

2021

21st Century Refugees: Uncovering the Human Rights Gap

J. Mauricio Gaona

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), and the [International Humanitarian Law Commons](#)

Recommended Citation

J. Mauricio Gaona (2021) "21st Century Refugees: Uncovering the Human Rights Gap," *Human Rights Brief*. Vol. 24: Iss. 3, Article 3.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol24/iss3/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

21ST-CENTURY REFUGEES: UNCOVERING THE HUMAN RIGHTS GAP

by J. Mauricio Gaona*

INTRODUCTION

Starvation, migrant smuggling, human trafficking, labor exploitation, detention, physical abuse, rape, gang and drug-cartel violence, psychological trauma, torture, abandonment, and dire humanitarian conditions are some of the most archetypical risks refugees and asylum seekers (including millions of children) encounter today. These risks are present not only in the countries migrants flee from but also in the countries they pass through and, increasingly, in host countries. Since its inception, however, refugee protection has focused mostly on the risks migrants face in their home countries, neglecting far more endemic risks affecting the security, human dignity, and wellbeing of forced migrants around the world.

The emergence of these risks in host countries raise pressing questions on legal gaps exposing refugees to human rights violations or, as I describe it, “the Human Rights Gap.” Yet no legal scholarship truly conceptualizes — much less categorizes — the practices and regulations fostering these risks. As such, the main inquiry of this Article is this: Does refugee protection consider the human rights risks that migrants, who are already fleeing persecution or conflict, encounter in the 21st century? If not, should modern refugee protection include such risks?

It is the contention of this Article that when the law no longer mirrors the purpose of its creation (protecting migrants), but rather the unintended

reality of its moral decadence (targeting migrants), the law thereby conceived loses its social institutional role while becoming a tool of oppression. When such an oppression subjugates the human dignity of the most vulnerable, the law becomes, in itself, the most powerful tool to foster human suffering.

Drawing on a novel classification of the risks that refugees encounter in the 21st century, this Article aims to expose — and hopefully will lead efforts to correct — critical legal gaps prompting State and non-State actors to neglect refugees’ most basic human rights and international legal protections.

This Article is divided in two sections. Section I concerns the security and human rights risks forced migrants encounter in their journey to safety while becoming refugees. Section II explores the risks refugees and asylum seekers confront once their claims in designated or intended host countries are decided.

I. EVOLVING RISKS: BECOMING A REFUGEE

Under international refugee law, once the preliminary legal determination of *subjective* (well-founded fear) and *objective* (persecution) elements is made, individuals forced to leave their home countries due to a credible fear of persecution and who, due to such fear cannot or are unwilling to return to their home countries, have the right to seek refugee or asylum protection.¹ Although this

* J. Mauricio Gaona is a Visiting Fellow at Harvard Law School (IGLP) and O’Brien Fellow at McGill Center for Human Rights (CHRLP). He holds a Ph.D. from McGill University (DCL, Faculty of Law), a Master’s degree in International and Comparative Law from University of California Los Angeles (LL.M., UCLA School of Law), a Master’s degree in European Union Law from Paris 2 Panthéon-Assas University (M2, Faculty of Law), and a law degree from University Externado. The author thanks professor and former United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau, for his insightful feedback. The author thanks as well professors Payam Akhavan, Asli Ü. Bâli, and Kevin Gerson for their outstanding support and interest.

¹ Convention relating to the Status of Refugees art. 1, opened for signature July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

rule of international law finds different applications and interpretations in domestic immigration law, international refugee protection conveys nonetheless a minimum level of human rights protection (human dignity) afforded by nation-states² and the international community³ to individuals fleeing persecution or conflict.

I use the term “security and human rights risks” to identify the risks 21st-century refugees face from the moment they are forced to leave their home country to the moment their protection claims are decided — which, I argue, extends to risks associated with their migratory status and journey for safety, along with their rejection and exclusion in host countries. These risks, in short, concern the security of the migrant from a multidimensional perspective circumscribed by a threefold agency threat: specifically, the *persecutor agent* (State or non-State actor) causing the person to migrate, *incidental agents* benefiting from the migrant’s precarious situation (migrant smugglers, human traffickers, drug cartels, illegal armed groups, terrorist organizations), and *settlement agents* (immigration authorities) whose practices, systems, and policies further endanger the wellbeing and security of migrants.

Becoming a refugee in the 21st century has become a security and human rights risk. This process exposes forced migrants not only to human rights violations such as sexual exploitation and human trafficking, but also to a myriad of security risks threatening

their physical, mental and moral integrity including torture, psychological trauma, and others.⁴ In fact, whether a migrant’s protection claim in a host country is granted or denied, these *evolving risks* emerge.

