2015-16 SYMPOSIUM TRANSCRIPT: THE GLOBAL REFUGEE CRISIS[1]

There have always been refugees: people forced from their home countries by war, persecution, or other types of violence and who must seek new homes and new lives abroad. But the world is now experiencing a crisis of a greater scope and severity than anything it has seen in decades. The ongoing refugee crisis has placed unprecedented strains on international, regional, and national institutions, and exacerbated longstanding tensions and unresolved questions in the global framework for refugee protection. The Connecticut Journal of International Law explored the issues and challenges faced by the refugee protection regime in its 2016 symposium, The Global Refugee Crisis, held at the University of Connecticut School of Law on April 15, 2016.

Three panels of scholars and practitioners addressed the following issues:

Panel 1: Can effective steps be taken to address protracted refugee situations and the root problems that cause refugee flows? With many refugees languishing in camps or unstable situations in nearby countries, how can the international community provide them with adequate support or help them find new homes? How can countries be incentivized to take in their fair share of refugees?

Panel 2: How can states' interests in border protection and controlling mass migrations be reconciled with refugees' rights and protection needs? International law bars countries from returning refugees to places where their lives or freedom would be threatened. While some nations have responded generously, many countries have gone to great lengths to evade their obligations by preventing refugees from arriving in the first place.

Panel 3: How should states manage the pressure to tighten eligibility standards, lessen procedural protections, or place higher burdens of proof on asylum-seekers when there is a large scale refugee flow? These mass refugee flows tend to heighten

1. Although this is a transcript, minor corrections and edits have been made throughout, so this is not an exact reproduction of what was said at the event. Additionally, the Connecticut Journal of International Law thanks its Volume 31 Symposium Editors, Katherine Peccerillo and Afua Akoto, for their tireless efforts and tremendous execution of this event.

fears that asylum claims will be by persons that are really economic migrants, potential terrorists, or otherwise "unworthy."

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PANEL 1 - PROTRACTED REFUGEE SITUATIONS: SHARING RESPONSIBILITY AND ADDRESSING ROOT CAUSES

Richard Wilson: Good morning, everyone. My name is Richard Wilson from the University of Connecticut School of Law and I'll be the moderator of this panel. The panel addresses the issue of sharing responsibility for protracted refugee situations. We'll be asking the question, where is the burden of responsibility for accepting refugees falling presently? And you may have noticed that distribution is very uneven. Why is that distribution so skewed? There are countries in the region such as Lebanon, Jordan and Turkey that are taking almost a million refugees each. There are countries in the region which have accepted no refugees at all thus far. There are about four of them. There are countries in Europe which have taken more than their share per capita and there are others that have taken very few. I'll point out that the figure reported in the LA Times yesterday for the number of asylum seekers and refugees in the United States this year in 2016 is about 1,500 compared with about 98,000 that have applied for asylum in Germany and 64,000 in Sweden.

So one of the questions that we must address is, what can be done to incentivize countries to take their fair share of refugees? And what is a fair share? How do we determine that? What kind of principles will be at stake in determining those questions? Responsibility to protect, a doctrine that's been around for a while to deal with human emergencies? The idea of development which has been around longer? And we must ask, are there more holistic approaches, which build a variety of measures together to address the problem? We'll also the notice the failure of EU framework of asylum law for addressing this question adequately. And we'll also note the recent payment or arrangement to pay Turkey $3 billion to hold on to its refugees and not send them any further.

We have an esteemed panel to deal with all these pressing questions and in the interest of time, so we can get to the very substantive discussion, I'm going to be very brief in introducing them but I'll introduce them in the order in which they'll speak. We'll start with Tendayi Achiume who is an Assistant Professor of Law at the UCLA School of Law. Followed by Susan Akram who is seated here from the second who is Clinical Professor and Director of International Human Rights Clinic at Boston University School of Law. And then Jacqueline Bhabha who is Professor of Practice of Health and Human Rights at the Harvard School of Public Health. And Maryellen Fullerton is a Professor of Law at Brooklyn Law School and there are much more extensive biographies. I think we'll go ahead and start, we've got about 10 to 15 minutes each and then we'll have time at the end for discussion.

Tendayi Achiume: First of all, thank you very much to the symposium organizers for creating a space for much needed reflection on global refugee trends and the role of international law in addressing protracted refugee situations. It's really a pleasure to be here and I am thrilled to be on this panel, not only because of the importance of the issues we will address, but also because of the esteemed panelists with whom I have the opportunity to engage.

I'm going to focus my remarks on four issues.[2] First, I'm going to make the case for the pressing need for international cooperation to share the cost and responsibility of protecting Syrian refugees. Today, this is a very easy case to make and our moderator's opening remarks already make this clear. Secondly, I'm going to discuss the legal limitations on achieving international cooperation for more comprehensive responsibility-sharing. There, of course, many significant non-legal limitations, but my focus will be a number of the fundamental legal limitations. Thirdly, I'll reflect briefly on approaches to achieving the international cooperation so desperately required, in light of the existing international legal regime. Finally I'll conclude with some reflections on xenophobia in relation to addressing root causes of the failure to achieve global cost and responsibility-sharing.

Before reaching these four issues, it is useful to start with the international legal definition of a refugee. Under international refugee law, a refugee is a person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion, is outside of his or her country of nationality, and owing to such fear, is unable or unwilling to avail him or herself of the protection of his or her country of nationality.

The Case for International Cooperation

As Richard mentioned, there are now almost 5 million Syrian refugees and an overwhelming majority of these refugees is confined to Syria's vicinity. There is no principle basis for this current distribution of the cost and responsibility of protecting Syrian refugees. Despite the dramatic regional concentration of refugees, regional protection efforts as of last night are only 7% funded—in other words only 7% of the funding that is required to secure the protection of refugees in the region is available right now to those tasked with realizing regional refugee protection. According to UNHCR, Turkey presently hosts almost 3 million refugees. Compare that figure with the number of refugees that have sought asylum in Europe. As of February 2006, just under 1 million Syrians had applied for asylum in *all* of Europe. On the other hand Lebanon—a territory that is so much smaller than Europe—currently hosts over 1 million Syrian refugees, who now constitute at least a quarter of Lebanon's population. These figures starkly represent just how unevenly the refugees are distributed.

As of December 2015, according to the U.S. government, the United States had admitted only 2234 Syrian refugees, although the LA Times figure Richard quoted identifies the number admitted as even fewer. Whether it's 2200 or 1500, either figure represents a drop in the ocean as compared to the number of refugees concentrated in the Middle East. At present, the countries that are hosting the most refugees are not those most responsible for the root of the refugee crisis, and this is important to keep in mind, given the continuing status of Syria's conflict as a regional

2. These remarks draw in part from the speaker's article, E. Tendayi Achiume, *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316562.

and international proxy war. Furthermore, the countries in the region that are doing the most to protect Syrian refugees are not those with the greatest capacity to do so in terms of resources. Instead, geographic proximity to conflict and porousness of borders are the two factors that remain the primary determinants of which nations are bearing the highest cost in terms of protecting refugees.

The effects of this distribution are disastrous for many. Among the worst affected are, of course, the refugees who are concentrated in the region, and whose livelihoods are tenuous. Regional refugee host communities as well continue to pay a high price as a result of this distribution. Frontier countries in Europe and in Africa, to a lesser but significant extent also bear the brunt of this uneven distribution, as do the few interior countries in Europe that have broken step with the rest of Europe to extend protection to Syrian refugees.

