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# Revenge on Revenge Porn: International Approaches to Protecting Privacy Rights

January 2, 2019

by Mary Kate O'Connell

Under Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights, the privacy of individuals is protected from interference and attacks. However, the advent and evolution of the internet has created new ways for users to violate privacy that are difficult to regulate and prevent. One such modern privacy violation is revenge porn, which can be broadly defined as the distribution of sexually graphic images of individuals without their consent.

As access to the internet has provided individuals with the ability to search and share information quickly and easily, revenge porn has become a mechanism used by abusers and harassers to diminish their victim's privacy. The three major forms of revenge porn include Nonconsensual Pornography, which can be defined as the distribution of private, sexually explicit images of individuals without their consent; Recorded Sexual Assault, which involves using the image or video capture of a sexual assault— typically by a rapist— to further humiliate a victim and/or discourage them from reporting the crime; and Sextortion, which is the act of threatening to expose a nude or sexually explicit image in order to get a person to do something such as share more nude or sexually explicit images, pay someone money, or perform sexual acts.

While several countries have been successful in criminalizing revenge porn, criminalization has required legislators to balance the human right to freedom of expression with the human right to privacy. Both of these basic human rights are governed by the Universal Declaration of Human Rights and the European Convention on Human Rights. In order to craft effective strategies to punish distributors of revenge porn, countries have had to be creative in ensuring such strategies do not unintentionally infringe on the right to freedom of expression. As discussed below, international approaches to protecting individuals from revenge porn have included defining it as a breach of civil law under defamation and including it as part of existing sexual violence statutes. While these approaches have been comprehensive, they have almost all led to conflicts with existing country protections of the right to freedom of expression.

Last November, Senator Kamala Harris introduced the ENOUGH Act, or the Ending Nonconsensual Online User Graphic Harassment Act of 2017. The goal of this act is to amend Title 18 of the United States Code to include a provision that would make it a federal crime to “knowingly distribute a private, visual depiction of an individual's intimate parts or of an individual engaging in sexually explicit conduct, with reckless disregard for the individual's lack of consent to the distribution, and for other purposes.” A vote is likely to occur soon on the ENOUGH Act once the Senate Committee on the Judiciary completes the markup process. The potential effectiveness of the ENOUGH Act can be analyzed through a critique of international legal approaches to combating revenge porn.

In the United Kingdom, a law was passed in 2015 to criminalize all forms of revenge porn. Within the first six months of the law being enacted, 175 cases of revenge porn were reported, but very few people were convicted of the crime. The sentencing for convictions of revenge porn under the UK law imposes a maximum sentence of two years in prison with no additional fines or required protections for the victim. Criminalization of revenge porn in the UK illustrates the negative aspects of the idealistic view that proponents of criminalization hold. While criminalization may increase reporting of revenge porn, it creates difficulties in punishing distributors of revenge porn since evidence for the criminal trials are often scarce. Additionally, the relatively low maximum sentence for those convicted of revenge porn does little to address the legal needs of victims. Without the ability to recover damages due to the law being a criminal statute, the victim is likely unable to receive monetary relief for the harm caused, which may have required them to take expensive measures to further protect their privacy. In terms of free speech, the law provides exceptions for journalistic material, but nonetheless it has been criticized by organizations such as English PEN and Article 19, who argue that the law criminalizing revenge porn is too broad and requires more exceptions for artistic expression.

In Iceland, revenge porn has not been criminalized, but distributors of revenge porn are prosecuted under Iceland's Tort Act, which includes decency and defamation clauses. An example of the effectiveness of this approach is demonstrated in a case regarding the conviction of a 19-year-old for distributing naked pictures of his ex-girlfriend online without her consent. In this case, the distributor of revenge porn was required to pay his victim \$1,800 in damages. By allowing victims of revenge porn to recover damages, Iceland's approach to combating revenge porn provides both a deterrent for distributors to commit further acts of revenge porn, while also providing victims with reparations for the harm caused. However, without a possible prison sentence, some distributors of revenge porn may not view the possible \$1,800 in damages as a deterrence. Revenge porn is a malicious act, and unfortunately, many distributors could view the benefit of revenge as outweighing the high monetary punishment. In comparison to the United Kingdom, Iceland's efforts to combat revenge porn have not encountered as much criticism from free speech activists. This is likely due to how Iceland classified the act as a tort, but it could also be a result of the Icelandic popular opinion that censorship is beneficial, as evidenced by Iceland's proposition of a law to ban all online pornography.

Currently, in the United States, forty states and the District of Columbia have laws criminalizing revenge porn, but the passage of the ENOUGH act would make the distribution of revenge porn a federal crime. The possible effects of the passage of the ENOUGH act can also be predicted by looking at similar state-level laws prohibiting revenge porn. For example, in New Jersey, revenge porn acts are criminalized as acts of harassment and distributors of revenge porn are prosecuted as harassers. The criminalization of revenge porn in New Jersey has made it easier for victims of the horrific crime to be granted restraining orders against their abusers/harassers. This criminalization in New Jersey has also extended the scope of such restraining orders by requiring the abuser/harasser to remove all images/videos of their victim from the internet. Additionally, someone found guilty of revenge porn under New Jersey's law is ordered to pay a fine of up to \$30,000 and can be sentenced to three to five years in prison. With this combination approach to sentencing, New Jersey's law is effective in achieving a balance between deterrence, rehabilitation, and justice for the victim when it comes to punishing

perpetrators of revenge porn. No lawsuits have been filed yet regarding the New Jersey law, but similar laws in Arizona and Texas have been at the center of lawsuits the extent to whether the laws are unconstitutional because they infringe on the first amendment right to free speech.

While the ineffectiveness of the UK and Icelandic approaches to combating revenge porn provide a negative view of criminalizing or reclassifying the horrific act, the effectiveness of New Jersey's law criminalizing revenge porn gives an optimistic outlook to the possible impact of the ENOUGH act, if passed. Harassers, abusers, and distributors would be deterred by the monetary fine and rehabilitated by the possible jail sentence, and victims of revenge porn would be able to receive both monetary reparations for and protection from harm.