Evolving risks are the risks migrants face while becoming refugees. This includes both risks associated with the triggering event of persecution or the conflict forcing the migrant to seek protection abroad, and risks related to the transition that migrants experience from the moment they leave their home country to the moment they arrive at their intended or designated host country. In effect, under international refugee law, the term “refugee” does not require a formal declaration of refugee status for the migrant to be considered a refugee. Article 1 of the 1951 Refugee Convention states that the term refugee refers to “any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country defines a refugee as the individual.”⁵

Assuming that refugee protection is exclusively limited to the moment when such protection is granted would contradict what refugee protection aims to accomplish. Namely, protecting migrants against persecution — which begins neither with their arrival to their final destination nor when the protective status is granted or denied. I argue that denying refugee protection on the grounds that refugee status has not been granted would violate Article 31 of the Vienna Convention on the Law of Treaties,⁶ which requires treaties such as the Refugee Convention be interpreted “in good faith in

² Unlike the United States, several legal systems across the world have internalized the notion of “human dignity” either within the scope of equality rights or as a fundamental right. See, e.g., Canadian Charter of Rights and Freedoms, s. 15, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter]; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law] art. 1, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last amended March 28, 2019) (Ger.) [hereinafter GRUNDGESETZ]; NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 24 (Japan); COSTITUZIONE [COST.] art. 3 (It.); CONSTITUTION OF IRELAND 1937 art. 40; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1.

³ See Refugee Convention, *supra* note 1, art. 13 (highlighting in its Preamble the international community’s commitment vis-à-vis refugee protection).

⁴ See UNITED NATIONS SUPPORT MISSION IN LIBYA, OFF. OF THE HIGH COMM’R FOR HUM. RTS., DESPERATE AND DANGEROUS: REPORTS ON THE HUMAN RIGHTS SITUATION OF MIGRANTS AND REFUGEES IN LIBYA 27-29 (2018) [hereinafter DESPERATE AND DANGEROUS].

⁵ Refugee Convention, *supra* note 1, art. 14.

⁶ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

A. Causal Risks

I define *causal risks* as the dangers that force individuals to migrate outside their home country and become refugees. These risks relate to the very elements preceding the legal determination on the migrant’s claim or status (well-founded fear and persecution).

Causal risks encompass a wide range of dangers connected to the type of persecution or conflict forcing the migrant to escape their home country — including non-State actors’ violence (e.g., gangs in El Salvador,⁷ guerrillas in Colombia,⁸ drug cartels⁹ in Mexico, terrorist organizations in Syria), State actors’ persecution (e.g., political repression in Venezuela,¹⁰ chemical attacks¹¹ in Syria), ethnic/religious conflicts (e.g., persecution of Muslims in Myanmar,¹²

persecution of Christians¹³ in Nigeria), and famine (e.g., Yemen, Somalia, South Sudan),¹⁴ overwhelming environmental impact (e.g., Bangladesh,¹⁵ Nauru¹⁶ island) as well as gender (e.g., women in Honduras)¹⁷ and sexual-orientation persecution (e.g., LGBTQ persecution in Russia).¹⁸

I contend that each one of these risks must be considered in order to properly determine refugee protection. *Causal risks*, in particular, are determined by the danger each migrant experiences. This means that the *objective-subjective assertion* of causal risks is circumscribed to the legal viability of the cause-event forcing migrants to leave (and not want to return) their home country. Under international refugee law, moreover, these preliminary triggering-effect conditions constitute the factual basis immigration authorities use to assess the legal viability of refugee and asylum claims.

⁷ See, e.g., Jonathan Watts, *One Murder Every Hour: How El Salvador Became the Homicide Capital of the World*, THE GUARDIAN (Aug. 22, 2015), <https://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place>.

⁸ See, e.g., *Refugiados Colombianos en Ecuador: No Regresarán*, DW (Sept. 22, 2016), <http://www.dw.com/es/refugiados-colombianos-en-ecuador-no-regresar%C3%A1n/a-19568279>.

⁹ See, e.g., Nathaniel Parish Flannery, *Is Mexico Really the World’s Most Dangerous War Zone*, FORBES (May 10, 2017), <https://www.forbes.com/sites/nathanielparishflannery/2017/05/10/is-mexico-really-the-worlds-most-dangerous-warzone/#726f3c0e5e3f>.

¹⁰ See, e.g., Jose Mauricio Gaona, *Dictatorship in Venezuela Will Soon Be Reality*, THE GLOBE AND MAIL (July 30, 2017), <https://www.theglobeandmail.com/opinion/dictatorship-in-venezuela-will-soon-be-reality/article35839985/>.

¹¹ See, e.g., Russell Goldman, *Assad’s History of Chemical Attacks, and Other Atrocities*, N.Y. TIMES (April 5, 2017), <https://www.nytimes.com/2017/04/05/world/middleeast/syria-bashar-al-assad-atrocities-civilian-deaths-gas-attack.html>.

¹² See, e.g., *Myanmar Wants Ethnic Cleansing of Rohingya – UN Official*, BBC (Nov. 24, 2016), <http://www.bbc.com/news/world-asia-38091816>.

¹³ See, e.g., Harriet Sherwood, *Christians Flee Growing Persecution in Africa and Middle East*, THE GUARDIAN (Jan. 13, 2016), <https://www.theguardian.com/world/2016/jan/13/christians-flee-growing-persecution-africa-middle-east>.

¹⁴ See, e.g., *UNHCR Says Death Risk from Starvation in Horn of Africa, Yemen, Nigeria Growing, Displacement Already Rising*, U.N. HIGH COMM’R FOR REFUGEES (April 11, 2017), <http://www.unhcr.org/news/briefing/2017/4/58ec9d464/unhcr-says-death-risk-starvation-horn-africa-yemen-nigeria-growing-displacement.html>.