The Syrian refugee crisis we confront today really has been a slow motion crisis, steadily destroying the lives of many since 2011. For at least the first three of these years, powerful international actors largely focused attention on military intervention and other coercive measures targeted at Syria, and at the same time largely neglected the plight of Syrian refugees as well as the global implications of their displacement. I underscore this point because references to the refugee crisis—especially in the media and other popular sources we regularly access—speak of it as though it arose in the summer of 2015. This is simply not true—the refugee crisis has been underway for a much longer period of time.

What happened in the middle of 2015, is that refugee flows to *Europe* seemed finally to bring attention to a situation that had been unfolding long before that. Focus on the European dimension is an important development. However, without more, the disproportionate focus on the European dimension of the crisis puts the cart before the horse, as I have argued in more detail elsewhere.[3] The fact is that the real crux of this Syrian refugee crisis remains in the Middle East region, and resolving this crisis requires a comprehensive approach that pursues international cooperation for *all* Syrian refugees, not only the ones that make it to Europe. In certain respects, to focus on Europe is to focus on symptoms, while ignoring the much bigger problem playing itself in Syria's vicinity. This does not bring us any closer to robust international cooperation to share the cost and responsibility of protecting Syrian refugees, which is one thing that would meaningfully mitigate the ongoing crisis.

Legal Limitations to Achieving International Cooperation

There are many limitations that attend achieving international cooperation to share the cost of protecting Syrian refugees. And even though I want to focus my remarks on legal limitations, it is nonetheless important to dispel a notion that I think is fairly prevalent—the notion that the obstacle to adequate refugee protection is that of absolute resources. In other words, this is the notion that the international

3. E. Tendayi Achiume, *Focus on Europe Neglects the Syrian Refugee Crisis*, JURIST (Nov. 12, 2015) *available at* http://www.jurist.org/forum/2015/11/Tendayi-Achiume-Syrian-Refugees.php.

community—and by this I mean the world's states—do not have sufficient resources to extend protection to Syrian refugees. Speaking in 2013, when, as now, the United Nations was struggling to raise money to fund the regional refugee protection effort, the United Nations High Commissioner for Refugees had the following to say about the amount of money it would have taken at that time, fully to fund the refugee protection effort:

> "It represents what the Americans spend on ice cream in 32 days. It represents what the Australians spend on overseas travel in 32 weeks. It represents what German drivers spend on petrol in six weeks. I don't recall any bail out of any average dimension bank in the western world that has not cost 5, 6, 7 or 10 times more. So, what we are asking for is indeed massive from the point of view of what is normally the support given by the international community to humanitarian needs. But it is really . . . very little compared to what is spent on other purposes in other parts of the world."[4]

Although this statement was made in 2013, many persuasively argue that even today, the challenge today is not that of absolute resource availability.

If it's not absolute resources, what *is* the challenge to comprehensive global responsibility sharing? There are many, but an important piece of the puzzle is that regional containment of refugees to areas geographically proximate to conflict produces a dynamic that is difficult to disrupt. On the one hand, countries bordering conflict typically shoulder a disproportionate share of the responsibility and cost of refugee protection, and on the other, the rest of the world's states have limited incentive to cooperate in providing this protection. In other words, regional refugee containment decreases international investment in addressing massive refugee flows. And I will explain below how in important respects, international refugee law exacerbates the problems created by this regional containment, as I will explain further momentarily.

A key premise of my remarks on the legal challenges to achieving comprehensive international cooperation is that legal regimes such as international refugee law provide frames for articulating problems and their solutions, and for facilitating action to pursue these solutions. In other words, as others have argued, framing can play an important role in generating the sort of political will that is required to achieve international cooperation to share the cost and responsibility of protecting refugees. Framing alone will not achieve this cooperation, but it is a relevant factor, and one that is of particular significance for international lawyers and for international legal scholars.

Presently, international refugee law creates no legal obligations for states to assist other states with protecting refugees under the jurisdiction of the latter. At the same time the global distribution of refugees, in 2013 for example, was such that so-

4. UN High Commissioner for Refugees, *Geneva/Syria* (UN video recording and transcript), UNIFEED (June 7, 2013), http://www.unmultimedia.org/tv/unifeed/2013/06/geneva-syria-11/.

called developing countries hosted 86% of the world's refugees. This was roughly the case in 2014, and if you look at this graph you'll see that essentially between 1989 and 2013, this distribution of refugees has been the status quo, concentrating refugees in the developing world. Another feature of international refugee law that must be layered over this dynamic, is that it requires states to protect refugees within their territories. So if a state is party to the United Nations Convention or Protocol Relating to the Status of Refugees, then it is bears an obligation to protect the refugees within its territory. However, other states parties have no corresponding legal obligation to assist the hosting state with the protection of these refugees. This is a serious problem, and is a fundamental reason why international refugee law provides a poor frame for pursuing international cooperation for refugee cost-sharing. It's not that it would be impossible to achieve this cooperation under existing law, but rather that the current legal regime does little to facilitate it.

There are different approaches that might resolve the problem of international refugee law's poor framing. One approach that many have suggested, and with which I agree is a comprehensive overhaul of the international refugee law regime. The world is in dire need of a refugee regime that is better able a deal with the realities presented by contemporary patterns of global displacement. That said, the prospect of comprehensive overhaul is truly distant. It remains unlikely that we will witness an entire overhaul of the international refugee regime even though today, it seems more likely than in recent years that we may witness limited shifts in the international regulation of migration more broadly. And in fact, as many have pointed out, an overhaul of international refugee law today would likely be a dangerous prospect, in the sense that it would arguably result in a contraction of protections for refugees if states were to convene to renegotiate this law.

This context creates urgency for international lawyers and international legal scholar to pursue a different approach to the frame problem, and that approach is seriously to consider the opportunities within the international legal regime broadly—even outside of the official cannon of international refugee law—for facilitating the requisite cooperation. This begs the question: what frames exist within the current international regime that might take us closer to international cooperation?

Achieving International Cooperation Within the Existing Legal Frame

In an article that I published in 2015 I argued that the international doctrine of the responsibility to protect (RtoP) might be a piece of the puzzle of achieving improved global responsibility-sharing for refugees, pending comprehensive overhaul of the overall international refugee regime.[5] I made clear in that article that applying RtoP to the context of mass refugee displacement by no means achieves a best-case scenario. That said, RtoP's potential remains unexplored.

5. E. Tendayi Achiume, *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316562.

[Note: Professor Achiume ran out of time during her presentation, but, to provide an overview of her argument with respect to RtoP's application to global responsibility-sharing, the following two paragraphs summarize the remarks she would have made. These paragraphs offer a brief account of how RtoP could play a role in strategies to secure global refugee responsibility-sharing.]

RtoP is a doctrine that reconceives sovereignty as responsibility. In 2005, the United Nations General Assembly unanimously adopted a resolution containing what is now the official statement of RtoP's content. The doctrine has three pillars. The first is that states have a responsibility to protect their territorial populations from war crimes, crimes against humanity, genocide and ethnic cleansing. The second is that the international community has a complementary responsibility to provide international assistance, including capacity building assistance to assist any states unable to protect their populations from RtoP crimes. The third and final pillar is that the international community has a responsibility to take timely and decisive collective action, when states are manifestly failing to protect their populations from RtoP crimes. This timely and decisive action includes pacific measures under Chapter VI of the United Nations Charter. It also includes, on a case-by-case basis, where pacific measures fail, coercive measures under Chapter VII, which might include sanctions, International Criminal Court referrals, and even military intervention.