However, the approaches in Iceland and the United Kingdom to combating revenge porn make clear that the implementation of revenge porn laws, whether criminal or civil, often does not lead to predicted or desired results. Effective revenge porn legislation must protect the rights to both privacy and the freedom of expression, and it must be able to address the ever-evolving cyber means to distribute revenge porn. Lawmakers should keep in mind that privacy is essential to free speech, and that the right to privacy applies equally to all. Privacy, just like freedom of speech, must be defended, and combatting revenge porn is one step in defense of both rights.

# U.S. Refugee Resettlement: Presidential Authority and Congressional Oversight

February 25, 2019  
by Betsy L. Fisher<sup>[1]</sup>

## Introduction

Each year the President issues a Presidential Determination (PD) setting the number of refugees to be admitted to the United States in the upcoming fiscal year,<sup>[2]</sup> a decision that news coverage has widely discussed in recent years.<sup>[3]</sup> President Obama, seeking to demonstrate U.S. leadership in the Syrian refugee crisis, sought to resettle at least 10,000 Syrian refugees in Fiscal Year 2016 and established a PD of 110,000 refugees for Fiscal Year 2017—then a twenty-two-year high.<sup>[4]</sup> In one of President Trump’s first official acts after his inauguration, he ordered the PD for Fiscal Year 2017 to be lowered to 50,000 before issuing consecutive, all-time low refugee PDs of 45,000 for Fiscal Year 2018 and 30,000 for Fiscal Year 2019.<sup>[5]</sup>

Historically, advocates paid less attention to the process by which the PD for refugee resettlement is set. Congress established this process in the Refugee Act of 1980 and, despite many complaints,<sup>[6]</sup> Congress has not amended the process since.<sup>[7]</sup> While the 1980 Refugee Act has advanced legislators’ goals of facilitating longer-term policy making and planning for refugee resettlement,<sup>[8]</sup> the Act does not provide for refugee resettlement to continue if a PD is not issued prior to the start of a fiscal year. The consequences for an Administration failing to comply with the procedural requirements set out in the Act are borne not by the Administration, but by refugees who are waiting for resettlement.

This article examines those procedural requirements and proposals for legislative reform, proceeding in three parts following this introduction. Part II addresses the anomalous procedural requirements of the United States Refugee Admissions Program (USRAP), whose annual admissions number is set by the President in consultation with Congress. Part III discusses the shortcomings of the current statutory structure, namely the failure to provide for continued resettlement in the absence of a Presidential Determination. Part IV evaluates legislative proposals for reform and the extent to which they would address this shortcoming.

## Background Information: Congressional Consultation Requirements in the Presidential Determination Process

Congress has extensive authority over who can be admitted to, removed from, and naturalized in the United States.<sup>[9]</sup> As a result, Congress sets the numbers of authorized admissions for most immigration programs in advance, allowing either a predetermined number of visas for each category each year, or allowing visa issuances to as many individuals who qualify.<sup>[10]</sup>

By contrast, the 1980 Refugee Act established the U.S. Refugee Admissions Program and delegated to the President the decision of how many refugees to admit each year.<sup>[11]</sup> In setting

up this structure, legislators sought to establish equality in treatment of various groups of refugees, and to allow an Administration to establish longer-term refugee policy rather than addressing refugee situations on an ad hoc basis.[12] Yet, Congress did not blindly assign the PD to the President without reserving an oversight role for itself:[13] the refugee ceiling for each fiscal year “shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation [with Congress], is justified by humanitarian concerns or is otherwise in the national interest.”[14]

The 1980 Refugee Act sets out a multi-step process for setting the PD and appropriate consultation. First, prior to the start of the fiscal year, the President is to submit information to the House and Senate Judiciary Committees on the number of refugees in need of resettlement, and the President’s “anticipated allocation of refugee admissions.”[15] The Administration is expected to provide a list of information to Congress “[t]o the extent possible . . . at least two weeks in advance of discussions in person by designated representatives of the President with such members.”[16] This information essentially requires the President to provide a rough draft of the PD and an explanation to Congress as to how the President reached this preliminary decision. In practice, administrations have satisfied this requirement by publishing a document called “Proposed Refugee Admissions” for the upcoming fiscal year.[17]

The next step is to hold “appropriate consultations,” defined as “discussions in person by designated Cabinet-level representatives of the President” with House and Senate Judiciary Committee members about the information provided by the Administration and to additionally inform Congress of the global refugee situation, impact of refugee resettlement on the United States, and other information.[18] The statute imposes a “consultation” requirement, not a reporting or briefing requirement, indicating an intent that Judiciary committee members should have the opportunity to state their opinions with the possibility of influencing the final PD rather than just to receive information passively. However, the Act does not describe how the Administration is to receive or weigh input from the Committee members during or after the consultations.[19]

“As soon as possible” after these consultations are initiated, the Judiciary Committee members are to print “the substance” of the consultation in the Congressional Record.[20] Prior to issuing a final determination, Congress is to hold a hearing unless there are safety concerns preventing a public hearing.[21] Only after these steps are followed is the President to finalize the determination. All of these steps are to occur prior to the start of the fiscal year.[22] The Presidential Determination can be increased to allow for greater refugee admissions in the fiscal year if

the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under [the Presidential Determination issued prior to the start of the fiscal year].[23]

### Legal Analysis: Shortcomings of Current Consultation Requirements

While the 1980 Refugee Act sets out a roadmap for issuing the annual Presidential Determination, the statute's primary challenge is the lack of means for refugee admissions in a new fiscal year until the President issues a PD. Most of the requirements listed above are mandatory, which is to say that Congress has stated that the President or Administration "shall" carry out these statutes. When an Administration is unwilling to carry out statutory requirements, though, the statute does not specify a means for Congress to force the Administration to comply. The clearest consequence of failing to carry out these procedures is that the U.S. Refugee Admissions Program is unable to admit refugees until the President issues a PD.

