 899 at 900-02.

more than 10 million people were forcibly displaced during World War I⁴⁹ and, although the number of refugees remains inexact due to the absence of demographic references,⁵⁰ data indicate that more than three million people were at some point refugees, that is, migrants crossing international borders after fleeing their home country due to persecution.⁵¹

Over time, the focus of immigration systems gradually moved away from sociocultural and racial policies and towards security concerns. The protection of national security vis-à-vis both migrants and immigrants from enemy States led the United States,⁵² Canada,⁵³ and United Kingdom⁵⁴ to authorize espionage against “the red peril”;⁵⁵ immigrants whose activities and ideas were viewed by host countries as direct threat to the stability of government. In fact, the notion of “enemy aliens” representing a “national danger” was eventually printed in legislation that regulated government powers to control the entry of migrants and immigrants.⁵⁶

⁴⁹ Peter Gatrell, “Refugees” in Ute Daniel et al, eds, *International Encyclopedia of the First World War: 1914-1918* (8 October 2014) at 2, online (pdf): <encyclopedia.1914-1918-online.net/pdf/1914-1918-Online-refugees-2014-10-08.pdf> [perma.cc/Q75L-8AE7].

⁵⁰ At the time, there was no international agency (e.g. UNHCR) with the ability to collect demographic data on the number of refugees (global figure) on the move. As a result, scholars nowadays use estimates arising out of each population and specific migration. The most recurrent data indicate more than 3 million refugees, but there are estimates of up to 6 million refugees in Russia. See Paul Spiegel & Ginger Golub, “Refugees and Health: Lessons from World War 1” (2014) 384:8 *The Lancet* 1644; see also Peter Gatrell, “Europe on the Move: Refugees and World War One” (29 January 2014), online: *British Library* <www.bl.uk/world-war-one/articles/refugees-europe-on-the-move#> [perma.cc/Q39L-EK2Z].

⁵¹ Spiegel & Golub, *supra* at 1644. Moreover, it is estimated that nearly 2 million Armenians were forced to leave their homeland during the Armenian Genocide. Reports of the Netherlands, British and French governments further indicate that at least 1.5 million refugees from Belgium fled to these countries during the Great War. Committee on Foreign Affairs, *supra* note 44; Martin Banks, “How Belgians Became Refugees During the First World War”, *Brussels Times* (17 December 2018) (citing government sources and historians), online: <brusselstimes.com/all-news/magazine/52562/how-belgians-became-refugees-during-the-first-world-war/> [perma.cc/N6XB-X282]. In 1919, the International Committee of the Red Cross (ICRC) repatriated more than 425 thousand Russian, Austrian, German and Hungarian citizens held as POWs during the Great War. See International Committee of the Red Cross, “A Look Back at the First World War’s Most Vulnerable” (19 January 2018), online: *ICRC* <www.icrc.org/en/document/look-back-world-war-ones-most-vulnerable> [perma.cc/PT39-WKE9].

⁵² See Matthew Stibbe, “Enemy Aliens and Internment” in Ute Daniel et al, eds, *International Encyclopedia of the First World War 1914-1918* (8 October 2014) at 2, online (pdf): <encyclopedia.1914-1918-online.net/pdf/1914-1918-Online-enemy_aliases_and_internment-2014-10-08.pdf> [perma.cc/SY7G-25AJ]; *Espionage Act of 1917*, Pub L No 65-24, 40 Stat 217 (1917); see also *Schenk v United States*, 249 US 47 (1919) (upholding the constitutionality of the *Espionage Act of 1917* following First-Amendment constitutional challenge on freedom of speech).

⁵³ Fears on the influence of the Bolshevik Revolution led the Canadian Government to authorize law-enforcement agencies to spy on ethnic groups and the so-called “radical left”. See J L Granatstein, “After the Fighting, a Nation Changed”, *Maclean’s* (1 November 2018), online: <www.macleans.ca/after-fighting-nation-changed/> [perma.cc/4PYL-X3Q2].

⁵⁴ The UK Parliament passed the *Aliens Restriction Act of 1914* authorizing the espionage of suspicious immigrants and ordering the registration of aliens from enemy States (Germany, Hungary, Austria) entering and living in the country. See *Aliens Restriction Act 1914* (UK), 4 & 5 Geo V, c 12 [Aliens Restrictions Act].

⁵⁵ See Michelle Murray Yang, *American Political Discourse on China* (New York: Routledge, 2017) at 5 (explaining the sociopolitical implications of the term in the United States).

⁵⁶ *Aliens Restriction Act 1914*, *supra* note 54.

B. Protected Migrants: International Refugee Protection

Although the League of Nations provided the first institutional response to protect millions of forced migrants (persecuted minorities and political dissidents) arriving to Europe from Russia and Armenia during the first quarter of the 20th century, international refugee protection only began after War World II through United Nations resolutions, convention and protocol. Through these efforts, the United Nations gave rise to international refugee law within the context of democratic and human rights protections. In this sense, the Post-War Refugee Paradigm benefits from the construction of an international legal order in general (human rights protections) and the development of international refugee protection in particular (non-refoulement, non-discrimination and non-penalization principles). As such, the Post-War Refugee Paradigm was conceptualized and framed within the legal principles and moral values of human dignity, liberty, and equality.⁵⁷ The Post-war Refugee Paradigm is therefore characterized by the protection of minorities and political dissidents fleeing dissimilar yet reproachable forms of persecution deemed to violate their human dignity, liberty and equality.

Some of the most significant changes leading to the Post-war Refugee Paradigm occurred during the Interwar period (1918-1939). The previously reigning principle of reciprocity, which held that the benefits granted to or penalties imposed on the citizens of a State are reciprocally granted to or imposed on the citizens of other States,⁵⁸ was gradually replaced, following the emergence of the League of Nations and the appointment of Special High Commissioners for Refugees,⁵⁹ by either the naturalization or repatriation of migrants whose identity could not be clearly established through routine measures. The number of refugees produced during the Russian Civil War led the allies to establish a different type of document to recognize the temporary migratory status of Russian (and later Armenian) refugees known as the *Nansen Passport* or *Certificate*.⁶⁰

World War II led to the highest number of refugees on record (more than 40 million).⁶¹ The war raised the need for peace and stability among States

⁵⁷ The political context and the atrocities committed during the Armenian Genocide, the Russian Civil War, and War World I and II became the triggering events placing human dignity at the heart of the international legal system – which includes the human dignity of migrants. See Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge: Cambridge University Press, 2015) at 41-66 (reflecting on the role of human dignity as foundational legal principle).

⁵⁸ See generally Robert O Keohane, “Reciprocity in International Relations” (1986) 40:1 Intl Organization 1.

⁵⁹ Prior to the establishment of the UN High Commissioner for Refugees, the League of Nations appointed two special UN High Commissioners; that is, one for Russian, Armenian, Assyrian, Christian and Czechoslovakian Refugees (1922), and another for German Refugees (1933). See Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Burlington: Ashgate, 2014) at 18.

⁶⁰ *Ibid* at 19.

⁶¹ Mona Chalabi, “What Happened to History’s Refugees?” (25 July 2013), online (blog): *The Guardian* <theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees> [perma.

and triggered critical reflections on individual rights as the preconditions of dignity, tolerance, equality and liberty among people and countries. Both the Nuremberg Trials and the massive migration movements of the Post-war Era pushed States to implement domestic and international legislation aimed at settling millions of refugees (e.g. *US Displaced Persons Act of 1948*,⁶² *UN Relief and Rehabilitation Program UNRRA*,⁶³ *UN High Commissioner for Refugees UNHCR*⁶⁴).65

I maintain that despite the lack of prior legal connection (duty to protect), the humanitarian, legal, economic and political protection accorded to migrants fleeing persecution constituted a *moral choice* for potential and future host countries, which legal effects (rights and duties) transcended moral-legal assimilations on civility, compassion, and humanity. In this context, the eventual recognition of this rather unprecedented legal protection through the *Convention Relating to the Status of Refugees* (“1951 Refugee Convention”)⁶⁶ defines the very assertion of the Post-war Refugee Paradigm of the 20th century. This paradigm, in particular, is characterized by the development (via jurisprudence and legislation) of gradually identifiable grounds of legal protection (race, religion, national origin, political opinion, torture, and membership in a persecuted social group),⁶⁷ thereby uncovering a set of aspirational values (human dignity, liberty, equality) aimed at protecting foreign citizens.⁶⁸

III. The Modern Refugee Paradigm: Suspected Migrants

The transition from the Post-war Refugee Paradigm to the Modern Refugee Paradigm lies in the sociopolitical perception and the legal treatment of refugees and asylum seekers. While the protection and human dignity of forced migrants was a paramount attribute of the Post-war Refugee Paradigm, mistrust and suspicion toward both immigrants and forced migrants became identifiable trends in the Modern Refugee Paradigm.

Under the Modern Refugee Paradigm (*middle ebb*), refugees were no

cc/2AER-9BV9]; see also Colin Bundy, “Migrants, Refugees, History and Precedents” (January 2016) 51 *Forced Migration Rev* 5 at 6 (indicating more than 40 million refugees in Europe by May 1945).

⁶² *Displaced Persons Act of 1948*, Pub L No 80-774, 62 Stat 1009 (1948).

⁶³ *United Nations Relief and Rehabilitation Administration (UNRRA)*, 1 February 1946, A/RES/6.

⁶⁴ *United Nations Commissioner for Refugees (UNHCR)*, 14 December 1950.

⁶⁵ See James L Carlin, “Significant Refugee Crises Since War World II and the Response of the International Community” (1982) 3:1 *Mich J Intl L* 3 (describing reactions towards refugees in the wake of World War II).

⁶⁶ *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force on 22 April 1954) [Refugee Convention].

⁶⁷ For example, not only did the Supreme Court of Canada acknowledge legal grounds established by the 1951 *Refugee Convention* (art 33), but further recognized torture as legally proscribed conduct in Canada. See *ibid* at art 33; *Suresh v Canada (Citizenship and Immigration)*, 2002 SCC 1 at paras 5–6, 68 [Suresh].

⁶⁸ See generally James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014).

longer viewed as victims of persecution but instead as suspects subject to prosecutorial treatment (detention, deportation) depending upon the migrant's race, religion, nationality, political opinion, or membership in a particularly and gradually targeted group (refugees). As such, this paradigm is defined by the characterization of immigrants and refugees as national security threats through a series of events in the second half of the 20th century and the beginning of the 21st century. These events include the end of the Cold War, the development of international terrorism, and the resulting drivers of prosecution (espionage, terrorism) and exclusion (immigration law violations).

A. Drivers of Prosecution: National Security and International Terrorism

The first major recharacterization of migrants took place during the Cold War. The sociopolitical context of the Cold War led to mistrust towards enemy States and their citizens.⁶⁹ A war fought through intelligence and counterintelligence measures used immigration as a weapon for the infiltration of foreign countries' national security apparatuses. Given the growing social and political mistrust between the East and the West following the ideological restructuring of Europe, the movement of people from one part of the ideologically influenced world to the other eventually became a national security concern.⁷⁰ In this regard, the US Supreme Court upheld the constitutionality of the powers vested by Congress in the executive branch to deny entry, detain, and expel migrants and immigrants coming from countries whose political affiliation⁷¹ represented a threat to government stability (e.g. *Carlson v Landon* 1952,⁷² *Kleindienst v Mandel* 1972⁷³).

⁶⁹ Nathan Glazer, "Dual Citizenship as a Challenge to Sovereignty" in John D Montgomery & Nathan Glazer, eds, *Sovereignty Under Challenge: How Governments Respond* (New York: Routledge, 2017) 33 at 40 (describing immigration reforms and attitudes in the United States during the Cold War).