¹⁵ See, e.g., *Bangladesh Listed as One of 7 Climate Change Spots*, DHAKA TRIBUNE (June 24, 2017), <http://www.dhakatribune.com/climate-change/2017/06/24/bangladesh-listed-one-7-climate-change-hotspots/>.

¹⁶ See, e.g., Ben Doherty & Eleanor Ainge Roy, *World Bank: Let Climate-threatened Pacific Islanders Migrate to Australia or NZ*, THE GUARDIAN (May 8, 2017), <https://www.theguardian.com/environment/2017/may/08/australia-and-nz-should-allow-open-migration-for-pacific-islanders-threatened-by-climate-says-report>.

¹⁷ See, e.g., *5 Mil Mujeres Han Sido Asesinadas en Honduras Durante 11 Años*, LA PRENSA LIBRE COSTA RICA (July 11, 2017), <https://www.laprensa libre.cr/Noticias/detalle/116357/5-mil-mujeres-han-sido-asesinadas-en-honduras-durante-11-anos>.

¹⁸ See, e.g., Antoun Issa, *Why Russia’s Persecution of Its LGBTQ Community Matters*, HUFFINGTON POST (Apr. 19, 2017), https://www.huffpost.com/entry/why-russias-persecution-of-its-lgbt-community-matters_b_58f78163e4b0c892a4fb7452.

On the one hand, the danger migrants face must be established through an *objective legal standard*. That is, anyone facing similar events (persecution or conflict) would objectively appreciate the particular danger as imminent risk forcing the person to seek protection abroad. This *objective standard* relates to the factual persecution or conflict the migrant faces, which presupposes an objective connection between the event of persecution and the migrant's particular situation (*objective assessment*).¹⁹ This, in turn, requires the claimant to prove a "clear probability of persecution"²⁰ where the claimant is the intended target or a victim of conflict. It is worth noting that persecution grounds have been statutorily (race, religion, nationality, political opinion) and judicially defined (membership of a particular social group), while the grounds of persecution associated with conflict derive from well-known situations of danger portrayed as conflicts in modern society (e.g., civil war, famine, ethnic cleansing, religious persecution, gender discrimination). Still, refugees may also encounter other types of persecution based on their personal views or positions, the decisions they make, or the nature of the conflict they confront.

¹⁹ For example, the High Court of South Africa requires refugee claimants to prove "well-grounded apprehension of harm" showing no other satisfactory remedy. See *AI v. Director of Asylum Seeker Management* (Department of Home Affairs), 22059/18 [2019] ZAWCHC 114, South Africa's High Court (2019) at ¶¶ 25-27 (S. Afr.).

²⁰ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (setting forth a constitutional precedent on "clear probability of persecution" as the standard of proof on asylum claims in the U.S.); *Kwiatkowsky v. Minister of Emp't and Immigration*, [1982] 2 SCR 856 (Can.); *Singh v. Minister of Emp't and Immigration*, [1985] 1 SCR 177, at 9 (Can.) [hereafter *Singh*] (reaffirming *Kwiatkowsky's* constitutional precedent while holding "more likely than not" to be Canada's burden of proof on refugee protection). See also *Un'Analisi Giuridica: Valutazione delle Prove e della Credibilità nell'Ambito del Sistema Europeo Comune di Asilo*, EUR. ASYLUM OFF. SUPPORT at 40, 93 (2018) (asserting the objective nature of meaningful persecution facts or "fatti significative").

On the other hand, *causal risks* must further meet a *subjective legal standard* based on a well-founded and credible fear of persecution,²¹ which aims to facilitate a coherent connection between objective and subjective circumstances of persecution leading to the migrant's ultimate decision to seek protection abroad. In fact, the legal assessment that immigration officials make on refugee and asylum claims hinges on a critical disquisition concerning the migrant's perception, apprehension, plausibility, and account of persecution.²² This means that the migrant must connect the need to escape from and the unwillingness to return to their home country by showing how the persecution or conflict threatens the migrant in particular. Although this legal assessment may vary from one jurisdiction to another, the well-founded fear must be credible, timely, and factually and individually connected to the alleged persecution or conflict (*subjective assessment*). To that end, the triggering event of persecution must be such that anyone in the migrant's situation would have been forced to leave the country. The 1951 Refugee Convention²³ — and most domestic legal systems²⁴ — require connection between these two elements by imposing on claimants the need to prove that their "fear of persecution" is particularly related to the persecution from which they fled.²⁵

²¹ James Hathaway argues that the legal standard ("test") is exclusively objective as the fear is merely anticipatory (if returning), not psychological. See JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* at 100-110 (2d ed. 2014).

²² See, e.g., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), Policy Memorandum 602-0162 (July 11, 2018) at 7.

²³ Refugee Convention, *supra* note 1, art. 1(A)(2).

²⁴ See, e.g., Immigration National Act of 1965 (INA), Pub. L. 89-236, § 101(a)(42)(A), 79 Stat. 911 (1965) (modified by Immigration Act of 1990, 8 U.S.C. § 1101(a)(42)(A)).