Scholars of RtoP have focused primarily on coercive measures under RtoP, especially on whether RtoP represents a change in when and how states can use force to intervene in the territories of other states. They have not devoted much analysis to what implications RtoP has for the way that states treat refugees fleeing RtoP crimes. Refugee scholars, in turn, have paid little attention to RtoP and its possible implications for refugee protection. Yet RtoP as presently articulated by the United Nations General Assembly has implications for refuge protection generally, and specifically for international refugee cost-sharing, given the underlying purpose of the doctrine. I have spelled these implications out at some length elsewhere, but here it suffices to highlight the implications for the Syrian refugee crisis.

The international community bears a responsibility to assist regional states lacking the capacity and resources to protect Syrian refugees. This responsibility persists for as long as these refugees remain at risk of RtoP crimes in Syria, and simultaneously remain at risk of return to Syria. The nature and extent of the international community's responsibility to protect is a function of refugee host states' willingness to or capacity for protecting refugees. Where states are less capable of protecting refugees, the international community must do more to assist. In some cases, the international community will have to take "timely and decisive action" under pillar three, where the vulnerability of refugees and their hosts is especially acute. And this timely and decisive action could take the form of a Comprehensive Plan of Action (CPA) for Syrian refugees, including, but not limited, to a CPA convened by the United Nations Security Council under Chapter VII. Even while making this proposal, I want to be clear that I see no role for military intervention or other coercive measures in RtoP's application to refugee crises.

Xenophobia and Root Causes of the Failure to Achieve Global Responsibility-Sharing

I want to conclude by talking about xenophobia and the role that I think it plays in making international cooperation for protecting refugees that much harder to achieve. I use the term xenophobia to refer to attitudes, practices, policies or structures that are prejudicial to individuals or groups on account of their status as foreigners. Xenophobia and xenophobic discrimination pose urgent and complex challenges to protection of refugees and specifically for achieving global responsibility-sharing. Even before Chancellor Angela Merkel opened Germany's doors to refugees in September 2015, media reports documented really steep increases in xenophobic discrimination or xenophobic violence in Germany. If you have been following media reports you know that similar dynamics are playing themselves out across different parts of Europe and the world more broadly. The salience of xenophobic rhetoric extends far beyond the regions that are most directly impacted by displacement from the Middle East and North Africa, and the United States is a case in point. As a growing feature of political rhetoric globally, xenophobia is dealing a powerful blow to attempts to pursue the international cooperation that is so desperately required to address the refugee and migrant crisis.

Any initiatives within international law or at the international level that seek to achieve comprehensive refugee cost and responsibility-sharing must consciously account for xenophobia in at least the following ways. First, any such initiatives will need to disrupt, counter or at least anticipate, politically strategic xenophobic ideology that preys on legitimate and illegitimate fears of nationals who often find themselves socio-economically or politically marginal in their own countries. That is absolutely essential. These initiatives must also be cognizant of legitimate host community concerns about heightened competition for materials resources, and the various other ways in which it is the most socio-economically marginal nationals in refugee- and forced migrant-dense regions that share the front lines of vulnerability with displaced persons. Finally, as far as possible, it is important to develop international regulatory initiatives that do not foster xenophobia. Thank you.

Susan Akram: Thank you so much for inviting me. It's a pleasure to be here and to share a very unpopular topic with a lot of people who seem to be interested in it. I'm also grateful for Tendayi going first because I can pick up a little on some of her points and also perhaps push back a little bit on her thesis.

It's my observation that since the coming into force of the 1951 Refugee Convention, each new refugee crisis has precipitated discussion of whether the Convention regime is outdated or inadequate for the task at hand. This question, however, always is always asked in the context not of actual inadequacy or ambiguity in the Convention regime, but with the lack of political commitment to adhere to its letter and spirit. Protracted refugee situations are the most extreme illustration of the main problems underlying unresolved refugee situations in general, particularly: perceived gaps in the law; failure to provide protection or adequate protection as required by law; narrow interpretations of existing legal principles and norms by states seeking to circumscribe their responsibilities towards refugees; barriers to

access and barriers to entry into state territory; measures intended to contain the flow of refugees as close to countries of origins as possible.

I will argue that two aspects of UNHCR's 2009 Conclusion on Protracted Refugee Situations are critical to understanding the dynamics of the current refugee crisis in the Middle East, what measures are prolonging it, and what can prevent it from becoming another intergenerational protracted situation like the Tibetans and Palestinians? The first is the renewed importance of international solidarity and burden-sharing which Tendayi mentioned--and I want to talk a bit more about—and the second is the urgent need for "full respect for affected persons' rights." On the first, I want to unpack the notion of international solidarity and burden-sharing by examining their converse: what happens when states fail to share responsibility for mass influx of refugees? On the second, I want to show how international burden-sharing relates directly to legal obligations to respect and protect refugee rights. I want to illustrate both of these with the containment paradigm, which is the main dynamic in place in today's refugee crisis.

As has been stated today, of the global refugee total documented by UNHCR as 20 million refugees in 2016, the Middle East region hosts the largest share; 22% of the global refugee flow is in that one region. Syria is of course the largest source country for refugees in the region—and in the world. I won't go through the numbers that each of the host states is bearing-- you've heard some of that-- but the numbers must be understood in context. Lebanon and Jordan (along with Syria) already hosted the majority of the world's Palestinian refugees for over 60 years--more than 2 million registered in Jordan, half a million in Lebanon and over half a million in Syria before the Syrian conflict began in 2011. Now, 1 person is 4 is a refugee in Lebanon while in Jordan--one of the most water stressed countries in the world with insufficient capacity to provide water and resources to its own people-- 1/4 of the population is refugees. Despite incredible efforts to provide for the Syrian refugee influx, Jordan and Lebanon have long exceeded their capacity to absorb more refugees, and both countries have recently closed their borders with Syria.

What is particularly interesting from a legal point of view is that the main host countries to the Syrians fleeing the war had no applicable refugee and asylum frameworks in place before 2011. Lebanon and Jordan are not parties to the main international treaty governing the rights and status of refugees, the 1951 Refugee Convention, and although Egypt and Turkey are parties to the Convention, they have carved out significant exception to its application that have affected the status of Syrians as refugees. As a result, all of these states treated Syrians as irregular migrants or short term visitors, with policies that have fluctuated over time. For the first four years of the, these governments did not conceive of incoming Syrians as refugees *per se*. Instead, they were guests, migrants, displaced civilians or, most recently as a result of a major change of law in Turkey, persons under temporary protection. As such, all the front line states as of last year were extremely generous in opening their territories to the refugees, establishing almost open door policies, and together hosting almost 4 million of the refugees as best they could with no governing definition of refugee.

The basically open door policies towards Syrians that these host states of Jordan, Lebanon, Turkey, and even Egypt shared, have become a closed door policy towards new Syrian entrants over the last approximately year and a half. And the key factor in this change is the containment paradigm imposed by western states to stem the flood of refugees from moving beyond the region. All the financial plans--billions so far have been spent on this crisis-- and a host of European and Western policies concerning refugees, are all working on a paradigm of containing this crisis to the region.