Perhaps, since Congress does not have tools to enforce the procedural requirements of the Act, Administrations regularly ignore the procedural requirements in several respects. The statute is clear that the Presidential Determination "shall" be set prior to the start of the fiscal year; in several years, though, the PD was issued after the start of the fiscal year.[24] A hearing is required, but no such hearing was held any time in Fiscal Year 2018. The statute is unambiguous that consultations should be "in person" and with Cabinet-level representatives of the President. The consultations for Fiscal Year 2019 were held over video-teleconference.[25] Congress clearly intended that consultations provide an opportunity for Congress to provide meaningful input; members of Congress have complained in recent years that the consultations are pro forma "discussions" held only after a final decision is made.[26] The content of the consultations are to be published in the Congressional Record, but, perhaps because they are not public proceedings, the consultations have not been published in the Congressional Record for several years.

These issues came to a head in the consultation processes for Fiscal Years 2018 and 2019, both of which elicited strong responses from Judiciary Committee members. In August 2018, after expressing frustration with the Fiscal Year 2018 process, the Senate Judiciary Chairman and Ranking Member wrote to administration officials to begin the process of scheduling consultations.[27] Still, the Fiscal Year 2019 consultations process started only after Secretary of State Mike Pompeo had already announced number of refugees to be resettled, forcing a State Department spokesperson to clarify that Congress would, in fact, be consulted before the PD was finalized.[28] Those consultations were held over video-teleconferencing and after the start of the fiscal year.[29]

Nearly four decades after the enactment of the 1980 Refugee Act, Congress should amend the Act to address a situation in which the President does not follow statutory requirements for congressional consultation and does not issue a PD prior to the start of a fiscal year. Several bills since 1980 have proposed amendments to the process. None of the bills have been enacted; two would address this statutory shortcoming, and one presents a viable legislative solution.

The Refugee Resettlement Extension Act of 1988[30] would have required the initial report's submission to Congress no later than June 1st.[31] The House and Senate Judiciary Committees, rather than the President, would then be responsible for moving forward with the remaining steps in the consultations process.[32] This would do little to remedy the situation of the last two years in which the President has simply delayed consultations and held only superficial consultations. It also does not state what should happen in the absence of a Presidential Determination at the beginning of the fiscal year.

The Refugee Program Integrity Restoration Act of 2016 would limit Presidential authority by setting a default Presidential Determination of 60,000—significantly lower than the historical average—and requires congressional approval for a Presidential Determination to be set above this level.[33] This bill would limit the need for consultations and allow for admissions without a Presidential Determination. However, its cap of 60,000 is artificially low, particularly when compared with historical averages,[34] and indeed, other provisions of the bill show that the legislation is clearly intended to *limit* refugee resettlement rather than to improve the resettlement process.[35]

The Refugee Protection Act of 2016 would have adjusted the consultation process by allowing refugee admissions to continue if the President did not issue a Presidential Determination.[36] It would also require the President to initiate consultations by May 30 of the preceding fiscal year.[37] By requiring consultations to begin earlier, it would have increased the likelihood that consultations would be held and that the PD would be issued prior to the beginning of the fiscal year. It thus would have strengthened the arrangement of congressional and executive collaboration without fundamentally reallocating authority. Crucially, it would have allowed refugee resettlement to continue without a PD and without arbitrarily curbing refugee resettlement as the Refugee Program Integrity Restoration Act would do. The Refugee Protection Act's PD provisions have one primary weakness: they peg ongoing arrivals in the absence of a PD to the previous year's PD. The PD has varied from 110,000 to 30,000 in the span of the last three fiscal years, demonstrating the wisdom of pegging refugee admissions without a PD to a broader historical average. Nonetheless, the Refugee Protection Act provides the strongest of the three legislative proposals.

## Conclusion

The Refugee Act of 1980 has been a remarkable success, but its procedural requirements have a key flaw: the punishment for an Administration's noncompliance is inflicted on refugees who are waiting for resettlement. Congress should amend the Refugee Act so that refugees can continue to access refugee resettlement if the President fails to issue a Presidential Determination.

[1] Betsy L. Fisher is the Policy Director of the International Refugee Assistance Project (IRAP).

[2] Immigration and Nationality Act (INA) § 207, 8 U.S.C. § 1157 (hereinafter INA).

[3] See, e.g., Victoria Macchi, *US Sets Refugee Admissions at Historic Low*, Voice of America (Oct. 4, 2018), <https://www.voanews.com/a/us-sets-refugee-admissions-at-historic-low/4600218.html>; Julie Hirschfield Davis, *White House Weighs Another Reduction in Refugees Admitted to U.S.*, N.Y. Times (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/us/politics/trump-refugees-reduction.html>; Conor Finegan, *Trump Administration Planning to Cap Refugees at 45,000 for Next Fiscal Year*, ABC News (Sept. 27, 2017), <https://abcnews.go.com/Politics/trump-admin-capping-refugees-45000-fy18/story?id=50140408>; Maya Rhodan, *President Obama: U.S. Will Accept 110,000 Refugees from Around the World*, Time (Sept. 20, 2016), <http://time.com/4501924/barack-obama-refugee-increase-united-nations/> (each discussing the refugee ceiling as determined by the President).

[4] Migration Policy Institute, U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present, <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united>.

[5] Julie Hirschfield Davis, *Trump to Cap Refugees Allowed into U.S. at 30,000, a Record Low*, N.Y. Times (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html>.

[6] House Judiciary Committee, *Goodlatte Calls on Trump Administration to Immediately Provide Refugee Consultation* (Sept. 20, 2018), <https://judiciary.house.gov/press-release/goodlatte-calls-on-trump-administration-to-immediately-provide-refugee-consultation/>; Office of Senator Charles Grassley, *Grassley, Feinstein: Congress Requires More Thorough Engagement with State Dept. on Refugee Numbers* (Sept. 27, 2017), <https://www.grassley.senate.gov/news/news-releases/grassley-feinstein-congress-requires-more-thorough-engagement-state-dept-refugee> (hereinafter Grassley and Feinstein Statement); Office of Senator Charles Grassley, *Grassley Statement on Refugee Consultation with State Department* (Sept. 9, 2015), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-refugee-consultation-state-department> (hereinafter Grassley Statement) (each expressing concerns from Judiciary Committee members about consultations with Congress on refugee admissions).