⁷⁰ See Deborah Welch Larson, *Anatomy of Mistrust: U.S.-Soviet Relations During the Cold War* (Ithaca: Cornell University Press, 1997) at 1-38. See also Meredith Oyen, *The Diplomacy of Migration: Transnational Lives and the Making of U.S.-Chinese Relations in the Cold War* (Ithaca: Cornell University Press, 2015) at 10 (describing Chinese scholars detained in the United States and Americans imprisoned in China).

⁷¹ *Immigration National Act of 1965 (INA)*, Pub L No 89-236, § 212(a)(3)(D), 79 Stat 911, (1965) (modified by the *Immigration Act of 1990*) [INA].

⁷² *Carlson v Landon*, 342 US 524 (1952) (holding constitutional the detention of resident aliens without bail pending decisions on deportability, while asserting immigration authorities' power to expel communist aliens from the United States).

⁷³ *Kleindienst v Mandel*, 408 US 753 (1972) (upholding the constitutional authority of the United States Attorney General to deny entry to aliens based on their ideology or political opinion following Congress plenary power to exclude migrants). *Mandel* became a legal basis for modern statutory discretion to deny entry and deport certain inadmissible aliens (INA, § 1182(f)). *Mandel* further set forth a lower constitutional review (Rational Basis Test) to assess national security risks concerning aliens, while precluding courts from asserting migrants' First Amendment rights. The Rational Basis Test, in short, ensues as a doctrinal elaboration in American law that aims to ascertain the constitutionality of government action through a defining legal inquiry: specifically, is the federal or State action being challenged (e.g. statute, ordinance)

Both the Cold War and international terrorism posed similar challenges to immigration systems and, in the process, to the national security of countries where suspect spies or terrorists were arriving. One spy was sufficient to infiltrate the national security of a country and obtain State secrets.⁷⁴ Similarly, of the millions of migrants arriving to the United States every year, only few were needed to commit the terrorist attacks of September 11th, 2001 (“9/11”), the quintessential modern-era terrorist attack which caused the deaths of 3,218 people (i.e. 2,977 killed during the attacks in New York City, Pennsylvania and DC,⁷⁵ plus 241 NYPD officers deceased since 9/11 due to related illnesses⁷⁶).

Still, the idea that either spies or terrorists aim to use asylum systems as the most effective way to attack host countries no longer holds in today’s world because both enemy countries and terrorist organizations use nowadays technology as a far more efficient tool not only to spy on other countries but also to inflict greater harm over their national infrastructure (e.g. Russia’s attack on the US electoral system).⁷⁷ Furthermore, some terrorist organizations use technology to turn the host country’s citizens into their radicalized operatives (self-radicalized and lone-wolf attacks) without even establishing a direct connection with such operatives (e.g. terrorist attacks in Oslo 2010⁷⁸ and Orlando 2016⁷⁹).⁸⁰

While host countries’ national security interests are recognised under international law (including under the *1951 Refugee Convention*),⁸¹ structural characterizations of threats to such interests are defined by and within each

imposing arbitrary restrictions on liberty or drawing unjustifiable distinctions among people in a way that it appears not merely foreign but inherently unreasonable vis-à-vis its contended constitutional legitimate purpose? For a more detailed description of this test see *New York State Board of Elections v Lopez Torres*, 552 US 196, 209 (2008) (Stevens J, concurring).

⁷⁴ Cases of detected spies using immigration systems to enter Canada and the United States during the Cold War were rather scarce. See Richard C S Trahair & Robert L Miller, *Encyclopedia of Cold War Espionage, Spies, and Secret Operations* (New York: Enigma Books, 2009) at 255.

⁷⁵ “September 11: Photos of the Worst Terrorist Attack on U.S. Soil” (11 September 2020), online: *History* <www.history.com/news/september-11-attacks-photos> [perma.cc/G62Y-MXT9].

⁷⁶ Aaron Katersky & Sejal Parekh, “241 NYPD Officers Have Died from 9/11 Illnesses”, *10 Times the Number Killed in the World Trade Center Attack*, *ABC News* (9 September 2019), online: <abcnews.go.com/US/241-nypd-officers-died-911-illnesses-10-times/story?id=65430201> [perma.cc/82R9-Z7KQ].

⁷⁷ US Government Publishing Office, “Report of the Select Committee on Intelligence United States Senate on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election – Volume 1: Russian Effort Against Election Infrastructure with Additional Views” (2020) at 21 (describing Russian interference in US elections), online (pdf): *US Senate Select Committee on Intelligence* <www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf> [perma.cc/MA53-WGPP].

⁷⁸ See Ingrid Melle, “The Breivik Case and What Psychiatrists Can Learn From It” (2013) 12:1 *World Psychiatry* 16 at 18–21 (profiling ‘lone wolf’ terrorist attack in Oslo in 2010).

⁷⁹ See Khalid A Beydoun, “Lone Wolf Terrorism: Types, Stripes and Double Standards” (2018) 112 *Nw UL Rev* 1213 at 1216–17 (describing ‘lone wolf’ classification in the context of the terrorist attack in Orlando in 2016).

⁸⁰ Public Safety Canada, “2016 Public Report on the Terrorist Threat to Canada” (2016) at 15 (identifying the use of social media to spread terrorist propaganda), online (pdf): *Government of Canada* <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2016-pblc-rpr-trrrst-thrt/2016-pblc-rpr-trrrst-thrt-en.pdf> [perma.cc/6]LH-6RMN].

⁸¹ Refugee Convention, *supra* note 66, art 9.

country's legal system.⁸²

Gradually, host countries moved from restricting “enemy aliens” to detaining “suspected aliens”. Though terrorism was not initially considered a legal ground affecting the admissibility, exclusion, or removal of foreign nationals entering the United States, Congress included “terrorist activities” as grounds for inadmissibility and deportability after the terrorist bombing of the World Trade Centre in New York City in 1993.⁸³ However, it was not until the 9/11 Commission Report singled out critical gaps on national security between intelligence and immigration services⁸⁴ that Congress extended inadmissibility and deportability grounds for aliens to a greater circumspection of relationships and activities (planning, funding, supporting, facilitating or perpetuating terrorist activities).⁸⁵

The second and most important recharacterization of migrants (first as “potential terrorists”, then as “foreign threats”) occurred in response to international jihadist-related terrorism. 9/11 was a critical event in the shifting of the relationship between immigration and national security and the consequent shifting of political discourse, the perception on migrants in general and refugees in particular – affecting legal systems around the world. In response to 9/11, 140 countries changed national security and immigration laws.⁸⁶

Less than two weeks after 9/11, the US Government declared the global War on Terror, calling for an international military campaign against terrorist organizations (e.g. Al-Qaeda, Tehrik-i-Taliban, the Taliban, the Islamic State) and their State sponsors.⁸⁷

The US Congress then passed the *USA Patriot Act*⁸⁸ (expanding government surveillance programs as well as funding and institutional cooperation

⁸² The United States, for instance, developed its institutional infrastructure to assess national security threats during the Postwar Era, which included the National Security Council (NSA), the Central Intelligence Agency (CIA), and the National Security Resources Board (NSRB). See *National Security Act of 1947*, Pub L No 80-235, 61 Stat 496 (1947) (codified 50 USC 15; amended on 19 January 2018).

⁸³ The US Congress enacted provisions on terrorist activities committed by aliens as well as on special witness protection for foreign nationals informing on terrorist activities through the nonimmigrant visa “S”. See *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, Pub L No 104-132, 110 Stat 1214 (1996).

⁸⁴ “The 9/11 Commission Report” (2004) at 256, online (pdf): *National Commission on Terrorist Attacks* <www.9-11commission.gov/report/911Report.pdf> [perma.cc/CXY6-M7K3] [9/11 Report].

⁸⁵ Michael John Garcia & Ruth Ellen Wasem, “Immigration: Terrorist Grounds for Exclusion and Removal of Aliens” (12 January 2010) at 4, online (pdf): *Congressional Research Service* <fas.org/sgp/crs/homesecc/RL32564.pdf> [perma.cc/H52C-KWQE].

⁸⁶ Human Rights Watch, “In the Name of Security: Counterterrorism Laws Worldwide Since September 11” (June 2012), online: *Refworld* <www.refworld.org/docid/4ff6bd302.html> [perma.cc/FTZ4-93P8].

⁸⁷ US President George W Bush, “Transcript of President Bush’s Address”, *CNN* (21 September 2001), online: <edition.cnn.com/2001/US/09/20/gen.bush.transcript/> [perma.cc/27GN-M3KD] [Transcript].

⁸⁸ *USA Patriot Act*, Pub L No 107-56, 115 Stat 272 (2001) (codified 18 USC 113B). The Act added immigration authorities’ provisions to ascertain inadmissibility and deportability of aliens based on terrorist activities (INA, § 212(a)(3)(B), (F)). Moreover, Title IV of the *Patriot Act* criminalized the act of “engaging” in terrorist activities.

mechanisms to prevent and investigate terrorism),⁸⁹ the *Homeland Security Act* (creating the Department of Homeland Security),⁹⁰ and the *REAL ID Act* (providing guiding principles for the War on Terror and funding for military operations).⁹¹

Eventually, the identification of migrants in this country as a national security threat led the Trump administration to develop the world's most aggressive legal migrant reception system, instituting policies which call for the detention of migrant children, the separation of migrant families as well as the prolonged detention, temporary expulsion, systematic exclusion and refoulement of asylum seekers.⁹²

The doctrine of the War on Terror was steadily extended throughout the world. After 9/11, the Philippines, Singapore, Malaysia, and Indonesia launched a systematic crackdown on jihadist terrorists believed to be affiliated to Al-Qaeda.⁹³ After two terrorist attacks in October (Srinagar) and December 2001 (National Parliament), India passed the *India Prevention of Terrorism Act of 2002* ("POTA"), which, due to its vague definition on "terrorism", led to human rights violations across the country.⁹⁴ In fact, more than 100 terrorist attacks occurred in India since POTA was passed, along with a record-high number of human rights violations committed by law enforcement agencies

⁸⁹ The constitutionality of this Act has been challenged due to the "unchecked powers" resulting from the contended institutional enhancement (US Attorney General) of surveillance programs. See "Surveillance Under the USA/Patriot Act" (2018), online: *ACLU* <www.aclu.org/other/surveillance-under-usapatriot-act> [perma.cc/F4HF-HBDN].

⁹⁰ *Homeland Security Act of 2002*, Pub L No 107-296, 116 Stat 2135 (2002) (harmonizing information on terrorist threats through immigration and national security coordination between the Departments of Homeland Security, Justice, and State).

⁹¹ *Real ID Act of 2005*, Pub L No 109-13, 119 Stat 231 (2005).

⁹² Threatening economic sanctions, the Trump administration pressured the Guatemalan Government into signing an agreement by which the latter is considered (despite the country's record on human rights violations and gang violence) a safe third country, precluding thereby migrants passing through Guatemala from seeking asylum in the US. Yet, under international refugee law (art 33 of the 1951 *Refugee Convention*), the refoulement of asylum seekers includes their forced return not only to the country they fled from but to any country where their life may be threatened. See Steve Holland & Sofia Menchu, "Guatemala Agrees to New Migration Measures to Avoid Trump Sanctions Threat", *Reuters* (26 July 2019), online: <reuters.com/article/us-usa-immigration-guatemala/guatemala-agrees-to-new-migration-measures-to-avoid-trump-sanctions-threat-idUSKCN1UL2KR> [perma.cc/DM5U-R5X3]; see also UN High Commissioner for Refugees (UNHCR), "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala" (January 2018) at 14 (describing gang violence in Guatemala), online (pdf): *Refworld* <www.refworld.org/pdfid/5a5e03e96.pdf> [perma.cc/PA3J-R8LL]; Inter-American Commission on Human Rights (IACHR), "Situation of Human Rights in Guatemala" (31 December 2017) at 123 (describing risks migrants face in Guatemala), online (pdf): *Reliefweb* <reliefweb.int/sites/reliefweb.int/files/resources/Guatemala2017-en%20%281%29.pdf> [perma.cc/NPU2-8TAX].