Restrictive policies in Europe and the Americas, including the EU Schengen and Dublin rules that penalize illegal border crossers and prevent access to refugee status, are creating barriers to Syrian asylum seekers. As a result of these barriers, more than 7500 people have died trying to make the risky journey across to Europe over the Mediterranean and Aegean, and two children are drowning on average every day trying to reach Europe.

So these extremely generous policies that Turkey Lebanon, Jordan and Egypt had put in place at the start of the Syrian crisis rapidly began reversing as a direct result of the failure of states outside the region to share responsibility for a portion of the refugee populations. The latest EU- Turkey agreement to send refugees back who have survived the risky journey by land or sea from Turkey to Europe, with a 3 billion Euro financial incentive, and a 'refugee exchange' plan, is only the latest of the policies of containment. The EU-Turkey agreement, the combined Dublin-Schengen rules and push-back policies in the Eastern European states, are the major elements of this containment paradigm currently driving the Middle East refugee dynamic. These measures are lifting the responsibility from States Party to the Refugee and European regional Conventions towards refugees, placing the entire burden of an enormous human crisis on a single region that is beyond its capacity to absorb. The irony of frontline states that are not parties to the Refugee Convention regime bearing the vast majority of the refugees, while the Western states which are parties to this regime have accepted a paltry share of the refugees, is I assure you, not lost on the host states.

Although burden-sharing does not appear as a separate obligation in the Refugee Convention, it does appear in the Preamble in the assumption that "the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized is international in scope and nature cannot be achieved without international cooperation." It is my argument that this premise in the Preamble has been operationalized through the process of the UNHCR's Executive Committee, EXCOM, process, which meets yearly to agree on sharing resettlement obligations and pledging donor contributions by hosts in third states to refugee solutions. It has also been reflected in state practice through shared responsibilities towards Comprehensive Plans of Action (CPA's), which I'm going to come back to a bit later. In other words, it is well-accepted that international responsibility and burden sharing of refugees is today a *legal* obligation on States Parties to the Refugee Convention.

Since European states are all parties to the 1951 Refugee Convention and/or the 1967 Protocol --as well as the European Human Rights Conventions which bear on

responsibility towards refugees-- and the EU charter itself incorporates the Refugee Convention's provisions as binding on all EU states, these treaties' core requirements are obligatory across Europe. The core requirements are the obligation to give every putative refugee access to refugee determination and fair asylum procedures; the obligation of *non-refoulement* through time; and the prohibition against mass expulsion. Additionally, under EU laws and regulations, there are obligations on member states: in times of emergency where there's mass influx of displaced persons, EU states must provide temporary protection against return; regardless of internal EU agreements like Dublin and Schengen, European States Parties to the European Convention on Human Rights are prohibited from sending refugees to other states where these individuals would be at risk of return to persecution or violations of their Convention rights.

International solidarity and burden-sharing are closely related to the second point, which is the full respect for rights of refugees. The containment paradigm also compromises a host of additional obligations on EU and Council of Europe states beyond the ones I mentioned, including the obligation to respect and protect family life and keep families together if any member is residing in an EU state. EU states also have obligations to implement the Directives on Subsidiary Protection and Temporary Protection to those who do not meet the criteria for refugee recognition. The prohibition against *refoulement* to torture is also absolute under a host of European treaties and international treaties. Freedom of movement is protected under the European Convention on Human Rights, as is the prohibition against cruel, inhuman and degrading treatment, arbitrary detention, and criminal penalties without due process of law. Many of the conditions and treatment of the refugees and asylum-seekers making their way to and across Europe violate a number of these obligations, but many of the same obligations are relevant to the consideration of whether such refugees can legally be returned to Turkey.

Current EU law--prior to the agreement with Turkey-- does permit returns in some situations. First, persons who do not meet the refugee definition and qualify for asylum are 'irregular migrants' and could theoretically be returned to Turkey as part of a readmission agreement with Greece. Turkey however, has not implemented the EU-Turkey agreement that would trigger the obligation to readmit such migrants. Second, under the Dublin and Schengen Regulations I mentioned earlier, asylum-seekers in one participating state could be returned to another state through which they traveled if it is considered a 'safe third country' or a 'country of first asylum'. Under these provisions, the obligation to assess the asylum claim would fall on the prior state if-- and that's a big if-- it provided adequate guarantees of protection, including access to fair asylum procedures and *non-refoulement*. The European court has, in several decisions, found that both Greece and Italy were not safe third countries for refugees. Turkey is the only country that has maintained a provision in its ratification of the Refugee Convention by which it recognizes only European nationals as refugees, and thus gives no refugee recognition to the 3 million refugees it is currently hosting from Syria, Iraq, Afghanistan, Iran and elsewhere. Turkey has adopted a new Law on Foreigners and International Protection, the LFIP, which provides temporary protection to certain groups, including Syrians, and under which,

until recently, Syrians were not subject *to refoulement*, and were given very generous temporary status and benefits. But Turkey, even under its new law does not allow Syrians to apply for asylum. Since last year there has been increasing evidence that Turkey has been *refouling* refugees to Syria and to Iraq and most recently, Amnesty International and other NGOs have been claiming that hundreds of Syrians have been deported from Turkey on a daily basis, and detained migrants and refugees were being prevented from filing claims, access to their attorneys, are being beaten and mistreated. Turkey's application of the Refugee Convention that fails to recognize non-Europeans as refugees, and lack of implementation of many of the provisions of its new law, suggest that it is highly dubious whether it can be considered a safe third country, at least for Syrians and possibly other refugee nationalities.

These illustrations of the absence of compliance with the twin principles of burden- sharing and respect for refugee rights in the context of the operating paradigm of containment, point to what the international community has known for decades, and is also binding law on European and Western states. Under prior international practice all of Europe-- not just EU states-- should be participating in a UNHCR-led proposal for a Comprehensive Plan for Action that sets out numbers of refugees that each state agrees to accept; the various kinds of status that participating states are willing to provide and should provide under law; minimum standards of benefits to be granted the refugees; and fair refugee status determination process in all states. Such CPAs have been negotiated in mass refugee flows all over the world from the 1970s onwards, and well-established guidelines and criteria exist as solid precedent to resolve the current crisis. I won't say more about this, but direct you to the report published by the Boston University human rights clinic on the Syrian refugee crisis, which sets out a very concrete and detailed Comprehensive Plan of Action. In sum, a well-designed and managed CPA at the start of the Syrian crisis would have avoided the tragedies and the systemic rights violations that we've been witnessing almost daily for the last 6 years. Responsibility-sharing and respect for rights are not moral obligations or symbols of generosity; they are legal obligations and are the key to ensuring the Syrian refugee crisis does not join the Tibetans, Sahrawi and Palestinians in becoming a protracted refugee crisis up to a third generation. Thank you.

Jacqueline Bhabha: Thank you very much, Richard it's an honor to be in this august space and to share a panel with highly respected and cherished colleagues.