[7] Pub. L. 96–212, 94 Stat. 102 (1980).

[8] 125 Cong. Rec. S2630-2631 (daily ed. March 13, 1979) (hereinafter Statement of Sen. Ted Kennedy).

[9] *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting that “over no conceivable subject is the legislative power of Congress more complete than it is over” than over immigration law”) (internal citation omitted).

[10] *See, e.g.*, INA, *supra* note 2, at § 201 (determining the level of immigration to the United States for most immigrant visa categories).

[11] *Id.* at § 207(a)(2) (stating that “the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.”).

[12] Statement of Sen. Ted Kennedy, *supra* note 8.

[13] INA, *supra* note 2 at § 207(d); *see also* 125 Cong. Rec. H1310–12 (daily ed. March 13, 1979) (statement of Rep. Elizabeth Holtzman); S. Rep. No. 256, 96th Cong. (1979) at 2; 126 Cong. Rec. H4708–21 (daily ed. June 10, 1980) (each supporting the 1980 Refugee Act and noting the congressional consultations requirement).

[14] INA, *supra* note 2, at § 207(a)(2)-(3).

[15] *Id.* at § 207(d)(1).

[16] *Id.* at § 207(e).

[17] *See, e.g.*, U.S. Dep't of State, U.S. Dep't of Homeland Security, U.S. Dep't of Health & Human Services, Proposed Refugee Admissions for Fiscal Year 2018 (Oct. 4, 2017), <https://www.state.gov/j/prm/releases/docsforcongress/274613.htm>.

[18] INA, *supra* note 2, at § 207(e).

[19] *Id.* at § 207(e).

[20] *Id.* at § 207(d)(2).

[21] *Id.* at § 207(d)(3).

[22] *Id.* at § 207(a)(2)-(3).

[23] *Id.* at § 207(b).

[24] Presidential Memorandum for the Secretary of State (Oct. 4, 2018) (issuing the Presidential Determination for FY 2019 on Oct. 4, 2018); Presidential Determination on FY 2006 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended (Nov. 1, 2005), 70 Fed. Reg. 65,825 (issuing the Presidential Determination for FY 2006 on Oct. 24, 2005); Presidential Determination on FY 2002 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended (Dec. 7, 2001), 66 Fed. Reg. 63,487 (issuing the Presidential Determination for FY 2002 on Nov. 21, 2001).

[25] Rebecca Rainey, *Politico Morning Shift*, Politico (Oct. 2, 2018), <https://www.politico.com/newsletters/morning-shift/2018/10/02/unions-wary-new-nafta-358683>.

[26] Grassley and Feinstein Statement, *supra* note 6; Grassley Statement, *supra* note 6 (each expressing concerns from Judiciary Committee members about consultations with Congress on refugee admissions).

[27] Office of Senator Dianne Feinstein, *Feinstein, Grassley Push for Meaningful Refugee Consultation with Administration* (Aug. 8, 2018), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=9F32953A-CB90-4B6F-A8AF-F08AC900DEDD>.

[28] Reuters, *Trump will Consult with Congress on Refugee Cap: State Department* (Sept. 18, 2018),

<https://www.reuters.com/article/us-usa-immigration-pompeo/trump-will-consult-with-congress-on-refugee-cap-state-department-idUSKCN1LY2W7>.

[29] *Id.*

[30] Refugee Resettlement Extension Act of 1988, S. 2605, 100th Cong. § 4 (1988).

[31] *Id.* at § 4(a).

[32] *Id.* at § 4(b).

[33] Refugee Program Integrity Restoration Act of 2016, H.R. 4731, 114th Cong. § 2 (2016) (amending INA § 207 to read “the President may submit to Congress a recommended number of refugees”).

[34] Migration Policy Institute, *supra* note 4.

[35] *See, e.g.*, Refugee Program Integrity Restoration Act of 2016, *supra* note 33, at § 9 (prohibiting resettlement in a state or locality if state or local officials have taken action officially disapproving of resettlement); *id.* at § 13 (limiting refugee status for individuals who were not specifically targeted); *see also* Niskanen Center, *Statement for the Record of the Niskanen Center Submitted to The House Committee on the Judiciary Legislative Markup on “Refugee Program Integrity Restoration Act of 2016”* (March 16, 2016), (noting that the bill’s “provisions reduce the number of refugees who may enter the United States”).

[36] Refugee Protection Act of 2016, S. 3241, 114th Cong. § 21 (2016).

[37] *Id.* at § 21(3)(B)(ii).

# Mexico: The New Holding Cell for the United States

February 26, 2019  
by Victoria Kadous

On January 29, 2019, the United States took the first action in its plan to send non-Mexican asylum seekers back to Mexico while waiting for their asylum hearings as per the new Migrant Protection Protocols (MPP) policy. The first migrant returned to wait in Mexico under this plan was Honduran and since then the overwhelming majority of asylum seekers returned to Mexico are from Central America. MPP was passed in response to the severe backlog of asylum cases in the United States and a general skepticism of the validity of asylum claims. Currently, it can take several years for an asylum case to come before an immigration judge. Additionally, the Trump administration does not believe that many of the asylum claims are valid. The migrants are being sent back through the Tijuana port of entry currently but use of other ports is expected in the near future. About twenty migrants are expected to be returned to Mexico every day.