⁹³ This included arrests and interrogations of Muslim citizens in Manila and East Timor. Jayson S Lamchek, *Human Rights - Compliant Counterterrorism: Myth-making and Reality in the Philippines and Indonesia* (Cambridge: Cambridge University Press, 2019) at 210-13 (describing detentions of Muslim citizens in the Philippines and Indonesia as well as diplomatic tensions between the United States, Malaysia, and Singapore).

⁹⁴ *Prevention of Terrorism Act (POTA)*, 2002, art 3(1)(a) (repealed on 21 September 2004).

while acting under the authority of *POTA*.⁹⁵ Still, the Supreme Court of India upheld the constitutionality of *POTA* in 2003 despite acknowledging the rise of the terrorist threat as a defining point both domestically and internationally, stating that “[t]errorism is affecting the security and sovereignty of the nation. It is not State-specific but trans-national.”⁹⁶

In response to 9/11, Canada passed the *Anti-terrorism Act* of 2001 (extending national security powers on preemptive detention and authorising secret trials and surveillance)⁹⁷ and the *Department of Public Safety and Emergency Preparedness Act of 2003* (concentrating Canada’s national security assessment and institutional action in the Department of Public Safety and Emergency Preparedness).⁹⁸ Though these security measures reflected the growing global association between immigrants, migrants, and terrorism, they were soon recognized to be inconsistent with the values underlying the Canadian legal system. In the words of Chief Justice of Canada, Hon. Beverly McLachlin:

Our civil liberties are not accidental accretions borrowed from foreign civilizations. They are deeply rooted in Canada’s own unique history. We cannot deny them without denying our history and ourselves ... we cannot view the problem in terms of “either-or” – either rights or terrorism. Our only option is to fight terrorism while maintaining our constitutional rights and freedoms to the maximum extent possible.⁹⁹

The excessive national-security measures introduced in Canada after 9/11 led to human rights abuses on forced migrants such as prolonged detention, inhumane detention-conditions, due process violations.¹⁰⁰ But, unlike the United States, human rights have gained constitutional status in Canada since 1982.¹⁰¹ Accordingly, the Canadian legal system considers the human rights

⁹⁵ Human rights violations under *POTA* have been reported by NGOs operating in India as well as by UN Special Rapporteurs and State commissions at local level. See Surabhi Chopra, “National Security Laws in India: The Unraveling of Constitutional Constraints” (2015) 17:1 *Oregon Rev of Intl L* 1 at 25–26.

⁹⁶ See C Raj Kumar, “Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties” in Sudha Setty, ed, *Constitutions, Security, and the Rule of Law* (New York: International Debate Education Association, 2014) at 243 (quoting the decision issued by the Supreme Court of India on *POTA*).

⁹⁷ See *Anti-Terrorism Act*, SC 2001, c 41 (assented to 18 December 2001) [*Anti-Terrorism*].

⁹⁸ See *Department of Public Safety and Emergency Preparedness Act*, SC 2005, c 10 (assented to 23 March 2005).

⁹⁹ Beverly McLachlin (Chief Justice of Canada), “Symons Lecture – 2008” (2008), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/spe-dis/bm-2008-10-21-eng.aspx> [perma.cc/9KYX-DSWK].

¹⁰⁰ Between 2003 and 2004, there were 13,413 immigration detainees in Canada. Other deterrence mechanisms include: immigration documents costs, elimination of appeals on asylum proceedings, reduction of legal aid. See François Crépeau & Delphine Nakache, “Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection” (2006) 12:1 *IRPP Choices* 1 at 13–17; Ashifa Kassam, “Immigrant Deaths Expose ‘Legal Black Hole’ of Canada’s Detention System”, *The Guardian* (17 May 2016), online: <theguardian.com/world/2016/may/17/canada-immigration-detention-deaths-border-services-agency> [perma.cc/BEL4-VWT5].

¹⁰¹ The *Canadian Charter of Rights and Freedoms* was integrated within the Canadian constitutional system in 1982. See François Crépeau & Stephen H Legomsky, “North American Responses: A Comparative Study of U.S. and Canadian Refugee Policy” in Susan Kneebone & Felicity Rawlings-Sanaei, eds, *New Regionalism and Asylum Seekers – Challenges Ahead, Studies in Forced Migration* (New York: Berghahn Books,

of migrants as valid constitutional grounds in determining national security threats with respect to suspected migrants arriving to or living in Canada. In the landmark decision *Suresh v Canada* (2002), the Supreme Court of Canada held that:

It would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.¹⁰²

The Canadian legal system does not define the term "terrorism" in any single document. Nor is there a ubiquitous definition common to many disciplines such as constitutional law, criminal law, immigration law, human rights law, or refugee law. However, it is possible to find several legal references and sources within the Canadian legal system.¹⁰³

The *Anti-terrorist Act of 2011* [Bill 51] had been criticized by human rights experts¹⁰⁴ and perceived by the public as invasive, secretive, inhumane and anti-Canadian. The government's surveillance and interception-of-communications powers became a challenge to Canadian courts trying to balance national security needs vis-à-vis human rights values.¹⁰⁵ The result, a more transparent *Anti-terrorism Act* by which government institutions become more accountable as human rights become part of the security assessment concerning immigrants and refugees. In effect, *the Anti-Terrorism Act of 2017* [Bill-59]¹⁰⁶ comes with a comprehensive list of "terrorist activities" provided such assessment is made in relation to similarly applicable restrictions under domestic and international law (e.g. *Canadian Charter of Rights and Freedoms*,¹⁰⁷ *Criminal Code*,¹⁰⁸ *Proceeds of Crime Act*,¹⁰⁹ *Canadian Security Intelligence Act*,¹¹⁰

2007) 137 at 138–42.

¹⁰² *Suresh*, *supra* note 67 at para 4.

¹⁰³ For example, the crime of terrorism is defined in *Canada's Criminal Code* along with related consequences (property forfeiture, aggravated punishment, financing) and terms ("terrorist activity", "terrorist group", "terrorist act"). See *Criminal Code*, RSC 1985, C-46, ss 83.01, 83.02, 83.14, 83.24 [*Criminal Code*].

¹⁰⁴ See generally Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).

¹⁰⁵ See Tamir Israel, "Foreign Intelligence in an Inter-Networked World: Time for a Re-Evaluation" in Michael Geist, ed, *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (Ottawa: University of Ottawa Press, 2015) 71 at 88.

¹⁰⁶ Bill 59, *An act respecting national security matters*, 1st Sess, 42nd Parl, 2019 (the Anti-terrorism Act of 2017) [Anti-Terrorism Act 2017].

¹⁰⁷ *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*].

¹⁰⁸ *Criminal Code*, *supra* note 103, s 83.01.

¹⁰⁹ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17, s 2(1) (assented to 29 June 2000).

¹¹⁰ *Canadian Intelligence Security Service Act*, RSC 1985, c C-23, s 2.

*UN Convention for the Suppression of Financing Terrorism*¹¹¹).¹¹²

Canada's *Immigration and Refugee Act of 2001* [IRPA] further acknowledges both terrorism (as an "inadmissibility ground")¹¹³ and the circumstances in which the terrorist attack occurs.¹¹⁴ This new "integral approach" on national security, human rights, immigration, refugee protection, and terrorism encompasses several layers of security, such as country, citizens, and non-citizens. This approach, moreover, seeks to protect the country's population through the immigration system (not despite the immigration system) by promoting the idea that human rights can only be circumscribed under specific circumstances. Also, according to the proposed balance between national security needs and human rights values, domestic legislation includes both national security threats provisions (*IRPA*, ss 34.1, 98¹¹⁵) and constitutional human rights protections afforded by the *Canadian Charter of Rights and Freedoms*.¹¹⁶

It must be noted, however, that, notwithstanding the legislative progress of the *Anti-terrorism Act of 2017*,¹¹⁷ some legal gaps (preventive and unwarranted detentions)¹¹⁸ and ambiguous provisions (deportation to torture if serious national security threat, the threshold for relevance and admissible evidence in asylum hearings, and the functional-investigative role of the judge) remain.¹¹⁹

The characterization of refugees as a security threat in Europe has evolved within the European immigration system (*Common European Asylum System* [CEAS]¹²⁰) alongside the European integration process¹²¹ through several phases which I describe as legal synergy cycles.

¹¹¹ *International Convention for the Suppression of the Financing of Terrorism*, GA Res 54/109, UNGAOR, 4th Sess (1999) (entered into force on 10 April 2002), online: <www.refworld.org/docid/3dda0b867.html> [perma.cc/3H4A-GJGN].

¹¹² See James C Simeon, "Terrorism Law in Canada: Combatting Terrorism through the Defense of Human Rights" in Satvinder S Juss, ed, *Beyond Human Rights and the War on Terror* (New York: Routledge, 2019) 143 at 144.

¹¹³ *Immigration and Refugee Protection Act*, SC 2001 c 27, s 34(1)(c) (assented to 1 November 2001) [amended and consolidated 19 June 2014] [IRPA].

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, ss 19, 34(1), 98.

¹¹⁶ *Canadian Charter*, *supra* note 107.

¹¹⁷ *Anti-Terrorism Act 2017*, *supra* note 106.

¹¹⁸ This considering ICCPR applies in time of peace and war. *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UNGAOR, 1966, art 9(3), online: <refworld.org/docid/3ae6b3aa0.html> [perma.cc/C5CA-2FD3] [ICCPR].

¹¹⁹ *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] SCR 1053, 1993 CarswellNat 1380 (analysing the scope of judicial investigation powers in immigration and asylum hearings).

¹²⁰ "Common European Asylum System" (last visited 2021), online: *European Commission* <ec.europa.eu/home-affairs/what-we-do/policies/asylum_en> [perma.cc/P3UM-Z]37].

¹²¹ See International Association of Refugee Law Judges European Chapter, "An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis" (August 2016) at 11-13, online (pdf): *European Asylum Support Office* <easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF> [perma.cc/D64N-M9ZB]; EC, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and Mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the member States by a third-country national* [2003] OJ, L 50/1.

The premise of an integrated Europe propelled the development of a common response to a myriad of humanitarian, human rights and national security challenges member states confronted in light of religiously motivated terrorism.¹²²

In the beginning, we find a community of nation-states integrated through sectorial communities and organized by strategic interests (European Coal and Steel Community (“ECSC”), European Atomic Energy Community (“EURATOM”), and European Economic Community (“EEC”),¹²³ in which the asylum system (policies, regulations, practices) remained under the exclusive jurisdiction of member states or, as I describe it, the national sovereignty cycle. Next, we find a gradual transposition of a community of nation-states into a union of member states whose membership hinges on common interests (pillars),¹²⁴ functional policies (freedoms),¹²⁵ and shared values (human dignity, human rights, liberty, equality, solidarity, justice, democracy, respect for the rule of law),¹²⁶ in which asylum becomes not merely a related interest but also eventually a common policy (intergovernmental cooperation within the European Union’s third pillar under the *Treaty of Maastricht of 1992*)¹²⁷ shared by member states, yet attributed to exclusive competences (*Dublin Convention of 1997*)¹²⁸ or, shared sovereignty cycle.