[The European refugee and migration "crisis" has kick started an overdue reassessment of the failings of the current refugee protection system. While ongoing massive population movements and related humanitarian crises in sub Saharan Africa, Central America and South East Asia have done little to jolt the architecture of post WW 2 migration regimes, the seemingly unstoppable outpouring of refugees from the war torn Middle East into Europe has provoked serious international scrutiny of established mechanisms and their limitations. Though this scrutiny is urgently needed and therefore welcome, it does not go far enough in challenging our current refugee and migration architecture. By taking as given the autonomy of the refugee/migration field as an arena for policy revision and administrative restructuring, current reform oriented discussions seriously limit and ultimately

undermine the possibility of sustainable and rights respecting progress. I will briefly explore elements of a complementary approach to that being proposed, an approach that insists on a more holistic and integrated engagement with the root causes of distress migration. This approach takes seriously the challenge of harm prevention as the starting point for a just and sustainable global migration system. It insists on linking global migration with global development. And it seeks to provide a preliminary road map for moving forward.

The SDG process provides a useful tool in this connection. The only SDG to directly address refugee and migration challenges, SDG 10.7, articulates the following goal:

> Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.

What would it take to realize this laudable and important goal? Before we "branch out into root causes", it is worth briefly surveying two key elements of the current reassessment that address the refugee element of "orderly, safe, regular and responsible migration. They address the constituency of policy makers and political actors that is key to achieving social change. And they complement a sustainable approach to the prevention of distress migration, even though they are manifestly partial solutions.

First, considerable attention has been paid to the question of resettlement of refugees. After years of abject neglect and willful disregard of protracted or "warehoused" refugees trapped for generations (3 already in Dadaab, more in Palestinian refugee camps in Lebanon), the moral imperative of resettlement has suddenly become front page news, unavoidable and compelling. Outbreaks of cholera, violence, child labor, child marriage and serious malnutrition in Syrian refugee settlements in the countries neighbouring the conflict, and much more urgently for European governments, massive population movements bound for Europe, have concentrated public attention where it has for years been absent from the dreary camps in Kenya, the harsh settings of Rohingya families in Indonesia, the violent and poverty stricken settlements in Tanzania and Guinea.

Against the Middle East crisis backdrop, pressure for a radically extended and improved resettlement policy has been mounting. Some have pointed to the Canadian example of robust resettlement that closely ties civil society sponsorship and engagement with government responsibility in supporting relocated refugees as a model to be emulated. Kumin argues that the Canadian model of private sponsorship could be adopted to very substantially increase the scope of current resettlement from the region surrounding Syria to the EU, by instituting an orderly scheme. She makes a powerful case for the way in which private sponsorship programmes could operate in parallel with government led resettlement efforts to significantly expand available relocation opportunities, because individual citizens or neighbourhood, book or sports groups or corporations could commit to supporting (financially and in other ways) designated refugees for a specified period. As she

notes the outpouring of public support for refugees in many quarters gives credence to the viability of this approach.[6]

Others have bemoaned the failures of political leadership that have led to the current impasse in resettlement opportunities, and pointed to viable alternatives. Michael Ignatieff argues that the US government's failure to intervene decisively and generously in the current EU refugee crisis constitutes a serious failure of leadership and a misunderstanding of the magnitude of the European crisis and its implications for US national interest. Instead of the Obama administration's meager offer to resettle 10,000 Syrians (when Turkey has accepted 3 million and Germany has welcomed over a million, and even Canada has committed to resettling 25,000) he outlines a plan of action that would immediately bring over double that number (23,000) to the US for screening and "surge" resettlement, that would establish additional refugee screening capacities in Europe for another 40,000 refugees, and that would dramatically speed up and streamline the current system of refugee security checks to be consistent with both security mandates and humanitarian obligations.[7]

A second element of the current reassessment of contemporary refugee protection, also triggered by the EU crisis, interrogates the outdated architecture and crafts suggested amendments. As has been noted, the 2015 crisis has "sorely tested the added value and legitimacy of the EU in responding to the refugee crisis"[8]. Commentators point to the urgent need for a rights respecting and workable alternative to the Dublin system, (that established the member state with responsibility for examining an asylum application); they bemoan the absence of equitable and consistent reception policies between MSs, a situation generating coercive pressures on asylum seekers. They propose creation of a new EU Migration, Asylum and Protection Agency (EMAPA), with the power to make decisions on asylum applications that apply EU wide, and to institute a coercion free approach to the choice of country of settlement for refugees. Part of the goal of such an EU wide agency relates back to the question of resettlement equity discussed earlier. Between July and September 2015, the EU committed to relocate 160,000 asylum seekers temporarily held in Greece and Italy; but by the end of the year only 54 people had been resettled elsewhere in Europe from Greece and a further 130 from Italy. In the US a related, if more protracted, discussion about the imperative of "comprehensive immigration reform" has been conducted, occasionally on a bi-partisan basis but more recently in sharply polarized terms. The institutional failures

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6. Judith Kumin, *Welcoming Engagement: How Private Sponsorship can Strengthen Refugee Resettlement in the European Union*, MPI December 2015.

7. Michael Ignatieff et al., *The United States and the Syrian Refugee Crisis: A Plan of Action*, Harvard Kennedy School Shorenstein Center on Media, Politics and Public Policy White Paper, 2 January 2016, http://shorensteincenter.org/wp-content/uploads/2016/01/Syria-Crisis-Plan-of-Action.pdf.

8. Sergio Carrera, Steven Blockmans, Daniel Gross and Elspeth Guild, The EUY's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities, CEPS Essay, No. 20/16 December 2015, Para 1.

to address the reality of 11 million undocumented residents, and the humanitarian exigencies of refugee outpourings from the Northern Triangle countries, so poorly and harshly dealt with, have generated a series of proposals and counter proposals about the urgency of institutional reform.

Others have looked beyond the national or regional to the global architecture of refugee protection and migration management. Some suggest solutions to enable the system to deal with "external and internal refugees, as well as with the forced or involuntary migrant without protection,"[9] - a much broader and more inclusive sphere of concern than has been officially integrated so far. Guy Goodwin-Gill argues that UNHCR's mandate should be revised to expressly include in addition to refugees, stateless persons, internally displaced persons and forced or involuntary migrants without or in need of protection[10]. This reconstituted "United Nations High Commissioner for Refugees and Displaced Persons" could transform the Refugee Statute into a living document more "fit for purpose" in current migration circumstances. But Goodwin-Gill acknowledges that the positive changes thus secured would not necessarily bind states to revise or expand their own protective reach. The challenge of moving from international design to local implementation, from policy to enforcement remains.

Both these innovative engagements with the current refugee crisis – resettlement strategies and migration institution reform at EU, US and UN levels – are generative of creative policy reflection and could have positive spin off effects for millions of vulnerable refugees and others trapped in un-livable situations. But, without a more comprehensive rethinking of the place of migration in transnational affairs more generally, reform results will be short lived and inadequate.

For this reason I advance a more holistic approach to refugee and migration policy, that honestly faces the challenge of safe and orderly migration opportunity, and of prevention of distress or survival migration. This approach situates the right to global mobility within a rights based international development and trade framework that broadens and deepens the migration "silo" beyond the narrow question of border control and immigration status. It sees human migration as an inevitable and enduring process that plays a crucial role in realizing sustainable development, and access to the enjoyment of fundamental rights. It plays a role in matching opportunity with talent, resources with need, humanitarian duty with aspirational energy. Building the political will to drive such a process requires a more comprehensive, transparent and far reaching discussion than migration or refugee advocates have engaged with so far. It requires, for a start, acknowledgement that migration is an essential component of a global strategy of building and sustaining safe, just and sustainable communities across national and regional borders. A starting point for such a strategy is robust and sustained engagement with root causes of distress migration to enhance local opportunity, and

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9. Guy S. Goodwin-Gill, *The Movements of people between States in the 21st Century – An Agenda for Urgent Institutional Change*, Paper presented to the Richard C. Holbrooke Forum, "The Global Migration Crisis: Its Challenges to the United States, Europe and Global Order", Feb. 2016 (on file with the author) 2.