Mexico has agreed to accept the asylum seekers for the time being unless they have health problems, are unaccompanied minors, or would be in danger in Mexico. Advocates have spoken out against sending asylum seekers back to Mexico though, claiming the country is unsafe for migrants who are regularly kidnapped by criminal gangs and smugglers. A lawsuit filed by rights groups on February 14, 2019, alleges that being forced to wait in Mexico is almost as dangerous as remaining in some parts of Central America, because of increased risks of “kidnapping, disappearance, trafficking, sexual assault and murder, among other harms.” In addition to possible danger in Mexico, advocates have argued that migrants sent back to Mexico would not have easy access to their legal counsel in the United States, making the process for seeking asylum more difficult.

The actions of the United States are contrary to its human rights obligations under the Universal Declaration of Human Rights (UDHR); the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), later codified in 8 USC § 1158; and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Under Article 14 of the UDHR, “[e]veryone has the right to seek and enjoy in other countries asylum from persecution.” Under Article 33 of the 1951 Refugee Convention, the principle of non-refoulement prohibits a state from returning a refugee to a situation where his or her life or freedom would be threatened on account of a protected ground. This Convention was later codified, making it domestic law. Title 8, Section 1158 of the U.S. Code states that the only time an asylum seeker may be sent to a third country is when “the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection.” Further, under Article 5(a) of the ICERD, there is a guaranteed right to not be discriminated against due to nationality or ethnic origin when appearing in front of tribunals and all other organs administering justice.

By refusing to allow certain asylum seekers to remain in the country, the United States is violating Article 14 of the UDHR. Based on reports of the violence in Mexico, the United States is violating obligations under Article 33 of the 1951 Refugee Convention and 8 USC § 1158 by sending asylum seekers to Mexico rather than allowing them to remain in the United States throughout the asylum process. Further, the rampant discrimination based on nationality under this protocol violates Article 5 of the ICERD. This is because under the MPP, only asylum seekers at the Mexican border and only asylum seekers who are not Mexican citizens will be held in Mexico. This discrimination is based on nationality of asylum seekers and serves to deprive them of equal access to asylum seeker services within the United States. By being held in Mexico, asylum seekers have a harder time meeting with United States lawyers and are being forced to make their cases under more dangerous conditions than other asylum seekers entering the United States.

While there are clearly increasing asylum seeker backlogs in the court system, the practical deprivation of attorney services to a select group of asylum seekers kept in another country will not serve to fix this issue as much as place an undue burden and risk on those seeking asylum. The U.S. government has multiple obligations under both international and domestic law that prohibit it from sending asylum seekers to another country simply because they are from Central America. If the U.S. government wants to avoid costly litigation, it should bring the MPP in line with its legal obligations.

# Another Assault on Indigenous Land: The Battle Against the British Columbia Pipeline

March 12, 2019  
by Shelsea Ramirez

The hereditary chiefs of the Wet'suwet'en Clans of British Columbia are protesting the British Columbia pipeline that is being built by the TransCanada subsidiary company Coastal GasLink. The Royal Canadian Mounted Police (RCMP) in British Columbia are carrying out an interim injunction from the British Columbia Supreme Court issued in mid-December 2018. The decision allows the company to begin pre-construction of a 416-mile pipeline that will cross the traditional territory of the Wet'suwet'en Clan. TransCanada claims to have permission from all twenty of the elected councils representing the First Nations of British Columbia for the entirety of the project, but demonstrators argue that the project is moving forward despite the outcry from the hereditary leaders of the Wet'suwet'en Clans. By moving forward with the British Columbia pipeline, the TransCanada company is violating a 1997 Canadian Supreme Court decision, Delgamuukw v. British Columbia, which protects the existing aboriginal rights and title to land in the territory.

The First Nations of British Columbia have a distinct political and legal system that predates colonization, with both hereditary chiefs and band councils speaking on behalf of the community. Hereditary chief is a title passed down through families, and the hereditary chiefs' roles are largely viewed as protecting the territory and the interest of the people. The Wet'suwet'en hereditary chief structure is made up of five clans and thirteen houses. Band councils, on the other hand, are a form of elected governance introduced by the Canadian government through the Indian Act of 1976. The representatives on band councils are subject to elections held every two years. The band councils' roles differ in each clan, although they are largely seen as administrators between the federal government and the First Nations. The New York Times reports, "A spokeswoman for Coastal GasLink, Jacquelynn Benson, said in an email that the company respects both leadership systems and has held 120 meetings with Wet'suwet'en hereditary chiefs since 2012, as well as logging 1,300 phone calls and emails with them, trying to reach a solution" because the hereditary chiefs have opposed the pipeline for years.

In the Delgamuukw case, the Supreme Court upheld Indigenous peoples' claims to lands that were never ceded by treaty. The Court affirmed that section 35 of the 1982 Constitution Act of Canada protects "Aboriginal title" as an "existing aboriginal right," and this includes the right to exclusive use and occupation of land in a manner consistent with the group's attachment to the land. Further, the Court implemented a three-part test to determine if the indigenous nations demonstrated Aboriginal title. The indigenous nations had to prove sufficient, continuous and exclusive evidence of territorial occupation. Although claims to the land were recognized, the Court never distinguished which of the two indigenous nations involved in the case, Gitksan and Wet'suwet'en, had title to the land where the pipeline is being protested. Although the indigenous nations chose not to move forward with another court case to determine the issue, it remains an issue between the First Nations.

By moving forward with the pipeline without the consent of the hereditary leaders of the Wet'suwet'en people, the TransCanada Company and effectively the Canadian government are blatantly disregarding the Wet'suwet'en people's governance structure, undermining the rights of the indigenous people, and extinguishing any claim they might have on the land. They are also violating the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 18, which states that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions,” and Article 19, which requires states to consult and cooperate in good faith with indigenous peoples through their own representative institutions to receive free, prior and informed consent before adopting and implementing administrative or legislative measures that may affect the indigenous people. It should be noted that Canada initially voted against the adoption of the declaration in 2007; however, Canada has since removed its objector status and officially adopted UNDRIP. Although it is not a legally binding instrument under international law, the government of British Columbia also promised to uphold the articles in UNDRIP.