The progressive development of a European Union requiring a different degree of legal synergy (economic and social cohesion under the *Single European Act of 1986*)¹²⁹ in order to function as a territorially connected, socially

¹²² Historical data (2001–2016) show a net increase in the number of incidents and terrorist attacks across Europe since 9/11. Anthony H Cordesman, “Trends in European Terrorism: 1970-2016” (18 August 2017) at 35–55, online: CSIS <www.csis.org/analysis/trends-european-terrorism-1970-2016> [perma.cc/QV3E-GD42] (analysing terrorist attacks in Western Europe); “European Union Terrorism Situation and Trend Report 2019” (2019) at 30, online (pdf): EUROPOL <www.europol.europa.eu/activities-services/main-reports/terrorism-situation-and-trend-report-2019-te-sat> [perma.cc/8R5Q-WBUM] (indicating seven “jihadist terrorist attacks” and sixteen “plots” disarticulated in 2018 at 4, 30).

¹²³ See generally Martin J Dedman, *The Origins and Development of the European Union 1945–2008: A History of European Integration*, 2nd ed (New York: Routledge, 2010).

¹²⁴ The EU was structured on three pillars: the *first pillar* absorbing the European Communities (EC), the *second pillar* fostering common foreign and security policies (CFSP), and the *third pillar* promoting a common space for justice and home affairs (JHA). See “The Pillars of Europe: The Legacy of the Maastricht Treaty After 25 Years” (November 2018) at 10, online (pdf): *Counsel of the European Union* <www.consilium.europa.eu/media/38778/expo_maastricht-brochure_en.pdf> [perma.cc/S56G-EB9V] [EU Pillars].

¹²⁵ See generally Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 5th ed (Oxford: Oxford University Press, 2016).

¹²⁶ Such values were articulated in the *European Charter of Fundamental Rights*. The Preamble of the *European Charter*, in fact, states: “The peoples of Europe, in creating an ever-closer union amongst them, are resolved to share a peaceful future based on common values.” See EC, *Charter of Fundamental Rights of the European Union* [2012] OJ, C 326/391 at 395 (preamble) [*European Charter*].

¹²⁷ EU Pillars, *supra* note 124 at 10.

¹²⁸ *Ibid.* States agreed on asylum requests under EU law provided each member State remains responsible for asylum claims lodged in its jurisdiction, unless provisions concerning family reunification, previous residence, permit of entry, waivers, or precedent orders apply. EC, *Convention determining the State responsible for examining applications for asylum lodged in one of the member States of the European Communities – Dublin Convention* [1997] OJ, C 254/1, arts 4-8, [“Dublin I”].

¹²⁹ See *Single European Act of 29 June 1986*, OJ L 169, p 1–18 (entered into force on 1 July 1987).

coherent and economically integrated union led member states to consider asylum protection within their harmonization goals by developing a common system of legal responsibilities (“Dublin I Regulation”¹³⁰). The system, in short, proposed a transfer of member states’ jurisdiction to the thereby established European Union (supranational jurisdiction within the EU’s first pillar under the *Treaty of Amsterdam of 1997*¹³¹)¹³² or, as I call it, the restricted sovereignty cycle.

Later, we find a higher degree of legal synergy between EU institutions, policies and legal values portraying a consolidated union of member states articulated through regional (European Court of Human Rights [ECtHR]),¹³³ supranational (Court of Justice of the European Union [CJEU]), constitutional (domestic courts), and legislative precedents (European Charter¹³⁴), in which asylum is protected not only as a common interest or policy but as a fundamental right subject to international and supranational restrictions¹³⁵ or, as I describe it, the international sovereignty cycle, a cycle which acknowledges regional human rights precedents and international legal provisions.

Finally, we witness a residual development of a highly contested European Union (by member-states’ authorities and citizens) requiring member states’ commitments vis-à-vis massive migration in Europe and emerging fissures in its increasingly ambivalent (U-Turn policies¹³⁶), detrimental (migrants deaths and smuggling) and inflicted integration system (member states’ rejections and withdrawals). In this sociopolitical context, the often-cited as failed yet common asylum system prompted member states and EU institutions to

¹³⁰ Dublin I, *supra* note 128.

¹³¹ EC, *Treaty of Amsterdam amending the Treaty on the European Union, the Treaties Establishing the European Communities and related Acts*, [1997] OJ, C 340/3, online (pdf): *Eur-Lex* <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997D/TXT&from=EN> [perma.cc/6EY8-3AFD].

¹³² This transition includes the “communitarisation” of *Schengen Acquis* (abolishment of internal and strengthening of external borders) and Title IV EC. See Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (Oxford: Oxford University Press, 2017) at 23 [Moreno-Lax].

¹³³ For example, the European Court of Human Rights has held that returns of refugees to Italy require individual assessments and guarantees of protection concerning the claimant’s vulnerability (e.g. children, women). See *Tarakhel v Switzerland* [GC], No 29217/12 (4 November 2014).

¹³⁴ *European Charter*, *supra* note 126.

¹³⁵ International because the right to asylum under the *European Charter* specifically refers to the *UN Geneva Convention of 1949* and the *UN 1951 Refugee Convention*, on the one hand, and supranational because the EU reception of international refugee law precludes member States from violating the *non-refoulement principle*, on the other. To that end, the *EU Charter of Fundamental Rights* provides that asylum shall be guaranteed based on the *Geneva Convention* and the *UN 1967 Asylum Protocol*, and in accordance with the *Treaty on European Union* and the *Treaty on the Functioning of the European Union*. Article 19(2) of the *European Charter* further precludes the removal of aliens where there is risk of death, torture or degrading treatment or punishment. See *European Charter*, *supra* note 126, arts 15, 19(2).

¹³⁶ See Sally Hayden, “Europe’s Harsh Border Policies Are Pushing Refugees All the Way to Rwanda”, (20 February 2020), online: *Foreign Policy* <foreignpolicy.com/2020/02/20/europes-harsh-border-policies-are-pushing-refugees-all-the-way-to-rwanda/> [perma.cc/UE5M-9GSC].

develop extraterritorial migration controls¹³⁷ (Frontex, EUROSUR, EBCGT).¹³⁸ I refer to this trend as the extended sovereignty cycle.

B. Drivers of Exclusion: Immigration Law Violations

Drivers of exclusion under the Modern Refugee Paradigm are mostly related to immigration law violations. These, in turn, determine whether a foreign national can be admitted or remain in the host country. Modern immigration law violations include a wide range of conducts, activities and situations, such as moral turpitude crimes, criminal convictions, terrorism, money laundering, drug trafficking, human trafficking, prostitution, financial issues, public health or, more broadly, violating certain immigration law restrictions.¹³⁹

Though the Modern Refugee Paradigm is defined by events occurring in the 20th and the beginning of the 21st centuries (the Cold War and terrorism), modern immigration thresholds (inadmissibility and deportability grounds) found their roots in the 19th and 20th centuries. In the United States, criminal convictions (other than political crimes) and prostitution became inadmissibility grounds under the *Page Act of 1875*.¹⁴⁰ Becoming a “public charge” was introduced as an inadmissibility ground in the *Immigration Act of 1882*, which found inadmissible “any convict, lunatic, idiot, or any person unable to take care of himself without becoming a public charge.”¹⁴¹ *The Immigration Act of 1891* expanded the inadmissibility grounds to moral turpitude, immigrants with contagious diseases, convicted felons, polygamists, and financially assisted immigrants.¹⁴² *The Immigration Act of 1917* added new grounds, which included fleeing religious persecution, deficient mental health, and illiteracy. This Act further authorised the deportation of aliens

¹³⁷ Moreno-Lax, *supra* note 132 at 153-99.

¹³⁸ EC, *Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing European Agency for the Management of Operational Cooperation at External Borders of Member States of the European Union* [2004] OJ, L 349/1 [“FRONTEX Regulation”]; see also EC, *Regulation (EC) No 1052/2013 of 22 October 2013, Establishing the European Border Surveillance System (Eurosur)* [2013] OJ, L 295/11; EC, *Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC* [2016] OJ, L 251/1; EU, *Council, Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers* [2007] OJ, L 199/30.

¹³⁹ See e.g. *IRPA*, *supra* note 113, ss 36(1) (serious criminality), 37(1) (organized criminality), 38(1)(a)(b) (public health and safety), 39 (financial reasons), 40(1) (misrepresentation); *INA*, *supra* note 71, §§ 212(a)(2)(A)(i)(I) (moral turpitude), 212(a)(2)(D) (prostitution), 212(a)(C) (drug trafficking), 212(a)(2)(H) (money laundering).

¹⁴⁰ *Page Act of 1875*, Pub L No 43-141, § 5, 18 Stat 477 (1876).

¹⁴¹ *The Immigration Act of 1882*, Pub L No 47-376, § 2, 22 Stat 214 (1882).

¹⁴² *The Immigration Act of 1891*, Pub L No 51-551, § 1, 26 Stat 1084a (1891).

without a statute of limitations for serious immigration law violations.¹⁴³

Canada's *Immigration Act of 1869* established poverty ("pauper immigrants") as well as restrictions on health and age as inadmissibility grounds for foreign nationals.¹⁴⁴ The *Immigration Act of 1910* included as inadmissibility and deportability grounds moral turpitude crimes, prostitution, status as a public charge, receipt of payment by charitable organizations, and violations of immigration law.¹⁴⁵

IV. The Final Refugee Paradigm: Criminals and Undesirable Migrants

The transition from the Modern Refugee Paradigm to the Final Refugee Paradigm is defined by three factors. First, the spread of jihadist-related terrorism in developed countries (e.g. the 2001 terrorist attacks in New York, Washington D.C. and Pennsylvania,¹⁴⁶ the 2004 train bombings in Madrid,¹⁴⁷ the 2005 underground bombings in London,¹⁴⁸ the 2013 Boston Marathon bombing,¹⁴⁹ the 2014 Parliament Hill shooting in Ottawa,¹⁵⁰ the 2015 synchronized attacks in Paris,¹⁵¹ the 2016 Berlin's *Breitscheidplatz* Christmas Market attack,¹⁵² the 2016 airport bombing in Brussels,¹⁵³ the 2017 Turku Market stabbing,¹⁵⁴ the 2018 Amsterdam Central Station attack,¹⁵⁵ the 2019

¹⁴³ *Immigration Act of 1917*, Pub L No 64-301, 39 Stat 874 (1917) [overridden by the Senate].

¹⁴⁴ *Statutes of Canada: An Act Respecting Immigration and Immigrants* (1869), Ottawa, Library and Archives Canada (SC 32-33 Victoria, c 10, s 16), online: <pier21.ca/research/immigration-history/immigration-act-1869> [perma.cc/Z29Y-BPRM] [Act of 1869].

¹⁴⁵ *Statutes of Canada: An Act Respecting Immigration* (1910), Ottawa, Library and Archives of Canada (SC 9-10, Edward VII, c 27, s 3(d)-3(i)), online: <www.pier21.ca/research/immigration-history/immigration-act-1910> [perma.cc/NTW7-KG55] [Act of 1910].

¹⁴⁶ 9/11 Report, *supra* note 84.

¹⁴⁷ See Katie Friesen, "The Effects of the Madrid and London Subway Bombings on Europe's View of Terrorism" (2007), online (pdf): *Review Digest: Human Rights & the War on Terror - 2007 Supplement* <du.edu/korbel/hrhw/researchdigest/terror/europe_2007.pdf> [perma.cc/FH45-WAXX].