²⁵ See *Ramos v. Holder*, 589 F.3d 426, 428 (7th Cir. 2009) (defining "particular social group"); *Matter of Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 2006) (introducing the concept of social visibility and legal connection); see also *Matter of Mogharabi*, 19 I&N Dec 439, 441 (B.I.A. 1987).

B. Transitional Risks

I define *transitional risks* as those that forced migrants encounter from the moment they flee their home country to the moment their refugee status or asylum claims are granted. These risks are associated not only to logistical or economic limitations refugees often face in their journey for safety, but also to incidental risks arising out of increasingly dysfunctional and hostile systems of reception of refugees and asylum seekers in the 21st century.

I maintain that *transitional risks* may subject refugees and asylum seekers to unexpected or greater danger than they would otherwise face should a more organized system of reception be in place. This encompasses risks that refugees experience while confronting State and non-State actors before reaching their destination: specifically, violence,²⁶ kidnapping,²⁷ rape,²⁸ starvation,²⁹ torture,³⁰ and migrant-smuggling-related risks (e.g., sexual violence, torture, death).³¹ Migrant smuggling,

in particular, has become one of the world's most profitable criminal enterprises.³²

The case of North-Triangle asylum seekers from El Salvador, Honduras, and Guatemala is illustrative. The territorial expansion of this region's two main gangs, MS-13 and Barrio 18, has forced women and children to leave these countries due to widespread violence.³³ On their arrival to the southern border

²⁶ See Mexico's Immigration Control Efforts, CONG. RSCH. SERV.: IN FOCUS at 1 (Feb. 2020), <https://fas.org/sgp/crs/row/IF10215.pdf> (reporting police corruption and abuses against migrants in Mexico).

²⁷ Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders – January-December 2018, U.N. HIGH COMM'R FOR REFUGEES 18 (2018), <https://data2.unhcr.org/en/documents/download/67712>, (reporting the kidnapping of refugees from East and Horn Africa while crossing the Eritrea-Sudan border).

²⁸ *Id.* at 19 (reporting cases of rape of Somali refugees by migrant smugglers in Libya); Juliana Oliveira Aaraujo et al., *Prevalence of Sexual Violence among Refugees: A Systematic Review*, 53 REV. DE SAÚDE PÚBLICA 10 (2019) (describing sexual violence against refugees based on a cross-referenced, bibliographic and global study).

²⁹ Migrant smugglers in Africa hold migrants in temporary locations where they face starvation. See DESPERATE AND DANGEROUS, *supra* note 4, at 27.

³⁰ *Id.* at 28.

³¹ *Id.*

³² In 2017, migrant smuggling from the Northern Triangle to the United States generated up to 2.3 billion (USD). Human Smuggling and Associated Revenues, RAND CORP. 15 (xv) (2019), <https://www.rand.org/pubs/researchreports/RR2852.html>. In 2016, 2.5 million migrants were smuggled around the world generating returns between 5.5 and 7 billion (USD). See Global Study on Smuggling of Migrants 2018, U.N. OFFICE ON DRUGS & CRIME 9 (June 2018), https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf.

³³ Stephanie Nolen, *Menaced by Gangs, El Salvador's Children Are Running for Their Lives*, THE GLOBE AND MAIL (Aug. 25, 2015), <https://www.theglobeandmail.com/news/world/menaced-by-gangs-el-salvadors-children-are-running-for-their-lives/article26151568/> (explaining that refugees who evade these human trafficking networks must find migrant smugglers or "coyotes" in very dangerous regions); see Marc Champion, *Mexico Now World's Deadliest Conflict Zone After Syria: Survey*, BLOOMBERG (May 9, 2017), <https://www.bloomberg.com/news/articles/2017-05-09/mexico-now-world-s-deadliest-conflict-zone-after-syria-survey>. Moreover, those who survive the hazardous journey crossing tunnels, rivers, and deserts face discrimination and, if caught, detention; see *U.S. Detention of Families Seeking Asylum: A One-Year Update*, HUM. RTS. FIRST 3 (June 2015), <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.

of Mexico, however, many of these migrants³⁴ face abuse³⁵ and discrimination.³⁶

Other refugees face similar security risks across the world. For example, prostitution has proliferated across the Colombia-Venezuela border (Cúcuta)³⁷ as guerrilla groups have seized the opportunity to

³⁴ See Janna Ataiants et al., *Unaccompanied Children at the United States Border, A Human Rights Crisis that Can Be Addressed with Policy Change*, 20 J. IMMIGR. MINOR HEALTH 1000, 1000-10 (2018) (analyzing human rights implications concerning the treatment of unaccompanied children in the U.S. southern border).

³⁵ Human trafficking networks operating in Mexico (e.g., the “Meléndez” gang) are known to target migrants crossing rural areas near Puebla, Tlaxcala, Oaxaca, and Mexico City. *Atrapan a Jefe de Banda de Trata de Personas en Puebla y Tlaxcala*, MUNICIPIOS (Mar. 27, 2020), <https://municipiospuebla.mx/nota/2019-02-13/izucar-de-matamoros/atrapan-jefe-de-banda-de-trata-de-personas-en-puebla-y-tlaxcala> (Mex.).