A separate reconciliation process is underway between the Wet'suwet'en people's hereditary chiefs and the Canadian government to discuss title, rights, laws, and traditional governance. It is not directly linked to the pipeline project, but it will open necessary doors to include the hereditary leaders in decisions regarding the territory. There continues to be an ongoing case where the interim injunction originated, and the case is expected to be heard in court by May at the latest. If Canada and the local British Columbian governments intend to stand by their earlier declarations regarding UNDRIP, they must recognize the rights of the Wet'suwet'en people.

# Struggling to Survive: The Devastating Impact of the Minas Gerais Dam Collapse on Indigenous Populations in Brazil

April 12, 2019  
by Victoria Kadous

On January 25, 2019, a Brazilian dam collapsed, killing hundreds of people in the Brazilian state of Minas Gerais. The dam was owned by a Brazilian company, Vale SA, and was designed to hold back iron ore waste. The collapse flooded the small southeastern city of Brumadinho along with multiple Vale buildings. In the days following the collapse, multiple search parties looked for missing persons and surveyors found dead fish and trash over ten miles away from the mine collapse in the Paraopeba River.

Coverage of the January 25 tragedy focused on how this was not the first time Vale has had to answer for a deadly dam failure. In 2015, another one of the Vale dams in Minas Gerais broke, killed nineteen people, caused hundreds to be relocated, and left 250,000 residents without drinking water. The most recent dam collapse has led to a re-evaluation of the circumstances surrounding the 2015 dam collapse and concern for the stability of the six hundred other dams in Minas Gerais which have been deemed at risk of rupture.

In addition to the growing number of deaths from the dam collapse, the lasting effects of the collapse are threatening the survival of indigenous communities. In particular, the Pataxó indigenous group lives along the Paraopeba River and use it to bathe, fish, and water plants. These communities have been told to refrain indefinitely from using the contaminated river water.

Discriminatory placement of hazardous waste disposal sites near lower income populations is a current problem in other nations such as the United States. Companies regularly choose cheap, low income areas to set up their waste disposal facilities and then fail to properly safeguard against dangers to the surrounding communities. Multiple arrests occurred following the Vale dam collapse because of the possibility of criminally poor maintenance of the dams and disregard of warning signs that the dam was unsafe. Vale knew about the dangerously unstable condition of the dam back in October of 2018, almost three months prior to the collapse. Despite knowing that the dam's chance of collapse was twice the maximum risk the company's own guidelines allowed, the company neglected to take action.

Under Article XIX of the American Declaration on the Rights of Indigenous Peoples (ADRIP), indigenous persons have a right to live in healthy environments. This includes the right to manage their lands in a sustainable way and to protect their lands from the deposit of harmful substances while placing a requirement on states that they “shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination.” In addition, the right to a healthy environment is further guaranteed by Article

11 of the Additional Protocol to the American Convention on Human Rights, which Brazil has ratified. For years, Brazil's indigenous populations have protested the placement of dams on and near their lands. These efforts have been thwarted by companies who develop the dams despite protest and simply compensate indigenous communities after the damage is already done. The most recent dam collapse and subsequent awareness of the instability of hundreds of other dams throughout Brazil proves that there are some consequences of developing on or near indigenous lands which cannot be resolved with a check.

The new Brazilian president, Jair Bolsonaro, has already taken steps to diminish tribal rights in Brazil. President Bolsonaro transferred the power to designate indigenous lands to the Ministry of Agriculture at the beginning of January 2019 just after dismantling Brazil's bureau of indigenous affairs. Researchers claim that these actions potentially foreshadow the complete annihilation of whole indigenous tribes in Brazil. These movements of the Brazilian government, coupled with the recent catastrophe of the Vale dam collapse could quickly lead to more than just a couple Vale executives facing jail time. Brazil owes a duty to its indigenous people to reinstate their rights and allow them to protect them from future catastrophes.

# The Decline of Indigenous Legal Protections in Guatemala

April 22, 2019

by Mary Kate O'Connell

In mid-January, thousands of indigenous Guatemalan citizens took to the streets to protest the country's recent actions to remove human rights protections for the indigenous community. Over the past year, Guatemala's president, Jimmy Morales, made tactical efforts to discredit the International Commission against Impunity in Guatemala (CICIG). Such efforts can be attributed to the UN-backed international institution's investigations against President Morales and his family for suspected corruption. On January 7 2019, President Morales expelled CICIG, a move that garnered international attention for the potential negative effect on the capacity of Guatemala's judicial system to pursue justice for violations of indigenous human rights. On January 17, 2019, soon after Morales expelled CICIG, the Guatemalan Congress announced an amendment to The National Reconciliation Law. If approved, this law would grant amnesty to those convicted of crimes against humanity in connection with Guatemala's thirty-six-year civil war, the victims of which predominantly belonged to the indigenous community. These recent moves by the Guatemalan government have come after 200 attacks against indigenous human rights defenders were reported in 2018, a number that is likely to be higher in 2019 given these new changes to institutional protections for rule of law. Both the expulsion of CICIG and the amendment to the National Reconciliation Law pose significant risks to the country's obligations to protect indigenous peoples from impunity.

Guatemala's thirty-six -year civil war, which occurred from 1960-1996, claimed the lives of more than 200,000 Guatemalans, the majority of whom belonged to the country's indigenous Mayan community. The war began as a conflict between a military-controlled government against a left-wing insurgency and largely occurred in the Guatemalan countryside and mountainous areas, where the population was primarily Mayan. As a result, the government brutally attacked and burnt down many Mayan villages entirely to avoid the guerilla insurgency from gaining more traction. In 1999, a United Nations ("UN") truth commission set up as part of Guatemala's supervised peace accords released a monumental report. The report revealed that the Guatemalan government was culpable for more than ninety percent of the 42,000 human rights violations that occurred during the civil war. The report further concluded that the Mayan community suffered the most from the civil war, and that the war consisted of "aggressive, racist, and extremely cruel violations that resulted in the massive extermination of defenseless Mayan communities."