¹⁴⁸ *Ibid.*

¹⁴⁹ Inspectors General of the Intelligence Community, Central Intelligence Agency, Department of Justice & Department of Homeland Security, "Unclassified Summary of Information Handling and Sharing Prior to the April 15, 2013 Boston Marathon Bombings" (10 April 2014) at 1, online (pdf): *Office of Inspector General* <oig.dhs.gov/assets/Mgmt/2014/OIG_Bos_Marathon_Bom_Rev_Apr14.pdf> [perma.cc/EQM8-Q5E5].

¹⁵⁰ Naina Bajekal, "The Rise of the Lone Wolf Terrorist", *Time* (23 October 2014), online: <time.com/3533581/canada-ottawa-shooting-lone-wolf-terrorism/> [perma.cc/384R-YPPY].

¹⁵¹ Assemblée Nationale, *Rapport fait au nom de la Commission d'Enquête relative aux moments mis en oeuvre par l'état pour lutter contre le terrorisme depuis le 7 janvier 2015*, 14^{ème} Legislature, No 3922, 5 juillet 2016.

¹⁵² Georg Heil, "The Berlin Attack and the 'Abu Walaa' Islamic State Recruitment Network" (2017) 10:2 CTC Sentinel 1.

¹⁵³ Alissa J Rubin, Aurelian Breeden & Anita Raghavan, "Strikes Claimed by ISIS Shut Brussels and Shake European Security", *The New York Times* (22 March 2016), online: <www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html> [perma.cc/ANQ2-S9ND].

¹⁵⁴ Safety Investigation Authority, *Turku Stabbings on 18 August 2017*, P2017-01, Report 7/2018 (Turku, Finland: SIA) 6.

¹⁵⁵ Bureau of Counterterrorism, "Country Report on Terrorism 2018" (2019) at 101, online: *United States Department of Publication* <www.state.gov/wp-content/uploads/2019/11/Country-Reports-on-Terrorism-

bombing in Lyon,¹⁵⁶ the 2020 beheading of a school teacher outside Paris¹⁵⁷), particularly in 2015 when OECD countries saw a net 650% increase of jihadist-related terrorism.¹⁵⁸

Second, the transition into the Final Refugee Paradigm is defined by an exponential increase in the number of refugees and asylum seekers produced by refugee crises all over the world.¹⁵⁹ In fact, from 2008 to 2018 the number of refugees worldwide increased by 10 million, while the number of asylum seekers increased from 827 thousand to 3.5 million.¹⁶⁰

Third, the transition into the Final Refugee Paradigm is defined by the exacerbation of the “refugee threat” (refugees being characterized as criminals and terrorists and eventually perceived as security threats),¹⁶¹ following the ascension of populist governments in developed host countries.¹⁶²

Under the Final Refugee Paradigm, refugees have gone from being seen as suspects subject to prosecution to being seen as dangerous (“criminals”) and,

2018-FINAL.pdf> [perma.cc/6GWL-KU76].

¹⁵⁶ Kristin Archick & Rachel L. Martin, “Terrorism in Europe” (10 February 2021) at 2, online (pdf): *Congressional Research Service* <fas.org/sgp/crs/terror/IF10561.pdf> [perma.cc/4GGT-554U].

¹⁵⁷ *Ibid.*

¹⁵⁸ Though international terrorism fell 10% in 2015 with respect to the previous year, it did nonetheless increase 650% in OECD countries. Institute for Economics & Peace, “Global Terrorism Index 2016” (2016) at 2–3, online (pdf): *Reliefweb* <www.reliefweb.int/sites/reliefweb.int/files/resources/Global%20Terrorism%20Index%202016_0.pdf> [perma.cc/AG6J-PTEK].

¹⁵⁹ “Global Trends: Forced Displacement in 2019” (2020) at 8, online (pdf): *UNHCR* <unhcr.org/5ee200e37.pdf> [perma.cc/LNW5-CNW7] [UNHCR 2019].

¹⁶⁰ UN High Commissioner for Refugees (UNHCR), “2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons” (2009) at 2, online (pdf): *UNHCR* <unhcr.org/statistics/country/4a375c426/2008-global-trends-refugees-asylum-seekers-returnees-internally-displaced.html> [perma.cc/3SWP-7RUR]; see also UN High Commissioner for Refugees (UNHCR), “Global Trends: Forced Displacement in 2018” (2019) at 2, online (pdf): *UNHCR* <5d08d7ee7.pdf> [perma.cc/7946-BRBF].

¹⁶¹ Though moderated attitudes towards refugees remain – especially with respect to those that tend to assimilate more effectively – there has been an underlying perception (both in the United States and Canada) that refugees are invading the country. See Philip Bump, *supra* note 1; Maura Forrest, “Influx of Irregular Refugees Has Reached Crisis Level for Most Canadians, Poll Suggests” *National Post* (3 August 2018), online: <nationalpost.com/news/politics/influx-of-irregular-refugees-has-reached-crisis-level-for-most-canadians-poll-suggests> [perma.cc/D6AM-ACK9]. See also Helen Dempster & Karen Hargrave, “Understanding Public Attitudes towards Refugees and Migrants” (2017) Overseas Development Institute Working Paper 512 at 10 (describing perceptions and debates on refugees and the security threat), online (pdf): *EU Agenda* <euagenda.eu/upload/publications/untitled-92767-ea.pdf> [perma.cc/NLA5-46LU]; *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UNGAOR, 22nd Sess, UN Doc A/71/348 (2016) 1 at 5 (describing perceptions on refugees and migrants with respect to security threats arising out of an unfounded connection between asylum systems and terrorism).

¹⁶² Many of these governments won elections while promoting anti-immigrant and anti-refugee platforms describing forced migrants as security, economic, religious and cultural threats. See Pippa Norris & Ronald Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (Cambridge; New York: Cambridge University Press, 2019) at 175 (reflecting on critical relations between populism and immigration in Europe and the United States); Anders Widfeldt, “The Growth of the Radical Right in Nordic Countries: Observations from the Past 20 Years” (2018) at 7, online (pdf): *Migration Policy Institute* <migrationpolicy.org/sites/default/files/publications/TCM-RadicalRightNordicCountries-Final.pdf> [perma.cc/4Q37-J7DC].

due to their race, religion, national origin, economic condition, incremental number, and differential risks (security, economic, cultural and public health threats), treated as undesirable migrants, thereby leading to their rejection and abandonment. As such, the Final Refugee Paradigm constitutes the most endemic form of legal protection yet (*lowest ebb*).

The Final Refugee Paradigm is characterized by domestic and regional actions (policies, regulations, practices) propelling the disarticulation of international refugee law. Under this paradigm, the reception of refugees is gradually implemented outside developed countries and outsourced to poor and developing countries – including those in a state of war or conflict (e.g. Turkey,¹⁶³ Colombia,¹⁶⁴ Sudan,¹⁶⁵ Peru,¹⁶⁶ Uganda¹⁶⁷).¹⁶⁸ I refer to this trend as “the outsourcing of humanity”. That is, relocating the reception of refugees and asylum seekers to “extraterritorial partners” who, thereafter, take care of undesirable migrants in exchange for a handling fee (e.g. EU-Turkey Agreement¹⁶⁹), depriving both refugees of human dignity and international refugee law of its humanitarian and moral-legal content.

A. Asylum Bans, Safe Zones, and Safe Third Country Agreements

Notwithstanding the United Nations’ efforts towards a more articulated and humane system of reception and treatment of refugees (*New York Declaration for Refugees and Migrants of 2016* and *Global Compact for Migration of 2018*¹⁷⁰), the domestic reception and treatment of refugees in the 21st century reflects dehumanized immigration systems.

One of the most well-known Safe Third Country Agreements [STCA]¹⁷¹ is

¹⁶³ See Human Rights Watch (HRW), “Human Rights Watch: World Report 2020” (Washington, DC: HRW, 2020) at 573.

¹⁶⁴ *Ibid* at 143.

¹⁶⁵ *Ibid* at 531.

¹⁶⁶ *Ibid* at 456.

¹⁶⁷ *Ibid* at 591.

¹⁶⁸ UNHCR 2019, *supra* note 159 at 7, 9 (showing global forced displacement increase in the last decade as well as poor and developing countries hosting millions of refugees). See also Stephanie Nebehay, “Poor Nations Hosting most Refugees Worldwide, Need more Western Help: UN”, *Reuters* (19 June 2019), online: <www.reuters.com/article/us-un-refugees/poor-nations-hosting-most-refugees-worldwide-need-more-western-help-u-n-idUSKCN1TK0CE> [perma.cc/BB5W-KTVY].

¹⁶⁹ See Dana Shmalz, “Global Responsibility Sharing and the Production of Superfluity in the Context of Refugee Protection” in Stefan Salomon et al, eds, *Blurring Boundaries: Human Security and Forced Migration* (Boston: Brill Nijhoff, 2017) 23 at 23–47 (analysing legal and geopolitical repercussions of the EU-Turkey Agreement); European Commission, “EU-Turkey Joint Action Plan” (15 October 2015), online: [EUROPA <ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860>](http://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860) [perma.cc/TK3C-AWMY].

¹⁷⁰ *New York Declaration for Refugees and Migrants*, A RES 71/1, UNGAOR, 71st session (2016) (recognising the need for international cooperation to manage more effectively global migration challenges); *Intergovernmental Conference to adopt the Global Compact for Safe, Orderly and Regular Migration*, A CONF 231/3, UNGAOR (2018) [UN Marrakech Conference].

¹⁷¹ A Safe Third Country Agreement (“STCA”) is a bilateral immigration agreement whereby two countries declare themselves safe for refugees, precluding citizens from other countries from claiming asylum or refugee protection should they arrive in or pass first through any of the thereby declared “safe countries”.

the *Agreement between the Government of Canada and the Government of the United States of America* [Canada-US Agreement] of 2002.¹⁷² Although the *Canada-US Agreement* helped Canada deter migrants traveling from the US, critics have found its provisions and practice to be inconsistent with Canadian values¹⁷³ and the “irregular immigration” that these types of measures allegedly prevent.¹⁷⁴

The *Canada-US Agreement* was recently declared invalid by the Federal Court of Canada, which held that it violated the right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*.¹⁷⁵ This violation resulted from the finding that the US was no longer a safe third country for refugees. The Federal Court’s finding is particularly relevant in light of former President Trump’s previously described immigration policies which exposed migrants to human rights violations.

In 2018, and with aims to countervail the arrival of thousands of Central American asylum-seekers traveling in caravans from Guatemala, El Salvador, and Honduras to the United States, the Trump administration issued a so-called “Zero Tolerance Policy” which aimed to dissuade “undesirable migrants” from even considering the US as their host country. In his memorandum setting off this policy, US Attorney General Jeff Sessions ordered federal prosecutors across the southwest border to prosecute anyone violating 8 U.S. Code § 1325.¹⁷⁶ In due course, at least 2,500 children asylum-seekers were separated from their parents as a result of the actions of the Trump administration.¹⁷⁷

Under the Trump administration, the United States also signed various bilateral immigration agreements (Asylum Cooperation Agreements [ACA])

¹⁷² Government of Canada, “Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries” (5 December 2002), online (pdf): *Refworld* <refworld.org/pdfid/42d7b9944.pdf> [perma.cc/FAZ8-NUHF].

¹⁷³ See Audrey Macklin, “The Value(s) of the Canada-US Safe Third Country Agreement” (2003) at 19, online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=557005> [perma.cc/J6ML-X67G]; Lara Sarbit, “The Reality beneath the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement” (2003) 18 *J of L and Soc Policy* 138 at 148.