³⁶ Attacks on asylum seekers on the move have been reported in Mexico, Brazil, Croatia, and Hungary. See La Caravana de Migrantes Centroamericanos en Tijuana 2018-2019 – Segunda Etapa, EL COLEGIO DE LA FRONTERA NORTE 22 (March 2019), <https://observatoriocolef.org/wp-content/uploads/2019/03/2o.-Reporte-Caravana-Tijuana.250319compressed1.pdf> (describing local officials’ and residents’ attitudes in Tijuana toward Central American migrants) (Mex.); Jackson Félix & Emily Costa, *Após Ataques de Brasileiros, 1,2 Mil Venezuelanos Deixaram o País, Diz Exército*, GLOBO BRASIL G1 (Aug. 19, 2018), <https://g1.globo.com/rroraima/noticia/2018/08/19/pacaraima-tem-ruas-desertas-apos-confronto-entre-brasileiros-e-venezuelanos.html> (Braz.); see also *Croatia: EU Complicit in Violence and Abuse by Police against Refugees and Migrants*, AMNESTY INT’L (Mar. 13, 2019), <https://www.amnesty.org/en/latest/news/2019/03/croatia-eu-complicit-in-violence-and-abuse-by-police-against-refugees-and-migrants/> (reporting Croatia’s police brutality against refugees and migrants crossing the so-called “Balkan route”); Marc Santora & Benjamin Novak, *Hungary’s Migrant Abuse Is ‘Matter of Urgency,’ European Agency Finds*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/world/europe/hungary-migrant-abuse-report.html>.

³⁷ See Anastasia Moloney, *Venezuelans Sell Sex and Hair to Survive in Colombian Border City*, REUTERS (June 10, 2018), <http://www.reuters.com/article/us-colombia-migrants-venezuela/venezuelans-sell-hair-and-sex-to-survive-in-Colombian-border-city-idUSKBN1J703B>.

recruit Venezuelan migrants crossing the border (Arauca).³⁸ Sexual violence against migrants also occurs in South Africa³⁹ and Europe.⁴⁰

II. EMERGING RISKS: BEING A REFUGEE

I define *emerging risks* as those intrinsically related to the legal status and condition of being a refugee in the 21st century, which I argue derive from the embedded effects of modern dehumanization⁴¹ and exclusion of migrants, refugees, and asylum seekers.⁴²

A. Status-Related Risks

Status-related risks refer to the risks arising out of the migrant’s expressed intent “to become a refugee” and the resulting immigration status (“refugee status”) leading to their prosecutorial treatment (confinement, detention). The prosecutorial treatment of migrants (detention beyond

³⁸ See *Fleeing Crisis, Some Venezuelans Are Recruited by Rebel Forces Fighting in Colombia*, NPR (Jan. 18, 2019), <https://www.npr.org/2019/01/18/685850399/fleeing-crisis-some-venezuelans-are-recruited-by-rebel-forces-fighting-in-colomb> (describing recruitment of migrants by illegal armed groups in Colombia).

³⁹ See Theresa Alfaro-Velcamp & Robert H. McLaughlin, *Rape without Remedy: Congolese Refugees in South Africa*, 6 J. CO-GEN MED. 1, 10, 15 (2019) (describing cases of rape of Congolese refugees in South Africa).

⁴⁰ See Gianna Robbers et al., *Sexual Violence against Refugee Women on the Move and within Europe*, WORLD HEALTH ORG. at 26-28 (2016).

⁴¹ See, e.g., Helen Davidson, *Australia’s Politicians Have Promoted Xenophobia: UN Expert*, THE GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/australia-news/2016/nov/18/australias-immigration-policies-have-promoted-xenophobia-un-expert>.

⁴² See Filippo Grandi, *Refugees Deserve Action and Investment, Not Indifference and Cruelty*, WORLD ECON. F. (May 24, 2016), <https://www.weforum.org/agenda/2016/05/refugees-deserve-action-and-investment-not-indifference-and-cruelty/>; Ashley Fantz & Ben Brumfield, *More than Half of the Nation’s Governors Say Syrian Refugees Are Not Welcome*, CNN (Nov. 19, 2015), <https://www.cnn.com/2015/11/16/world/paris-attacks-syrian-refugees-backlash/index.html>.

administrative purpose)⁴³ often takes place in the host country, not for a crime the migrant committed but for the migrant's intent to become a refugee or asylum seeker in the host country. Some host countries are further criminalizing the very presence of migrants in their territory while portraying asylum claims as "illegal acts" punished by detention, exclusion, or summary deportation. I maintain that the systematic and institutionalized detention (*e.g.*, United States, Australia, Libya, Hungary, Greece, Serbia, Croatia) of refugees and asylum seekers constitutes a palpable expression of migrants' ongoing criminalization.⁴⁴ This criminalization (status/migratory intent), notwithstanding personal liberty concerns, violates both constitutional