10. Op. cit., 10.

discourage survival driven flight. Elements of this more holistic approach include development programs that encompass anti-corruption transparency in trade deals, monitored corporate social investing in public services, gender and youth policies that promote nondiscrimination and opportunity in refugee producing countries and regions.

The SDGs provide clear pointers for the priorities that need addressing. Migration and refugee protection need to be clearly and comprehensively included in the strategic work that is developing around these recently agreed goals for measuring progress. Among the many relevant targets, I will mention a couple to highlight the integration between migration and refugee policy and broader development and socio/economic concerns that I consider essential.

Any policy that effectively prevents or reduces vulnerability to forced migration must start with a robust national social protection system, funded by taxation floors and international contributions. This central element of a prevention or harm reduction strategy needs developing, supporting publicly, and funding. Target 1.3 articulates this vision:

> 1.3 Implement nationally appropriate social protection systems and measures for all, including floors;

Beyond the social safety net, communities need vigorous access to education (SDG 4), to health and reproductive rights, and policies that promote gender equality and empowerment at all levels (SDG 5c), to decent work and economic prospects, preferably at or close to home. Refugee advocates, anti-trafficking NGOs, organizations working to protect migrant workers and their families, or trafficking for child labor or sexual exploitation, have not adequately targeted these basic building blocks in their general advocacy. In this connection SDG 8.7 provides a useful common target for action across a plethora of relevant domains, from law enforcement, to child welfare protection to social and economic development:

> 8.7 Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

The complement to this ambitious target is generating rights respecting alternatives for young people. Among the many vital goals and targets, none in my view, is more critical than the need for investment in measures that build child and youth opportunity for education, training, skill development, internships and apprenticeships, vocational training possibilities, possibilities that need to be envisaged across national and continental borders. Budgets currently allocated to militarized border control, to last ditch rescue at sea, to extensive detention systems, to costly asylum and other legal determination processes, even to expensive and traumatic resettlement strategies could, perhaps, be better deployed to support strengthening skills and opportunities for the next generation. This may appear

utopian but again I suggest that the SDG strategy can be appropriated and deployed to good effect, as a tool for building political will, for generating measurable benchmarks, for prioritizing public spending. Just consider, both in relation to Syrian youth and Central American adolescents, the potential impact of this last target:

> 4.b By 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries.

This is where the tie between mobility imperatives and development strategies is inescapable. In country preventative procedures based on energetic development targets are an essential but insufficient part of the root causes strategy. It also requires branching out into mobility based elements. These include generous, systematic and large scale educational programs that make secondary and tertiary education in developed states accessible to adolescents and youth in migration generating states. With safe, legal and affordable access to quality education and skill training – of the kind widely available in the global north, either by in person attendance or through EdEx, or MOOCs or Kiron or other digital and app based forms of information technology, children and young people from some of the most adverse settings could instead thrive. I suggest that to call for this is not utopian. SDG 4B articulates precisely this vision.

Many of the 169 SDG goals and targets are highly relevant to the venture of addressing the root causes of distress and forced migration. A useful strategy at this early stage of priority setting and policy development would be for the refugee advocacy and protection movement to coalesce around several key goals that are particularly relevant to enhancing protection of their populations of concern, building common platforms for action, monitoring and benchmarking, and contributing to an integrated system that holds state actors and international policy makers across countries accountable for the priorities they adopt and the practices they implement. This incremental process of generating momentum for stock taking, redirection of energies and galvanizing of political will is going to be essential for branching out into root causes that precipitate the catastrophic suffering and human tragedy of contemporary refugee flows.] Thank you.

Maryellen Fullerton: I would like to thank the organizers of the symposium, the Provost, the Dean, the faculty, and all of you who have come today to talk with us about these pressing problems. I feel fortunate to be included in this conversation. I have already learned so much this morning that my brain is bursting. I feel that I should sit down and try to process what has been said, but instead I will contribute some additional thoughts about the refugee crisis. My focus will be the Common European Asylum System and, in particular, its cornerstone, the Dublin Regulation. I thank Tendayi Achiume, Susan Akram, and Jacqueline Bhabha for setting forth a broad conceptual framework for our discussion and for sketching ambitious and

creative responses to the large movements of people currently seeking safety in every corner of the globe.

The Institution of Asylum in the European Union

The European asylum law presents a useful case study that highlights fundamental design defects. Once identified, the flaws can perhaps be remedied as we go forward with improved refugee programs.

It was only a short time ago -- 15 years ago -- that the European Union (EU) decided it needed a uniform asylum law. The EU Member States came together to pass common legislation. Their aspiration was to create a joint area of freedom, security, and justice for asylum seekers throughout the European Union countries.

Fast forward 15 years and the European asylum law is in disarray. The system is deeply dysfunctional. It relies on deflecting asylum seekers away from the heart of Europe. It requires individuals to go through duplicative legal proceedings. It imposes long term delays on human beings who are trying to reach safety. Its major flaw is the absence of shared responsibility. There is a lack of recognition that EU countries need to pull together to respond effectively to the profound human needs.

Journey to Asylum in Europe

I will take a micro level approach and talk about a particular refugee family, the Tarakhel family, and tell the story of their travels – as they were forced to move from their homeland to Europe and ultimately how they were forced to move within Europe. Golajan Tarakhel was born in Afghanistan in 1971. Sometime -- and the records are unclear about this – sometime after this he was forced to leave Afghanistan and move to Pakistan. He met Maryam Habibi, and they were married. They moved to Iran where they lived for a number of years as refugees in an unsettled, unrecognized situation. They started a family and had five children. To try to find safety and security for their family, they traveled through Turkey and across the dangerous Mediterranean crossing in July 2011. At this time the Syrian crisis was just beginning, but the crisis in Afghanistan and elsewhere had been going on for generations. They landed in southern Italy. They were met by Italian officers. They were fingerprinted. They were given shelter in an asylum reception center. And their European odyssey began. They found the refugee reception center a place of violence. A place with totally inadequate sanitary facilities. A place where they and their young children could not find safety.

Shortly thereafter – less than two weeks later – without having filed for asylum in Italy, they made their way to Austria where they immediately filed for asylum. Again they were fingerprinted. The Austrian authorities learned from the fingerprints that the Tarakhel family had first been in Italy. The Austrians immediately said, “We're not going to examine your claim. You may be asylum seekers, you may be refugees, we don't care, and it’s not our responsibility. We're going to send you back to Italy.” And there began an elaborate bureaucratic dance between Italy and Austria as to which country was going to examine the Tarakhel

family's asylum application. Under the Dublin Regulation, the Austrians were correct that Italy had responsibility, because the Tarakhels had entered the European Union in Italy. The Tarakhels returned to Italy. Two months later they were in Switzerland where, immediately upon crossing the border into Switzerland, they applied for asylum again. Fingerprinted again. The Swiss authorities said, "You came through Italy, we're to send you back to Italy. We don't know whether you're refugees or not. We're not concerned about that. We're concerned about sending you back to Italy. Let Italy handle this problem."