¹⁷⁴ See Efrat Arbel, “Between Protection and Punishment: The Irregular Arrival Regime in Canadian Refugee Law” in Keramet Reiter & Alexa Koenig, eds, *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solidarity Confinement* (London: Palgrave MacMillan, 2015) 197 at 199 (arguing that the Canada-US STCA fosters discourses of “criminality” and “illegality” of refugees).

¹⁷⁵ The decision issued in July 2020 was nonetheless suspended (declaration of invalidity) until January 2021, “to allow time for Parliament to respond.” See *Canadian Council for Refugees v Canada (Immigration, Refugees, and Citizenship)*, 2020 FC 770 at paras 162–163. See also *Canadian Charter*, *supra* note 107, s 7.

¹⁷⁶ Office of the Attorney General, “Memorandum for Federal Prosecutors Along the Southwest Border” (6 April 2018), online (pdf): *Department of Justice* <justice.gov/opa/press-release/file/1049751/download> [perma.cc/94S2-ZLHW].

¹⁷⁷ Even though the policy ended in 2018, hundreds of children have not been yet reunified with their parents. See “Judiciary Committee Releases Report on Trump Administration Family Separation Policy” (29 October 2020), online: *House Committee on the Judiciary* <judiciary.house.gov/news/documentsingle.aspx?DocumentID=3442> [perma.cc/A6BK-QBDD].

with El Salvador,¹⁷⁸ Guatemala,¹⁷⁹ and Honduras¹⁸⁰ directed at returning Central American migrants found to be “illegally” present in the US to their home countries. I argue that the Trump administration took four different yet synchronized actions to make sure these migrants could be effectively refouled to their home countries, denying them thereby the most basic international human rights (human dignity, liberty, equality) and refugee protections (non-refoulement, non-discrimination, non-penalization, access to courts).

First, the Trump administration removed the factual and legal basis of asylum protection for Central American asylum claimants by eliminating the otherwise established policy (precedent) of adjudicating asylum protection on the account of membership in a particular social group defined by gang violence and domestic violence (*Matter of A-B*, 2018).¹⁸¹ Gang violence and domestic violence were, in practice, the most recurrent persecution claims raised by Central American women and unaccompanied children before US immigration authorities.¹⁸²

Second, the Trump administration created the appearance of a “safe country” with respect to El Salvador, Honduras, and Guatemala by gradually eliminating official warning travel restrictions to these countries.¹⁸³

Third, the Trump administration forcibly created ACA’s, which functioned as safe-third-country-*like* agreements, with each one of these countries by using economic threats (i.e. imposing tariffs to Guatemala, cutting humanitarian aid to El Salvador, eliminating remittances services from the US to Honduras).¹⁸⁴

¹⁷⁸ “Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador for Cooperation in the Examination of Protection Claims” (26 July 2019) (establishing procedures for the refoulement or “referral” of asylum claimants from the United States to El Salvador), online (pdf): [Thomson Reuters <fingfx.thomsonreuters.com/gfx/mkt/12/6447/6378/DHS%20Cooperative%20Agreement%20with%20El%20Salvador.pdf>](https://www.thomsonreuters.com/gfx/mkt/12/6447/6378/DHS%20Cooperative%20Agreement%20with%20El%20Salvador.pdf) [perma.cc/JJ43-RYPW].

¹⁷⁹ See Priscilla Alvarez, “Read: US-Guatemala Agreement on Asylum Claims”, CNN (1 August 2019) (posting copy of the Asylum Cooperation Agreement between the United States and Guatemala), online: [cnn.com/2019/08/01/politics/guatemala-asylum-agreement-doc/index.html](https://www.cnn.com/2019/08/01/politics/guatemala-asylum-agreement-doc/index.html) [perma.cc/2M67-SMJZ].

¹⁸⁰ “Agreement Between the Government of the United States of America and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims” (25 September 2019), online (pdf): [Federal Register <www.govinfo.gov/content/pkg/FR-2020-05-01/pdf/2020-09322.pdf>](https://www.govinfo.gov/content/pkg/FR-2020-05-01/pdf/2020-09322.pdf) [perma.cc/4S5P-7Y23].

¹⁸¹ See 27 I&N Dec 316 (AG 2018) at 319–20 [“*Matter of A-B*”]. US Attorney General Jeff Sessions overruled BIA decision (*Matter of A-R-C-G*, 26 I&N Dec 388, BIA 2014) on asylum protection of a woman from El Salvador claiming persecution as member in the particular group suffering domestic and gang violence.

¹⁸² See *NRLB v Wyman Gordon Co*, 394 US 759 (1969) (establishing policy precedent granting asylum protection through “adjudication”); see also *Eco Tour Adventures, Inc v Zinke*, 249 F Supp 3d 360 (DDC 2017) (stating the need to evaluate irreparable harm should the asylum claim be denied); *Grace et al v Mathew G Whitaker*, 344 F Supp 3d 96 (DDC 2018) (blocking AG Session’s decision on injunctive relief).

¹⁸³ See Nicole Narea, “The State Department Is Telling US Tourists that El Salvador Is Now as Safe as Denmark”, *Vox* (2 October 2019), online: www.vox.com/policy-and-politics/2019/10/2/20894552/state-department-el-salvador-travel-alert-safe [perma.cc/8QT3-HBUK].

¹⁸⁴ See “Guatemala Signs Migration Deal with US After Trump Threats”, *BBC News* (27 July 2019), online: www.bbc.com/news/world-latin-america-49134544 [perma.cc/E5KX-JSJB]; Michelle Hackman & Juan Montes, “U.S., El Salvador Reach Deal on Asylum Seekers”, *Wall Street Journal* (20 September 2019) (threatening to cut humanitarian aid to El Salvador), online: www.wsj.com/articles/u-s-el-salvador-reach-deal-on-asylum-seekers-11569006377 [perma.cc/RSL8-WLKF]; see also “Las Repercusiones Que

The Trump administration further implemented these three strategies as a legal ban, known as the ACA ban,¹⁸⁵ on asylum seekers from these countries. As a result of the ACA ban, US authorities were permitted to refoul Central American migrants upon their crossing of the southern border of the United States to any of these countries, irrespective of the human rights violations they may confront if returned to the designated “safe country”.¹⁸⁶

Fourth, the Trump administration began returning asylum seekers to these countries despite a lack of safe conditions. In fact, neither the temporary (Mexico) nor the designated safe host countries (El Salvador, Honduras, Guatemala) offered safe or voluntary return to these migrants,¹⁸⁷ especially considering international reports both on Mexico returning asylum seekers to Central America by force (acting under the threat of US tariffs)¹⁸⁸ and on the killing of asylum seekers refoiled by the US by the non-state actors (gangs)¹⁸⁹ from which they escaped.¹⁹⁰

Honduras No Acepte Ser Tercer País Seguro, Amenazas a las Remesas y la Maquila” (17 September 2019) (threatening to cut remittances from the United States to Honduras, along with tariffs on industrial production), online: *Proceso Digital* <proceso.hn/las-repercusiones-que-honduras-no-accepte-ser-tercer-pais-seguro-amenazas-a-las-remesas-y-la-maquila/> [perma.cc/95X3-4QF2].

¹⁸⁵ Department of Homeland Security & Department of Justice, “Implementing Bilateral and Multilateral Asylum Cooperation Agreements Under the Immigration and Nationality Act” (2019) at 6, 8, 10, online (pdf): *Federal Register* <www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-25137.pdf> [perma.cc/29ML-8R2R] [DOJ Cooperation Agreements]. Following the so-called “Asylum Cooperation Agreement”, both the Department of Justice and the Department of Homeland Security issued an “Interim Final Rule” based on INA, § 208(a)(1), 8 USC § 1158(a)(1) (“Asylum is a discriminatory immigration benefit”), which operates as a “third-country transit bar” establishing an eligibility-to-remain-in-the-USA ban for Central American migrants – including unaccompanied children passing through Mexico or another designated “safe third country”. The rule ordered the removal of asylum seekers from El Salvador, Honduras, and Guatemala due to the increase in the number of applications viewed as “too many”, immigration detention centres “pushed to capacity”, and the number of aliens that “consumes DOJ resources”. Department of Homeland Security & Department of Justice, “Asylum Eligibility and Procedural Modifications” (2020), online (pdf): *Federal Register* <govinfo.gov/content/pkg/FR-2020-12-17/pdf/2020-27856.pdf> [perma.cc/3LVH-A4FC].

¹⁸⁶ See Human Rights Watch, “Deported to Danger: United States Deportation Policies Expose Salvadorans to Death and Abuse” (2020), online (pdf): *HRW* <hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf> [perma.cc/UQ5B-4T5Y] [HRW Deported to Danger] (reporting human rights violations in El Salvador, gang violence, abductions, deported asylum-claimants’ killings).

¹⁸⁷ See Amnesty International, “Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum” (2018) at 5, online (pdf): *Amnesty* <amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf> [perma.cc/28JX-57ZY].

¹⁸⁸ See Alejandra Macías Delgadillo, “As Mexico Abuses Migrants Under Trump’s Orders, Where Is Congress?” (4 February 2020), online (blog): *The Hill* <thehill.com/blogs/congress-blog/politics/481474-as-mexico-abuses-migrants-under-trumps-orders-where-is-congress> [perma.cc/GFY6-GFYS]; “Mexico Under Pressure as Asylum Applications Skyrocket”, *BBC News* (15 October 2019), online: <www.bbc.com/news/world-latin-america-50040477> [perma.cc/2N9R-AXF3]; see also AP Archive “Guardia Nacional Mexicana Detiene con Fuerza a Migrantes tras Cruzar la Frontera” *Associated Press* (29 January 2020), online (video): *YouTube* <www.youtube.com/watch?v=8waaRPUJyA8> [perma.cc/T9KK-ZJ7C].

¹⁸⁹ See HRW Deported to Danger, *supra* note 186 at 28–31.

¹⁹⁰ By November 2019, more than 60 thousand migrants had been refoiled to Mexico under MPP. This includes more than 16 thousand kids under 18 years of age, 4 thousand toddlers under 5 years of age and five hundred babies under 12 months of age. The data is particularly concerning considering both the dire humanitarian conditions in which asylum seekers are abandoned and the human rights violations to which they are exposed while waiting for their claims to be decided. Refugee and Immigration

Furthermore, the United States issued the so-called “Remain in Mexico policy” (Migrant Protection Protocols [MPP])¹⁹¹ oriented at arresting undocumented asylum claimants in the United States and returning them to Mexico until their claims are decided or their presence is required (with asylum hearings arranged at the border). Both the Asylum Cooperation Agreements and the Migrant Protection Protocols violate international refugee law protections. On the one hand, ACA’s violate both the access to courts protected under the *1951 Refugee Convention* (art 16) and the principle of non-penalization (art 31(1))¹⁹² by arresting and returning undocumented asylum seekers. On the other hand, MPP’s constitute a direct violation to the principle of non-refoulement (art 31) because they temporarily expel the forced migrant to another country (including the country from which the migrant fled) while waiting under dire humanitarian and dangerous conditions in Mexico for a hearing at the border.

Safe Zones in the migrant’s home country have also been promoted as a suitable way to relocate refugees and asylum seekers outside the migrant’s intended host country.