⁴³ I argue that migrants are being prosecuted when their detention exceeds legitimate administrative purposes. Administrative detention takes place when the liberty of the person (or migrant) is restricted on reasonable, necessary, and previously regulated administrative grounds often related to State security or the need to ascertain the person's identity. Since this type of detention occurs rather preemptively and without a trial, its use constitutes an exception to the principle of liberty and security of the person protected under international law. See G. A. Res 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 19, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR]; African Charter on Human and People's Rights art. 6, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I/L/M/ 58 (1982) (entered into force Oct. 21, 1986); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, art. 5(1), Nov. 4, 1950, ETS 5 (entered into force Sept. 3, 1953); American Convention on Human Rights art. 7(1), Nov. 22, 1969 (entered into force July 18, 1978). Yet, when it comes to migrants (including children), prolonged detention is increasingly the rule. See Global Detention Project (data), GDP, <http://globaldetentionproject.org> (last visited Mar. 23, 2021). Nonetheless, some countries still circumscribe the detention of asylum seekers beyond administrative purposes to exceptional circumstances, *see, e.g.*, Convention Act 2004, Pub. Act 2004, no. 50, s. 200(1)(d) (assented to June 3, 2004) (N.Z.) (regulating the detention of asylum seekers in cases of false identity and national security threats).

⁴⁴ See Revised Deliberation no. 5 on Deprivation of Liberty of Migrants, U.N. HUM. RTS. COUNCIL — WORKING GROUP ON ARBITRARY DETENTION at 9-11 (Feb. 7, 2018) (stating that seeking asylum is a "universal right," for which irregular entry and stay in a country "should not be treated as a criminal offence").

protections under domestic law⁴⁵ and human rights protections under international law.⁴⁶

Detention of migrants and refugees is prevalent across the world.⁴⁷ In fact, *detention* is one of the most archetypical *status-related risks* refugees confront today. For example, though the average length of detention of migrants in Canada has decreased in the last few years (from twenty-six days in 2014-2015 to thirteen days in 2018-2019), the number of migrants in detention in this country increased 5.1% in the 2018-2019 fiscal year (8,781 migrants).⁴⁸ The United States, in particular, has built the world's largest detention system for migrants and asylum seekers.⁴⁹ The United States detains annually 316,391 migrants⁵⁰ including women and children; that is, an exponential growth rate of twentyfold from 1979 to 2019.

⁴⁵ See, *e.g.*, Canadian Charter, *supra* note 2, s. 7 (regulating the right to ["liberty and security of the person"]); Grundgesetz, *supra* note 2, arts. 2(2) and 11(2) (establishing ["the freedom of a person"] as an inviolable principle and its physical restriction to limited circumstances); S. AFR. CONST., 1996, art. 12(a), (b) and (e) (providing the ["freedom and security of the person"] while proscribing detention without just cause and trial, along with cruel punishment and inhuman treatment); *see also* CONSTITUCIÓN ESPAÑOLA art. 17(1), Nov. 29, 1978, BOE-A-1978-31229 (guaranteeing the ["right to liberty and security of the person"] to any person ["toda persona"], not just Spanish citizens). Likewise, the Constitution of Malaysia guarantees the liberty of the person based on the notion of personhood, not citizenship. See MALAYSIA FED. CONST. art. 5, Aug. 31, 1967 (stating the liberty of the person as a fundamental liberty while providing strict guidelines to prevent arbitrary detention).

⁴⁶ See UDHR, *supra* note 43, art. 3; ICCPR, *supra* note 43, art. 9(1).

⁴⁷ See Global Detention Project, *supra* note 43. In the United States, only asylum seekers entering legally are exempted from detention ["affirmative process"]. *Id.*

⁴⁸ *Annual Detention Statistics – 2012-2019*, CANADA BORDER SERVICES AGENCY (2020), <https://www.cbsa-asfc.gc.ca/securedetent/stat-2012-2019-eng.html>.

⁴⁹ See Emily Kassie, *Detained: How the United States Created the Largest Immigrant Detention System in the World*, THE MARSHALL PROJECT (Sep. 2019), <https://www.themarshallproject.org/2019/09/24/detained>.

⁵⁰ *Id.*

Prolonged detention of migrants frequently occurs in dire humanitarian conditions. For instance, following a crackdown order on illegal migration, authorities in Thailand detained more than 200 asylum seekers from Vietnam, Cambodia, and Pakistan in 2019 (including more than fifty children separated from their parents).⁵¹ There are reports of prolonged detention (even for years) of Rohingya refugees in Saudi Arabia.⁵² Likewise, thousands of Venezuelan migrants have been denied asylum protection in Curaçao and imprisoned following government citation of “irregular migrant status.” In the process, detainees suffer gross human rights violations.⁵³

The reception of refugees and asylum seekers is also increasingly prosecutorial. For example, under Australia’s Migration Act, the police are authorized to question (§ 188) and detain (§ 189) non-citizens having no visa to enter or remain in Australia.⁵⁴

Another increasingly common *status-related risk* concerns the often-cited “crackdown” on refugees and asylum seekers. For example, police harassment and arbitrary detentions of Rohingya refugees in India⁵⁵ are forcing these refugees to leave India as they find themselves often unprotected within the

so-called *zero-line zone* along the India-Bangladesh border.⁵⁶ In Morocco, moreover, the crackdown on refugees (viewed as “illegal migrants”) has led to human rights violations, law enforcement abuses, and the gradual abandonment of thousands of sub-Saharan refugees.⁵⁷

B. Exclusion Risks

Exclusion risks refer to risks arising out of the social, legal, and cultural exclusion of migrants in host countries. These risks are externalized through local populations showing various forms of discrimination,⁵⁸ exclusion,⁵⁹ and violence⁶⁰ towards migrants. Here, notably, the socioeconomic exclusion of refugees constitutes a major *exclusion risk*.