Following the 1996 peace accords, Guatemala enacted The National Reconciliation Law. In its original form, this law was used by Guatemalan national courts to prosecute and convict leaders of the Guatemalan government who partook in the violence during the civil war that resulted in near-genocide of the Mayan community. The National Reconciliation Law, until recently, had been heralded by the international community as a legal model of how to fight institutional impunity for serious human rights violations. In 2013, Guatemala became the first country to

convict a former dictator of genocide when The National Reconciliation Law was used to convict Efraín Ríos Montt. Ríos Montt took control of Guatemala through leading a military coup in 1982 and directed and oversaw the killings, kidnappings, torture, and disappearance of hundreds of thousands, mainly Mayan, Guatemalan citizens. During his trial, he was found responsible for, among other acts, the massacres in 15 Ixil Mayan villages, which resulted in the killing of over 1,771 unarmed women, men, and children. In November 2018, The National Reconciliation Law was used to prosecute and convict Santos López Alonso, a former Guatemalan soldier. He was convicted for his involvement in the Dos Erres Massacre of 1982, in which 200 people were killed in the primarily Mayan village of Dos Erres.

Now, the amendment to The National Reconciliation Law, if adopted, would conflict with international obligations under the American Convention on Human Rights, which limits adoption of amnesty for crimes against humanity. The amendment would within twenty-four hours result in the release and amnesty of dozens of former governmental officials and military leaders, who were convicted for forced disappearances, mass executions, rape, and genocide. The amendment would also immediately halt the ongoing investigations into the abuse and violence that occurred during the civil war. Michele Bachelet, the UN High Commissioner for Human Rights, has referred to the possible consequence of this amendment as “complete impunity for all those involved in truly horrendous violations, including crimes against humanity.” This amendment to a law that fights impunity for human rights violations has the potential to cause retaliation against victims, witnesses, judges, organizations, and lawyers who helped convict the former government and military officials. However, as noted by High Commissioner Bachelet, international standards limit the adoption of amnesty for crimes against humanity, most notably the American Convention on Human Rights, which was ratified by Guatemala in 1978.

Efforts to restrict the ability of Guatemalan institutions such as CICIG to fight impunity have received international criticism from the UN for violating the state’s international obligation to protect the human rights of all citizens. The amendment to The National Reconciliation Law can be viewed as part of the Guatemalan government’s latest efforts to restrict the power of Guatemala’s institutions against corruption and impunity. One of these institutions is the International Commission Against Impunity (CICIG), which President Morales expelled from the country on January 7, 2019. CICIG was created and backed by the UN and the European Union and can be defined as a hybrid anti-corruption body that uses international investigators and national prosecutors to identify and prosecute criminal networks and corrupt government officials from the civil war. In November 2018, CICIG reported that it had worked with Guatemala’s Attorney General to prosecute more than 680 people and to gain convictions for 310 cases involving influence peddling and illegal campaign financing. Although President Morales was elected in part because of his anti-corruption platform with the campaign slogan “Neither corrupt nor thief,” he stopped supporting CICIG’s anti-corruption efforts beginning in 2017 when CICIG implicated him and his political party for campaign finance violations. Most recently, CICIG opened an investigation into President Morales and his brother on corruption charges, leading President Morales to banish CICIG’s commissioner from Guatemala, refuse to renew CICIG’s mandate, and expel CICIG in its entirety in January.

Some have referred to President Morales' expulsion of CICIG as part of his slow-motion coup to gain a military stronghold in the country similar to that which existed during the civil war. However, the Guatemalan Constitutional Court has limited President Morales' power and has issued a provisional injunction reversing CICIG's expulsion for unconstitutionality since the creation of CICIG was ratified by Guatemala's congress. Additionally, the UN deemed the expulsion impermissible and confirmed that CICIG would continue its work in Guatemala.

By expelling CICIG and proposing an amendment to The National Reconciliation Law, the Guatemalan government, led by President Morales, is allowing the state to fall back on its obligation under the American Convention on Human Rights to protect all citizens – including indigenous peoples – from impunity and violence. If President Morales continues to attack CICIG and the amnesty legislation passes congress, the indigenous community in Guatemala will face a heightened risk of violence reminiscent of the early years of the horrific civil war. To avoid the country falling into state-led violence again, the international community, including the UN and the Organization of American States should continue to monitor the constitutionality of President Morales' actions and continue to support the efforts and existence of the Truth Commission and CICIG in the country.

# Mistreatment in Nursing Homes through Antipsychotics

May 3, 2019  
By Liz Leman

All over the United States nursing homes are trying to control seniors by putting them on antipsychotic drugs without any authorization. This practice, unsurprisingly, makes the nurses' job more convenient because the seniors' become lethargic (at least). In addition to the legal and moral issues that stem from this misuse of drugs, the practice also carries disastrous health repercussions for residents. According to the Food and Drug Administration (FDA), antipsychotic drugs are meant to treat psychiatric conditions. Nurses, however, are administering antipsychotic drugs to seniors – not for its intended purpose – but as an unwarranted sedative for residents with dementia. The FDA requires manufacturers to label antipsychotic drugs with the strongest “black box” warning about the risks they pose to people with dementia because these drugs nearly double the risk of death for residents. One director of nursing stated that seeing the senior decline on an antipsychotic is “sadder than watching someone with dementia decline.” This inhumane phenomenon is so widespread that, according to a report by the Human Rights Watch, every week over 179,000 residents who do not have diagnoses requiring antipsychotic drugs are still given them. This practice reaches beyond creating irreversible health repercussions for seniors.