Following the withdrawal of US troops from Syria, where they were supporting Kurdish militias (October 2019), the Turkish government started a military invasion of Syria in order to allocate between 1 and 2 million Syrian refugees along a 20-mile stretch of Syria’s northern border which would thus use refugees and asylum seekers as a “buffer zone” to protect Turkey.¹⁹³ The “safe zone”¹⁹⁴ was eventually supported by Germany with a slight shift (“international safe zone”)¹⁹⁵ following Turkey’s threat to release millions

Center (RAICES), “You Can Help Stop MPP” (20 November 2019), online: *RAICES* <www.raicestexas.org/2019/11/20/you-can-help-stop-mpp/> [perma.cc/YYW3-XHGN]; see also Ben Fox, “Report: At least 138 Sent from US to El Salvador Were Killed”, *Associated Press* (4 February 2020), online: <apnews.com/article/5648a26b9f44313ff09cd09a3f4e38db> [perma.cc/64TC-PTPA]; Maria Verza, “Migrants Stuck in Lawless Limbo Within Sight of America”, *Associated Press* (15 November 2019) (reporting kidnapping, human trafficking, drug-cartels and gang violence in Nuevo Laredo, Matamoros, Ciudad Juarez, and Tamaulipas), online: <apnews.com/article/3752fd080525419f9be9352901b50e0ba> [perma.cc/7JMF-EDQL].

¹⁹¹ Department of Homeland Security, “Policy Guidance for the Implementation of the Migrant Protocols” (25 January 2019), online (pdf): *DHS* <dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf> [perma.cc/AU7V-CLV3].

¹⁹² Refugee Convention, *supra* note 66.

¹⁹³ Colum Lynch & Lara Seligman, “Turkey Pitches Plan to Settle 1 Million Refugees in Northern Syria”, *Foreign Policy* (18 December 2019) (referring to the refoulement of refugees as “safe zone”), online: <foreignpolicy.com/2019/12/18/turkey-pitches-plan-settle-1-million-refugees-northern-syria-erdogan-kurds/> [perma.cc/35T8-L8FV].

¹⁹⁴ See Julian E Barnes & Eric Schmitt, “Trump Orders Withdrawal of US Troops from Northern Syria”, *The New York Times* (13 October 2019), online: <www.nytimes.com/2019/10/13/us/politics/mark-esper-syria-kurds-turkey.html> [perma.cc/D3M3-FH73]; Michael Nienaber & Madeline Chambers, “German Defense Minister Proposes Security Zone for North Syria”, *Thomson Reuters* (21 October 2019), online: <reuters.com/article/us-syria-security-turkey-germany/german-defense-minister-proposes-security-zone-for-north-syria-idUSKBN1X029D> [perma.cc/5JXX-JEGV].

¹⁹⁵ See Austin Davis, “German Defense Chief Recommends International Security Zone in Syria”, *DW* (22 November 2019), online: <dw.com/en/german-defense-chief-recommends-international-security-zone>

of refugees in Europe.¹⁹⁶ The Turkish proposal was formally presented by President Recep Tayyip Erdoğan to the UN Secretary-General in November 2019.¹⁹⁷

B. Abandonment of Refugees and Asylum Seekers

The Final Refugee Paradigm is leading not merely to the systematic exclusion of refugees and asylums seekers in developed host countries, but also to their abandonment.

On the one hand, traditional and evolving drivers of exclusion (security, economy, cultural identity) have been used to justify policies and practices forcing migrants to return to their home countries, remain in unsafe third countries, or survive on their own in secluded areas or slams.¹⁹⁸

On the other hand, public health – that is, a historic yet increasingly recurrent driver of exclusion¹⁹⁹ – is leading host countries not only to exclude

in-syria/a-50924304> [perma.cc/AT2R-QBHL].

¹⁹⁶ Bel Trew, “Erdoğan Threatens to Flood Europe with 3.6 Million Refugees as Syria Offensive Forces Tens of Thousands to Flee”, *The Independent* (10 October 2019), online: <www.independent.co.uk/news/world/middle-east/erdogan-syria-turkey-kurds-europe-refugees-invasion-sdf-latest-middle-east-a9150271.html> [perma.cc/7MUR-ZER3].

¹⁹⁷ United Nations Secretary-General, “Readout of the Secretary-General’s Meeting with H.E. Mr. Recep Tayyip Erdoğan, President of Turkey” (1 November 2019), online: UN <un.org/sg/en/content/sg/readout/2019-11-01/readout-of-the-secretary-general%E2%80%99s-meeting-he-mr-recep-tayyip-erdogan-president-of-turkey> [perma.cc/5N4S-XY25].

¹⁹⁸ This includes Central American asylum seekers abandoned in the streets of Mexico at the mercy of drug cartels and human traffickers upon their expulsion from the United States (where their claims are pending), Syrian refugees summarily deported from Turkey to Syria, Eritrean refugees facing a rather inhumane choice between indefinite imprisonment in Israel or deportation to their home country, Rohingya refugees deported to Myanmar after years of imprisonment in India, Venezuelan refugees left on their own after crossing Los Andes Mountains to find themselves banned in Peru, and hundreds of Salvadoran asylum seekers killed by the very same actors they fled from after being deported from the United States. See Nicola Narea, “The Abandoned Asylum Seekers on the US-Mexico Border”, *Vox* (20 December 2019), online: <www.vox.com/policy-and-politics/2019/12/20/20997299/asylum-border-mexico-us-iom-unhcr-usaid-migration-international-humanitarian-aid-matamoros-juarez> [perma.cc/ALR3-D949]; see also V.H., “Suspension of EU-Turkey Deal and Mass Deportations from Turkey” (29 July 2019), online (blog): *Deportation Monitoring Aegean Blog* <www.dmaegean.bordermonitoring.eu/2019/07/26/suspension-of-eu-turkey-deal-and-mass-deportations-from-turkey/> [perma.cc/89H2-JQKU]; Cristiano d’Orsi, “To Stay or to Leave? The Unsolved Dilemma of Eritrean Asylum-Seekers in Israel” (2018) 59 *Harv Intl LJ* 137 at 178 (describing court decisions and public policies leading to Eritrean refugees’ choice), online (pdf): <harvardilj.org/wp-content/uploads/sites/15/20181112_dOrsi_toStayOrToLeave_vFinal.pdf> [perma.cc/ZAT7-6SV6]; Human Rights Watch, “India: 7 Rohingya Deported to Myanmar”, *Human Rights Watch News* (4 October 2018), online: <www.hrw.org/news/2018/10/04/india-7-rohingya-deported-myanmar> [perma.cc/T6VG-JW7G]; Amnesty International, “In Search of Safety: Peru Turns Its Back on People Fleeing Venezuela” (2020) at 18, online (pdf): *Amnesty International* <amnesty.org/download/Documents/AMR4616752020ENGLISH.PDF> [perma.cc/PJJ2-KQDY]; HRW Deported to Danger, *supra* note 186 at 28.

¹⁹⁹ Public health concerns have been used as a driver to exclude migrants throughout history. The first antecedent is found in Ancient Greece. Albeit often cited as a Greek tragedy, the Plague of Thebes described by Sophocles has been related to the Plague of Athens (430–29 BC). See Sophocles, *The Three Theban Plays: Antigone, Oedipus The King, Oedipus at Colonus* (London: Penguin Classics, 2000); Antonio A Kousoulis et al., “The Plague of Thebes, a Historical Epidemic in Sophocles’ Oedipus Rex” (January 2012) 18:1 *Emerging Infectious Diseases* 153 at 154–57. In the 14th century, the Republic of Venice created

systematically forced migrants through “express rejection” but also to gradually abandon them to dire humanitarian conditions, without medical attention, and in the middle of a pandemic.

As of January 18th, 2021, the COVID-19 virus has infected more than 95 million people worldwide and killed more than 2 million in 191 countries.²⁰⁰ Most countries have enforced either regional or national lockdowns on their population. After the UN Agency for Refugees [UNHCR] temporarily suspended all of its resettlement programs,²⁰¹ nearly all countries worldwide implemented immigration restrictions, including the suspension of refugee and asylum protection claims.²⁰² Furthermore, the number of casualties as well as the nature, transmissibility and global reach of the virus²⁰³ have led governments worldwide to stop immigration processes such as refugee and

the first quarantine system on migrants arriving by sea known as “in’ attest per quarantine giorgio” (“a 40-days waiting period”) in the island of Santa Maria di Nazareth (Lazaretto). Jane Stevens Crawshaw, “The Renaissance Invention of Quarantine” in Linda Clark & Carole Rawcliffe, eds, *The Fifteenth Century XII: Society in Age of Plague* (Woodbridge, United Kingdom: The Boydell Press, 2013) 161 at 164. Following the “Great Plague”, authorities across the world began using quarantine systems to exclude migrants and immigrants more broadly (e.g. France 1521, Boston 1647, Rome 1656, New York 1663, Russia 1664, Frankfurt 1666, England 1712, San Francisco 1900, Australia 1908, Canada 1869 and 2005, United States 1893 and 2001). See John Frith, “The History of the Plague: Part 1” (2012) 20:2 *J Military & Veterans’ Health* 1 at 2–6 (describing pandemics in the Middle Ages); see also Peter Tyson, “A Short History of Quarantine”, *Nova* (11 October 2004), online: <www.pbs.org/wgbh/nova/article/short-history-of-quarantine/> [perma.cc/6H74-KC63]; *Quarantine Act 1908* (Austl), 1908/3 [amended on 28 March 2013]; Bill C-12, *An Act to prevent the introduction and spread of communicable diseases*, 1st Sess, 38th Parl, 2004 (assented to 13 May 2005); Centres for Disease Control and Prevention, “Quarantine and Isolation: US Quarantine Stations” (2019), online: CDC <www.cdc.gov/quarantine/quarantine-stations-us.html> [perma.cc/8YLB-LYPD].

²⁰⁰ Johns Hopkins University, “COVID 19: Dashboard by the Center for Systems Science and Engineering (CSSE)” (2021, accessed 18 January 2021), online: *Johns Hopkins* <coronavirus.jhu.edu/map.html> [perma.cc/2A88-2DA2].

²⁰¹ UN, “COVID-19: Agencies Temporarily Suspend Refugee Resettlement Travel”, *UN News* (17 March 2020), online: <news.un.org/en/story/2020/03/1059602> [perma.cc/G7JH-FUPM] [UN Covid-19].

²⁰² See e.g. “How the Coronavirus Disease (COVID-19) Is Affecting Immigration, Refugees, Citizenship and Passport Services” (2020), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19.html> [perma.cc/89QG-LKYS]; President Donald J Trump, “Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus” (31 January 2020), online: *The White House* <whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/> [perma.cc/ERH3-3NXX] [Trump]; Muzaffar Chishti & Sarah Pierce, “Crisis within a Crisis: Immigration in the United States in a Time of COVID-19”, *Migration Policy* (26 March 2020), online: <www.migrationpolicy.org/article/crisis-within-crisis-immigration-time-covid-19> [perma.cc/Y5WM-HVNA]; Ronan Tésorière, “Coronavirus: en Pleine Épidémie, les Demandeurs d’Asile dans l’Oubli”, *Le Parisien* (24 March 2020), online: <www.leparisien.fr/societe/coronavirus-en-pleine-epidemie-les-demandeurs-d-asile-dans-l-oubli-24-03-2020-8286654.php> [perma.cc/6FPN-YJQ4]; Stefania D’Ignoti, “How Coronavirus Hits Migrants and Asylum Seekers in Italy”, *The New Humanitarian* (16 March 2020), online: <thenewhumanitarian.org/news/2020/03/16/italy-coronavirus-migrants-asylum-seekers> [perma.cc/RHX7-4LPQ]; María Martín, “Se Desploman las Solicitudes de Asilo y las Entradas Irregulares”, *El País* (27 March 2020), online: <elpais.com/espana/2020-03-26/se-desploman-las-solicitudes-de-asilo-y-las-entradas-irregulares.html> [perma.cc/WBJ4-ML7I].