⁵¹ WORLD REPORT 2019, HUM. RTS. WATCH 579 (2020), <https://www.hrw.org/world-report/2019/> [hereinafter HRW 2019].

⁵² Areeb Ullah, *Revealed: Hundreds of Rohingya Imprisoned ‘Indefinitely’ in Saudi Arabia*, MIDDLE EAST EYE (Nov. 13, 2018), <https://www.middleeasteye.net/news/revealed-hundreds-rohingya-imprisoned-indefinitely-saudi-arabia>.

⁵³ *Venezuelans Denied Protection in Curaçao*, AMNESTY INT’L at 11 (2018), https://www.amnestyusa.org/wp-content/uploads/2018/09/AMN_18_45_rapport-Curacao.pdf.

⁵⁴ Migration Act 1958, §§ 188, 189, Compilation no. 140 (compiled Aug. 12, 2018) (Austl.).

⁵⁵ See Ashley Starr Kineth, *India’s Rohingya Shame*, AL JAZEERA (Jan. 29, 2019), <https://www.aljazeera.com/indepth/>; see also Xinhua, *Return of Rohingya to Myanmar Delayed Yet Again*, CHINA DAILY NEWS (March 1, 2018), <http://www.china-daily-hk.com/articles/53/35/19/1519889549097.html>.

⁵⁶ Phelim Kine, *India’s Ominous Threat to Rohingya Muslim Refugees*, ASIA TIMES (Jan. 17, 2020), <https://asiatimes.com/2020/01/indias-ominous-threat-to-rohingya-muslim-refugees/>.

⁵⁷ *Morocco: Relentless Crackdown on Thousands of Sub-Saharan Migrants and Refugees Is Unlawful*, AMNESTY INT’L (Sept. 7, 2018), <https://www.amnesty.org/en/latest/news/2018/09/morocco-relentless-crackdown-on-thousands-of-sub-saharan-migrants-and-refugees-is-unlawful/>.

⁵⁸ See, e.g., Alfredo Corchado, *Central American Migrants Face Grueling Journey North*, DALLAS MORNING NEWS (2014), <http://res.dallasnews.com/interactives/migrantroute/>; see also Mohammed Sabour, *The Socio-Cultural Exclusion and Self-Exclusion of Foreigners in Finland: The Case of Joensuu*, in PAUL LITTLEWOOD ET AL., SOCIAL EXCLUSION IN EUROPE: PROBLEMS AND PARADIGMS at 219 (2017).

⁵⁹ See, e.g., Ignacio Correa-Velez et al., ‘We Are Here to Claim Better Services than Any Other:’ Social Exclusion among Men from Refugee Backgrounds in Urban and Regional Australia, 26 J. OF REFUGEE STUD. 163, 163-86 (2012) (proposing a different approach on resettlement of refugees based on social-exclusion study).

⁶⁰ See, e.g., HRW 2019, *supra* note 51.

Notwithstanding progress made towards the assimilation of refugees in some countries,⁶¹ the trend of *socioeconomic exclusion* of refugees and asylees is pervasive. In Greece, for instance, less than 15% of migrant children hosted on the islands of Samos and Lesbos and only one in two on the mainland have access to education.⁶² In South Korea, a petition signed by more than 700,000 citizens requested that the government review or eliminate the legal protection (상세 보기 [Visa-Free Policy]) accorded to Yemeni refugees⁶³ hosted on Jeju Island⁶⁴ — this notwithstanding, the Republic of Korea has been a party to the 1951 Refugee Convention and 1967 Protocol Relating to the Status of Refugees since 1992.⁶⁵ Of the 480 asylum applications filed by Yemeni nationals in Korea in 2018, the government only granted two,⁶⁶ and of the 6,015 total asylum applications filed that year by all other nationals, the government only granted ninety-one.⁶⁷ This trend is found in Hungary as well,

which granted asylum protection to only fifty-four claimants out of 3,119 in 2018.⁶⁸ Likewise, Japan, a signatory to the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees, only accepted seven asylum applications from Syrian nationals between 2011 and 2016.⁶⁹ In Turkey, the lack of proper documentation (*mülteci kayıt kartları* [refugee registration cards]) for Syrian refugees is affecting these migrants' mobility and ability to find jobs and integrate into the country's labor market, fostering their socioeconomic exclusion across Turkey.⁷⁰

Finally, one of the most palpable ongoing *exclusion risks* is *abandonment*. Reports on refugees deserted during the pandemic caused by COVID-19 have uncovered the state of indifference and neglect towards their security, human dignity, and well-being.⁷¹ To begin with, only very few countries have included within their vaccine distribution plans refugees and asylum seekers.⁷² Moreover, the lack of a coordinated international response to the pandemic,

⁶¹ E.g., Jordan's Migration Compact, HRW 2019, *supra* note 51 at 323; Canada's sponsor programs on refugees, *How Canada's Refugee System Works*, IMMIGR. AND REFUGEE SERV. (Nov. 27, 2019), <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/canada-role.html> (Can.); Colombia's work permits for Venezuelan refugees, *Colombia Offers Work Permits to Hundreds of Thousands of Venezuelan Migrants*, REUTERS (Jan. 29, 2020), <https://www.reuters.com/article/us-venezuela-politics-colombia/colombia-offers-work-permits-to-hundreds-of-thousands-of-venezuelan-migrants-idUSKBN1ZS2YE>.