The Common European Asylum System

As I said earlier, the European Union countries came together and agreed on a set of uniform asylum laws. The EU Qualification Directive sets forth a refugee definition and a definition of other people in refugee-like situations who need protection. This is a law that is in effect in all 28 European Union countries. Unfortunately, it is not applied uniformly in all 28 countries. The refugee recognition rates for people from the same country in the same situations vary dramatically depending on the country in which the asylum claim is filed. This is a major problem. Asylum systems appear to be arbitrary – and illegitimate – when people in the same situations receive drastically different results.

There's an Asylum Procedures law requiring EU countries provide a minimum set of fair asylum procedures. These "uniform" procedures vary significantly from country to country. The Reception Conditions Directive requires each EU country to provide safe shelter to asylum seekers while they are going through the asylum process. Again, as with the Qualification Directive and the Asylum Procedures Directive, the reception conditions vary dramatically. As we saw with the Tarakhel family, terrible reception conditions are one reason that asylum seekers do not stay in the first European Union country they enter. There is the EURODAC Regulation, which sets up a central fingerprint registry for asylum seekers and all irregular migrants. The central registry is important for many purposes, but the most important one for our discussion today is the Dublin Regulation.

The Dysfunctional Dublin Regulation

The Dublin Regulation is a venue statute. This law determines which EU country should be responsible for analyzing an asylum application. On its face, the Dublin Regulation is sensible. The highest priority, the most appropriate venue, is the country in which the asylum seeker has family members living lawfully in the European Union. If there are family members who already have legal residence in the EU, the country where they live is responsible for deciding the claim. The second venue priority focuses on the legal residence of the asylum seekers themselves. If the asylum seeker currently has – or recently in the past had – legal permission to live in any one of the European Union countries as a student, a laborer, a transit person, then the country that issued the authorization will be responsible for deciding

the asylum claim. The lowest priority, the default provision, is the first EU country the asylum seeker entered. This criterion is the one most generally used.

Before turning to details of the Dublin Regulation, I should note that four non-EU countries have voluntarily joined the Dublin system. Switzerland, Norway, Iceland, and Liechtenstein have agreed by treaty to subscribe to this venue provision. They want to be part of a system of deflecting refugees away from their territories to other countries, countries less able to take care of the asylum claims.

As I mentioned earlier, the Dublin Regulation's default venue provision places the responsibility for deciding the asylum claim on the first EU country the asylum seeker entered. This last place choice almost always applies. Roughly 95% of the Dublin cases involve efforts to transfer asylum seekers back to the country they first entered. There is no logical reason that the country first entered by the asylum seeker would be best equipped to decide the asylum claim. Indeed, the opposite is true. The EU countries first entered tend to be those on the southern and eastern frontiers of the European Union. These border countries are significantly poorer, as shown by standard measures of economic development, and have under resourced asylum systems. In the topsy-turvy Dublin Regulation world, wealthier countries such as Sweden, one of the countries that most frequently issues Dublin transfer requests, are trying to return asylum seekers to poorer countries like Hungary. Switzerland is sending asylum seekers back to Poland. Germany is sending asylum seeker back to Italy. There is a deflection of asylum seekers from countries with better developed asylum systems in the heart of Europe to poorer, weaker countries on the periphery.

The Dublin system is a major, integral part of the common European asylum law. According to statistics over a recent five-year period, approximately 17% of all EU asylum cases involve a request to transfer the asylum seekers to another country for decisions on the merits of their claims. In all of these instances, one EU state is saying that the responsibility for deciding the case rests on another EU state. There is no evaluation of whether the asylum case is meritorious. There is instead a concerted effort to shift responsibility to other EU states, states less equipped to do the job well.

One of the ironies of the Dublin system is that although many states submit and process Dublin transfer requests, few transfers actually occur. The EU statistical data show that almost one-fifth of asylum cases involve a Dublin transfer request. Further, many of the transfer requests receive positive answers from other EU states. But the data reveal that only 20% of the approved requests take place. Consequently, this preliminary venue phase, which requires enormous effort and enormous delay, is frequently for naught. Meanwhile human beings are kept in limbo waiting to learn their fate. This is another reason to question the Dublin transfer system.

There is an additional stark inefficiency. Many of the countries that file large numbers of Dublin transfer requests submit these requests to countries from which they simultaneously receive many Dublin requests. The statistics show, for example, that Germany and Sweden file similar numbers of Dublin transfer requests with each other, rather than simply deciding the asylum claims of the individuals and families within their territory. Such inefficiencies exacerbate the vulnerabilities of the asylum seekers waiting to have their fates decided.

This Dublin system is inefficient. It is deeply flawed. It is unjust.

European Human Rights Law

It has run afoul of European human rights law. All 28 EU states, as well as 19 other European countries, have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 3 of this European human rights treaty forbids states from sending individuals to places where they will face degrading or inhuman treatment or punishment. This includes relying on the Dublin Regulation to send individuals to EU countries where they will face inhuman and degrading treatment. In 2011 the European Human Rights Court prohibited Belgium from following the Dublin Regulation to send asylum seekers to Greece because the asylum system was so abysmal that asylum seekers essentially received no protection at all in Greece. The *M.S.S. v. Belgium and Greece* [[GC], Application No. 30696/09] opinion was the death knell of the EU common asylum system. European Union officials did not want to recognize the implications of the ruling, so they tried to limit the holding to Greece. "Greece is *the* problem," they said. "Greece is unique; what happens to asylum seekers in Greece doesn't happen elsewhere." The EU authorities were hiding their heads in the sand. Greece has many challenges, and its challenges are enormous. But so do many of the other EU countries.

In the wake of *M.S.S. v. Belgium and Greece*, Dublin transfer requests continued to countries other than Greece. A series of cases challenged the Dublin Regulation in both the national court systems and in the European Human Rights Court. They challenged Dublin transfers to Italy. They challenged transfers of asylum seekers to Hungary. They challenged transfers to Poland. The details varied, but the challenge was the same: asylum seekers will face inhuman and degrading treatment there. The European Human Rights Court hesitated. But three years later, in 2014, the Court again condemned reliance on the Dublin Regulation, and forbade Switzerland's transfer of the Tarakhel family back to Italy. Moreover, the Court expressly said that asylum conditions in Italy were not as bad as those in Greece. The *Tarakhel v. Switzerland and Italy* [Application No. 29217/12] judgment acknowledged that Italy – in contrast to Greece – has an asylum system that is functioning, at least in part. But Italy would not provide the Tarakhel family with humane treatment, according to the Court, because there were no asylum accommodations appropriate for families with small children.

The *Tarakhel* decision emphasized the European Human Rights Court's requirement that states analyze the individual circumstances of asylum seekers and other vulnerable people. The Court was emphatic that every EU country wishing to apply the Dublin Regulation must perform an individualized examination of the asylum seekers' personal circumstances and an individualized examination of the circumstances they will face when they are transferred. Only then can an EU state legitimately rely on the EU Dublin law. In my view, it makes no sense for EU governments to schedule multiple individualized hearings concerning the specific circumstances of asylum seekers' vulnerabilities and the suitability of

accommodations available in other EU countries. Rather, EU states should devote their energy and resources to deciding the merits of the asylum applications.