Unnecessarily putting peoples' parents, grandparents, etc. on drugs without authorization from the senior or his/her family also violates human rights norms. This widespread phenomenon blatantly violates the 1987 Nursing Home Reform Act, which provides a Bill of Rights to each resident to protect rights and ensure a level of care. The Act is supposed to ensure that nursing home residents a quality of care “that will result in their achieving or maintaining their ‘highest practicable’ physical, mental, and psychosocial well-being.” Administering antipsychotic drugs to residents with dementia harnesses the exact opposite effect. Instead of maintaining the “highest practicable” physical, mental, and psychosocial well-being, this practice increases the speed of these seniors' health deterioration. Under this act, the residents have a right to be “fully informed in advance about care and treatment.” The residents are administered these drugs, however, without adequate information for them or a family member to properly consent nor the opportunity to object. For example, a resident of a Texas nursing home explained that she had no idea she was being given antipsychotic drugs because “they crush it and put it in baby food, so you don't know what you're getting fed.” The 1987 Nursing Home Reform Act also provides that the residents' care is free from improper medical treatment.

Abusing antipsychotic drugs, however, by putting lives at danger, is worse than improper medical treatment. This treatment is inhumane. While there are federal regulations in place to bar the use of drugs without adequate indication for use, there should be stronger enforcement in connection to nursing homes. One example of an initiative that is already put in place is the National Partnership to Improve Dementia Care in Nursing Homes by the Centers for Medicare & Medicaid Services. The issue remains prevalent, however. One potential reason for the

continuation of unauthorized administration of antipsychotic drugs in nursing homes is because initiatives focus too much on the drugs, and less on the root of the problem, the rights of the residents. The [1987 Nursing Home Reform Act](#) focuses on the rights of the residents, but the value of this act depends on the effectiveness of its enforcement. Nursing home staff should be required to learn its principles. Additionally, the US government should work further to enforce residents' rights as per [the 1987 Nursing Home Reform Act](#) and hold nursing facilities accountable for their misconduct.

# A Sacrifice Zone: Environmental Justice in Chile

August 20, 2019

by Valentina Capotosto

In April 2019, the Supreme Court of Chile decided a landmark case in which the [court called for greater enforcement of citizens' environmental rights](#). The case was brought after two pollution incidents [exposed 200 residents](#) of Quintero and Puchuncaví to toxic pollutants in 2018. Quintero and Puchuncaví make up one of four [“sacrifice zones”](#)—communities plagued by immense industrial pollution justified by the promise of economic development. Unlimited industrial development, heavy waste production, and a lack of oversight or mitigation over the past fifty years have led to the contamination of the air, soil, and water in these [communities](#).

Residents of Quintero and Puchuncaví have [battled for their environmental rights](#) for years. In 2011 media attention and outrage garnered over the poisoning of thirty-three school children at La Greda school. The Chilean Center for Investigative Journalism and Information (CIPER) linked the pollutants to a state-run mining company, Codelco. Still, insufficient regulations and industrial growth persisted despite the contamination event at La Greda school. Today, these communities are described as a [“reservoir of chemical waste,”](#) a [dystopia](#) where the air is heavy and black sticky dust settles on every surface.

The case decided this year may be the first legal [victory for environmental justice](#) in Quintero and Puchuncaví after half a century of unfettered industrial growth and environmental degradation. The plaintiffs included representatives from the National Institute for Human Rights, Greenpeace, and the Municipalities of Quintero and Puchuncaví. In the opinion, the Chilean Supreme Court [criticized government agencies](#) such as the Ministry of the Environment, Ministry of Health, Valparaiso's Regional Ministry of Health, and the Office of National Emergency for systematic negligence. The opinion highlighted the [state's failure to mitigate pollution, monitor public health, comply with the national emergency plan, and adhere to international conventions](#). The court, in condemning responsible state actors, quoted [Article 1, Paragraph 4](#) of Chile's Constitution, holding that the duty of the State includes safeguarding national security, providing protection for families, and ensuring everyone has the right to participate in national life with equal opportunity.

One important takeaway from this case is that international standards matter in determining the responsibilities of state actors to enforce environmental rights. In the decision, the court condemned the Ministry of the Environment for failing to comply with international environmental conventions such as the [Montreal Protocol](#), the [Stockholm Convention](#), and the [Basel Convention](#). The Basel Convention, for example, sets environmental standards for hazardous waste disposal. Insufficient state oversight of industrial waste practices has led to events such as the [pollution incident at the La Greda school in 2011 and the contamination of Quintero Bay](#) which violate standards for protecting human health and the environment agreed to in the convention.

The decision has been praised by [Human Rights Watch](#) who contributed to an [Amicus Brief](#) (“HRW Brief”) for the case. The HRW Brief urged the court to consider international law and international standards in enforcing environmental rights. It advised the court to use the 2018 [United Nations Special Rapporteur on the Environment’s Framework Principles](#) (“Framework Principles”) as a guide for enforcing environmental rights, as embodied in [Article 19\(8\) of Chile's Constitution](#), which establishes citizens’ right to an environment free from contamination. The Framework Principles act as an interpretive guide for domestic enforcement of environmental rights and how states can be held accountable for violations of environmental rights. Key Framework Principles mentioned in the HRW Brief include requiring assessments of environmental impact, maintaining substantive environmental standards, and having affordable, effective, and timely public access to environmental information.

The Chilean Supreme Court’s enforcement of environmental rights through domestic law could be an important mechanism for environmental justice within Chile as well as internationally. Future domestic court decisions could establish affirmative responsibilities for state actors to uphold constitutionally protected environmental rights and international environmental conventions. For example, the HRW Brief mentioned [a case decided by the Supreme Court in Argentina](#) requiring the government to create mechanisms for access to information, emergency plans, international compliance, and enforcement oversight. Other trends mentioned in the HRW Brief include cases enforcing the human right to a healthy environment from the United Kingdom, France, and Germany.

While this case brings residents of Quintero and Puchuncaví one step closer to achieving environmental justice, it will likely take much more time to unravel the effects of severe industrial pollution accumulated over the last fifty years. Yet, this decision furthers a new potential trend for more courts to hold government actors accountable for upholding environmental rights. Marcos Orellana, Director for the Environment and Human Rights Division of Human Rights Watch, wrote an article describing the case as a [“cause for hope that other courts around the world may find a basis in domestic law to uphold the right to a healthy environment.”](#)