⁶² HRW 2019, *supra* note 51, at 231.

⁶³ See 청원내 ["PETITION"], 제주도 불법 난민 신청 문제에 따른 난민법, 무사증 입국, 난민신청허가 폐지/개헌 청원합니다 ["Petition for Abolition-revision of the Refugee Act, Visa-Free Entry, and Refugee Application Permission Due to the Illegal Refugee Application Issue in Jeju Island"] (2018), <https://www1.president.go.kr/petitions/269548?navigation=best-petitions> [petition contents under the title "청원내용"] (S. Kor.).

⁶⁴ *Id.*

⁶⁵ *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R FOR REFUGEES (2020).

⁶⁶ Choe Sang-Hun, *Just 2 of More Than 480 Yemenis Receive Refugee Status in South Korea*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/world/asia/yemen-south-korea-refugees.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Atsushi Yamagata, *Conflicting Japanese Responses to the Syrian Refugee Crisis*, 15 THE ASIA-PACIFIC J. 3, 4 (2017).

⁷⁰ See Kermal Viral Tarlen et al., *The DOM The "Other" Asylum Seekers from Syria: Discrimination, Isolation and Social Exclusion*, KIRKAYAK KÜLTÜR at 29 (2019), <http://panel.stgm.org.tr/vera/app/var/files/t/h/the-dom-the-other-asylum-seekers-from-syria-report.pdf> (describing living conditions and exclusion of Syrian refugees in Turkey, Lebanon, and Jordan).

⁷¹ See *Amid COVID-19 Pandemic, Thousands Strained in Bay of Bengal 'Unable to Come Ashore'*, UN NEWS (May 6, 2020), <https://news.un.org/en/story/2020/05/1063402>; Ben Doherty et al., *Left with Nothing: Australia's Migrant Workforce Face Destitution Without Coronavirus Safety Net*, THE GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/australia-news/2020/apr/01/left-with-nothing-australias-migrant-workforce-face-destitution-without-coronavirus-safety-net>.

⁷² See *Dozens of Countries Have No Plan to Vaccinate Refugees against the Coronavirus. That Could Be a Fatal Flaw, Experts Warn*, THE WASH. POST (Jan. 30, 2021), <http://www.washingtonpost.com/world/2021/01/30/refugees-vaccine-covid-jordan/>; see also *Jordan Starts 'World First' Covid Vaccinations in Refugee Camp*, FRANCE 24 (Feb. 15, 2021), <http://www.france24.com/en/live-news/20210215-jordan-starts-world-first-covid-vaccinations-in-refugee-camp>.

the number of refugees and asylum seekers on the move,⁷³ and the supply deficiency of the vaccine in most host countries and refugee camps could make refugee populations across the planet the perfect target for COVID-19 variants' development⁷⁴ — which could further accentuate their institutional, legal, social, and economic exclusion.

CONCLUSION

There is a critical and defining legal gap in modern refugee protection concerning the evolving and emerging human rights risks that 21st-century refugees encounter. Extending from increasingly complex causes of persecution/conflict and treacherous journeys to prosecutorial treatment of migrants and criminalization of refugee status/intent, there is, moreover, a growing number of human rights risks affecting the security, human dignity, and well-being of refugees and asylum seekers across the world. This Article advances a novel conceptualization and classification on those risks.

Unfortunately, many of the dangers refugees nowadays encounter (transitional, status-related, and exclusion risks) are not considered in current international refugee law. What is more, both domestic and regional regulations and policies have become triggering events either fostering or accelerating these risks. Accordingly, this Article finds that the modern protection of refugees must acknowledge and progressively consider these risks in regulations, practices, and policies in order to

eliminate the greatest risk in today's world: being a refugee in the 21st century.

⁷³ See *Figures at Glance* (2020), U.N. HIGH COMM'R FOR REFUGEES (reporting 26 million refugees, 4.2 million asylum seekers, and 3.6 million Venezuelan migrants by the end of 2019), <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

⁷⁴ So far, COVID-19 variants — that is, random genetic replications/mutations of the virus known to be more contagious — have been found in England, South Africa, Nigeria, and Brazil, along with thousands of worrisome trails of mutation across the planet. For example, just one variant found in the United Kingdom in September last year known as “B.1.1.7” has already produced 23 mutations leading to an increase of contamination of 70%. See *Investigation of Novel SARS-CoV-2 Variant: Variant of Concern*, PUB. HEALTH ENG., Technical Briefing no. 5, at 3 (Dec. 1, 2020) [updated Jan. 14, 2021].