²⁰³ World Health Organization (WHO), “Coronavirus Disease 2019 (COVID-19)” (March 2020) at 1–2, online (pdf): *WHO* <who.int/docs/default-source/coronaviruse/situation-reports/20200326-sitrep-66-covid-19.pdf?sfvrsn=9e5b8b48_2> [perma.cc/G53R-NZCB].

asylum application, impose restrictions on other migrants (e.g. Thailand's ban on neighboring migrant workers, Bangladesh's ban on new refugees in Cox's Bazar refugee camps),²⁰⁴ and reduce the movement of people across borders.²⁰⁵ Very few governments, in fact, have adopted measures to protect refugee and asylum seekers.²⁰⁶ On the contrary, through action or inaction (e.g. economic restrictions), some countries have started voluntary return programs and even mandatory expulsion of newcomers. For example, hundreds of Venezuelan refugees in Colombia are returning to their home country due to evictions, food shortages and unemployment caused both by the COVID-19 national lockdown and by a lack of public economic resources to provide for 1.6 million Venezuelans in Colombia.²⁰⁷ In the United States, the Director of the Centres of Disease Control [CDC] ordered the temporary suspension of entry and summary expulsion of designated or covered aliens ("as rapidly

²⁰⁴ "Migrants Let through 'Shut' Checkpoints", *Bangkok Post* (24 March 2020), online: <www.bangkokpost.com/thailand/general/1884830/migrants-let-through-shut-checkpoints> [perma.cc/GSV6-K74Z]; Humayun Kabir Bhuiyan, "Coronavirus: Critical Services Only in Rohingya Camps Since Wednesday", *Dhaka Tribune* (24 March 2020), online: <www.dhakatribune.com/bangladesh/rohingya-crisis/2020/03/24/all-activities-to-be-suspended-at-cox-s-bazar-rohingya-camps-from-wednesday> [perma.cc/5Z6 W-S96K].

²⁰⁵ See e.g. Shelby Thevenot & Kareem El-Assal, "New Canadian Immigration Instructions During Coronavirus Pandemic", *CIC News* (16 March 2020), online: <www.cicnews.com/2020/03/new-canadian-immigration-instructions-during-coronavirus-pandemic-0313909.html> [perma.cc/FNV5-2GKZ]; Trump, *supra* note 202; UN Covid-19, *supra* note 201.

²⁰⁶ The Ministry of Interior of Italy ordered Migrant Repatriation Centres across the country to monitor the health of migrants during the pandemic. The Government of New York opened testing facilities for underserved communities, and the Government of Ontario expanded its provincial health care coverage for uninsured people needing COVID-19 medical services. The Mayor of Chicago issued an executive order providing healthcare services to immigrants and refugees to prevent the spread of the virus within the city. See Associazione per gli Studi Giuridici sull'Immigrazione, "ASGI Chiede alle ASL di Verificare il Rispetto del Diritto alla Salute dei Migranti nei CPR", *ASGI Newsletter* (2 April 2020), online: <asgi.it/allontamento-espulsione/cpr-detenzione-migranti-diritto-salute/> [perma.cc/7VF7-WGMS]; "Ontario Expands Coverage for Care: Enhanced Health Care Coverage to Support Efforts to Contain COVID-19", *Ontario Newsroom* (20 March 2020), online: <news.ontario.ca/mohlrc/en/2020/03/ontario-expands-coverage-for-care.html> [perma.cc/LY6R-5GY8]; Mayor's Press Office, "Mayor Lightfoot Signs Executive Order to Protect Immigrant and Refugee Communities During COVID-19" (7 April 2020), online: *Chicago* <chicago.gov/city/en/depts/mayor/press_room/press_releases/2020/april/EOImmigrantRefugeeProtection.html> [perma.cc/4HYV-QFHY]; Governor's Press Office, "Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Five New COVID-19 Testing Facilities in Minority Communities Downstate" (9 April 2020), online: *New York State* <www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-five-new-covid-19-testing-facilities> [perma.cc/HU8G-8MNR]; see also Governor's Press Office, "Governor Cuomo Issues Letter to Secretary of Health and Human Services Urging Support for Underserved Communities and Protection for Undocumented Immigrants in Vaccine Distribution Program" (1 December 2020), online: *New York State* <governor.ny.gov/news/governor-cuomo-issues-letter-secretary-health-and-human-services-urging-support-underserved> [perma.cc/QPP9-MAND].

²⁰⁷ Natalie Gallón, "Refugiados Venezolanos Regresan a Casa en Medio de la Pandemia de Coronavirus", *CNN en Español* (7 April 2020), online: <cnnespanol.cnn.com/2020/04/07/refugiados-venezolanos-regresan-a-casa-en-medio-de-la-pandemia-de-coronavirus/> [perma.cc/T4D3-EAUN].

as possible”²⁰⁸) arriving to the US either through Mexico²⁰⁹ or Canada.²¹⁰ As for asylum seekers, the CDC order instructed immigration authorities to summarily expel (“express deportation”) asylum-seekers detained near US borders without screening process related to the migrant’s health condition.²¹¹

I contend that, considering the dire humanitarian conditions these migrants face in the 21st century, the lack of access to medical attention, and the need for social distancing, holding asylum seekers in detention (including children) as the virus spreads across the world is unconscionable. The detention of asylum seekers during the pandemic not only jeopardizes the lives of these migrants²¹² but, in light of the nature of the disease, the health of the world’s population, particularly considering reports of asylum-seekers dying of COVID-19 while under detention²¹³ and when even prisoners are released.²¹⁴ As it turns out, reports of refugees left to their fate during the COVID-19 pandemic have uncovered the state of indifference and neglect towards their safety.²¹⁵

²⁰⁸ Department of Health and Human Services (Centres for Disease Control and Prevention CDC), “Notice of Order under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists”, 85 Fed Reg 17060 (26 March 2020) at 17067, online (pdf): *Federal Register* <www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06327.pdf> [perma.cc/EDA5-KEBL]; Lucas Guttentag, “Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors” (15 April 2020), online (blog): *Stanford Law School* <law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/> [perma.cc/Q3E4-KB3Q].

²⁰⁹ Department of Homeland Security, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico” (24 March 2020), online (pdf): *Federal Register* <www.govinfo.gov/content/pkg/FR-2020-03-24/pdf/2020-06253.pdf> [perma.cc/SNS3-LVP7].

²¹⁰ Department of Homeland Security, “Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service between the United States and Canada” (24 March 2020), online (pdf): *Federal Register* <www.govinfo.gov/content/pkg/FR-2020-03-24/pdf/2020-06217.pdf> [perma.cc/K4PH-Z7JM].

²¹¹ See Jasmine Aguilera, “Many Asylum Seekers in Mexico Can’t Get U.S. Court Hearings Until 2021. A Coronavirus Outbreak Could ‘Devastate’ Them”, *Time* (14 May 2020), online: <time.com/5830807/asylum-seekers-coronavirus-mpp/> [perma.cc/ZMB8-ENPV].

²¹² Mark Leon Goldberg, “The Coronavirus Threatens Refugees and People in Crisis” (2 March 2020), online: *UN Dispatch* <undispatch.com/the-coronavirus-poses-a-big-threat-to-refugees-and-people-in-humanitarian-crisis/> [perma.cc/4YWD-9V3A].

²¹³ Thomas J Rachko Jr, “Second Covid-19 Death in US Immigration Detention” (4 June 2020), online: *Human Rights Watch* <hrw.org/news/2020/06/04/second-covid-19-death-us-immigration-detention> [perma.cc/5SET-7DZE].

²¹⁴ Due to the spread of COVID-19, the Colombian Government issued a declaration of State of Emergency releasing more than 10 thousand inmates. Likewise, the Government of Iran released 54,000 prisoners. “Cerca de 10.000 Presos Saldrian a Prisión Domiciliaria Ante Emergencia Carcelaria”, *El País* (23 March 2020), online: <www.elpais.com.co/colombia/cerca-de-10-000-presos-saldrian-a-prision-domiciliaria-ante-emergencia-carcelaria.html> [perma.cc/9XT2-URDQ]; “Coronavirus: Iran Temporarily Frees 54,000 Prisoners to Combat Spread”, *BBC News* (3 March 2020), online: <www.bbc.com/news/world-middle-east-51723398> [perma.cc/X48U-FU5R].

²¹⁵ See e.g. “Amid COVID-19 Pandemic, Thousands Stranded in Bay of Bengal ‘Unable to Come Ashore’”, *UN News* (6 May 2020), online: <news.un.org/en/story/2020/05/1063402> [perma.cc/F4LG-8Z68]; Ben Doherty, Josh Taylor & Paul Karp, “Left with Nothing: Australia’s Migrant Workforce Face Destitution Without Coronavirus Safety Net”, *The Guardian* (1 April 2020), online: <theguardian.com/>

Though international refugee law recognises the protection of public order as a legal exception (arts 9, 32(1) of the *Refugee Convention*),²¹⁶ it is nonetheless difficult to ascertain that either national security or public health suffice to justify the abandonment of the most vulnerable population on the planet in a particularly vulnerable time.

V. Conclusion

International Refugee Law derives from an apparently paradoxical equation in that it precludes the uncivilized actor (State or non-state) from persecuting, abandoning or killing its own citizens while it persuades the more civilized actor to come forward and protect those often foreign, different and unknown to its kind. From its inception, this specialized area of law has unveiled a historic moral choice with legal effects, a choice hundreds of countries once made in the aftermath of the most consequential tragedies of the 20th century in order to reject dissimilar drivers of persecution (race, religion, nationality, political opinion, membership in a particular social group, and torture) fostered in the most violent and uncivilized versions of the world.

This version of humanity, however, is vanishing. Uncivilized and civilized actions are no longer clearly discernible as arguably competing and gradually mischaracterized interests have shifted legal and political narratives from human rights to national security protection. A historical and comparative analysis of the laws and policies that led to this progression indicates a defining yet concerning trend: the protection of refugees is not merely circular but endemic. Exclusion, distrust, and fear have turned into criminalization, dehumanization, rejection, and abandonment.

This trend can be appreciated through three paradigms. Drawing on the atrocities committed during the Armenian Genocide, the Russian Civil War, World War I and II, the Post-war Refugee Paradigm forged a constructive path whereby forced migrants go from exclusion and neglect to recognition and international legal protection with a distinctive and increasingly defined immigration status: “refugees”. Under this paradigm, refugees and asylum seekers became viewed as victims of persecution and conflict in their host countries.

The Modern Refugee Paradigm then saw a gradual recharacterization of immigrants, migrants and refugees as “security threats”. Building on the effects of the Cold War and the development of international terrorism, the Modern Refugee Paradigm turned victims of persecution into suspects subject to prosecutorial treatment (detention, espionage, and assessments on

[australia-news/2020/apr/01/left-with-nothing-australias-migrant-workforce-face-destitution-without-coronavirus-safety-net](https://www.australia-news.com/2020/apr/01/left-with-nothing-australias-migrant-workforce-face-destitution-without-coronavirus-safety-net/)> [perma.cc/JN8L-234Y].

²¹⁶ Refugee Convention, *supra* note 66, arts 9, 32(1).

terrorism) and exclusion (immigration law violations).

Moving from mistrust to the dehumanization and criminalization of migrants, the Final Refugee Paradigm forged a new deconstructive path whereby mischaracterizations of refugees (“security threats”) and regressive immigration policies led to the disarticulation of basic human rights and international refugee protections at both domestic and at regional levels.

History shows a dangerous path of dehumanization and indifference; a comparative exploration of that history uncovers different sequences of change leading to endemic trends: criminalization, rejection, and abandonment. As such, I conclude, the Final Refugee Paradigm does not merely describe an emerging trend, but a point of no return: namely, the end of international refugee protection.