The Collective Responsibility to Provide Refuge

This examination of the European asylum system reveals the woeful lack of a sense of collective responsibility. There is no shared notion that EU states need to act together to respond to this refugee crisis. Instead there has been deflection: building fences to keep people out of certain EU countries, ordering police to forcibly put asylum seekers on planes and boats and trains to send them back to other EU countries. There has been duplication: sending individuals through multiple preliminary proceedings, rather than analyzing their asylum claims. There has been delay: vulnerable human beings remain in limbo as they try to find safety and to begin to build their lives again. As the earlier panelists have said, there needs to be recognition of the shared responsibility of the European Union member states. There needs to be acknowledgement of the individual lives that are literally at stake. And there needs to be responsibility for providing the refuge required by international and European Union law. Thank you.

Richard Wilson: Thank you to our panelists for very rich and engaging presentations and I'm sorry I have to restrict all of you in your time, but it does leave us with about 20 to 25 minutes for discussion which I think will help tease out some of these issues. I heard some different things from the panelists in terms of emphasis and I'd just like to highlight those a little bit to get you to speak more about those particular issues. I heard more of an emphasis from Jacqueline Bhabha and Tendayi Achiume on piecemeal and private strategies to address the refugee crisis. From Jacqueline, private sponsorships, scholarships and those kinds of measures. A holistic approach at the local level, social safety nets, health care issues and so on. From Tendayi I heard a warning about the possibility limitations of a consorted and collective strategy. But from the other two presenters, Susan and Maryellen, there was an emphasis on the UN and the comprehensive plan of action that they might take from Susan. Maryellen, I'm assuming you're saying you'd like to see the Dublin Regulation, despite its dysfunction, work better.

So the question I'd like to put to you all is let's say Donald Tusk of the EU mandates each of you as refugee czar, what would be the first measures you would undertake? Would you focus on the collective agency questions and seeking to improve regulations or plans of action at the collective level or would you focus more on individual, perhaps more pragmatic piecemeal strategies? And I'm sorry if this is sounding provocative, but I did want to put the speakers a little bit more on the spot. So we'll start with Tendayi.

Tendayi Achiume: So this has been happening my whole life, my last name starts with A and it's always me first.

Susan Akram: Me too.

Tendayi Achiume: I guess there are two of us here!

So I definitely think that a collective plan is necessary and if that didn't come through in my presentation I want to just be explicit about that. I think part of the

challenge right now is that we have a disaggregated approach that misprioritizes the focus. Right now, it's Europe at the expense of what's going on in Syria's vicinity. But a collective approach is absolutely essential, and I think one thing that's also important is that any collective response can learn from some of the private or informal strategies that are actually working right now in the places where people are successfully extending protection to refugees. In other words a collective approach should reflect an understanding of the empirical reality right now. The role of the private sector is going to be important in terms of thinking about what happens at the next stage. So will understanding and learning from communities that are protecting refugees in the absence of any kind of legal obligation. I think it's without question that a comprehensive plan is absolutely, absolutely necessary.

Susan Akram: I agree with Tendayi because I think there's a misunderstanding that a comprehensive plan of action is sort of one thing and every comprehensive plan of action that has been put in place and implemented is a bunch of things. What the big advantage of a carefully thought through comprehensive plan of action is that it builds on existing law. So at this point in time in the current dynamic there's no possibility of creating a new legal framework. No state that is unwilling to abide by current legal obligations is going to go farther and agree to something new. So the whole idea of a comprehensive plan of action in this moment would be to build on all of these different frameworks, the temporary protection framework, the subsidiary protection framework, the private sponsorships, the existing humanitarian visas, put all of those in place in a robust way with shared action towards those but not asking states to go beyond the law that they should already be complying with. That's kind of, that was the basis for the rather detailed plan that we put forward in our report. So I think I'll stick with that.

Jacqueline Bhabha: So I think presentational debates should emulate us because I think we're going to arrive and converge with a good strategy for the world as opposed to the nation. But I agree, I think that the difference between what you call piecemeal approaches, Richard, and the comprehensive is not a kind of individual versus collective, it's really a question of what the scope of the discussion is. My suggestion is the scope should be broader so within a comprehensive plan, I mean as Susan outlines it, we can't just think about borders and we can't just think about life saving in the Mediterranean or, you know, rescuing boats of Ruhinga in the, you know, in the South China Sea, we have to think about root causes too. And that has to be part of the strategy. So I agree with Susan that very much it's unlikely, most unlikely that countries who are violating their current obligations are going to accept more generous and more expansive migration obligations, but I do think that there's a way in which other parts of national and regional and international agendas can come together for mutual benefit to make a much more robust impact on some of the problems. I think the notions of kind of service exchange and whether it's education or in health or in skill training, there are really good examples that we can build on in a much more kind of comprehensive and big scale way to make a difference. So my plea is not really that we should abandon a comprehensive or a systemic approach or an individual approach but rather that what we consider within

the systemic approach should go beyond the confines of what we've taken to be the sort of refugee and migration niche.

Maryellen Fullerton: I'm going to make this unanimous, and I'll push back at the moderator. If he heard tensions between taking collective versus individual approaches, I didn't hear them.

I also want to take the opportunity to say I definitely do not want to make the Dublin Regulation work better. I want to do away with it. I think it's terrible. It not only has caused problems recently, but it's been terrible from the beginning. I think its design is fundamentally flawed for the reasons that I discussed earlier, and I'll be glad to address more attention to the Dublin Regulation later in the day.

If I get asked to be the refugee czar, I'd appoint Jacqueline Bhabha, Susan Akram, and Tendayi Achiume to take a comprehensive approach, and I'd be clear that the comprehensive approach must consider migration as well as refugee flows. Migration is with us; migration is part of the world. We need to focus on it and we need to address it. There clearly may be regional variations, but small-bore, compartmentalized responses will not be successful in the long run.

I do want to mention also that we, as private citizens, can often be engaged in individual actions that make sense in our own communities, and then these individual actions can build support for more national and regional and international developments. International law often works from the bottom up. Indeed, earlier this year, Jacqueline and I and others were talking about ways that we as private individuals could engage other private citizens in the United States in an effort to speak out to welcome refugees to the United States. We wanted to create an initiative that would both inspire and put pressure on our government leaders to respond generously to the refugees. I think there's a useful to role for individual private action to complement collective responses.

Richard Wilson: Thank you. I'm happy to take questions from the audience. My efforts to provoke the panelists have failed so perhaps you can do a better job. Yes. We have a lady here with her hand up.

Audience: Thank you. I understand Professor Fullerton said that she would like to abolish or repeal the Dublin Regulation so I'm curious what you would seek to replace that with?

Maryellen Fullerton: I would replace the Dublin Regulation with a system in which the country where the asylum seeker files an asylum application is the country that adjudicates the claim. I would keep the ability to transfer asylum seekers to other EU countries where family members live or in other extenuating circumstances. But the default position would be that the country where the asylum seeker is present would decide the asylum application. I would eliminate all of the satellite litigation about which country is going to decide the case. I would link this with a plan of resettlement within the EU: the country that decided the asylum claim wouldn't necessarily be the place where the successful asylum seeker would live. That would require the political will to accept asylum seekers who have had their claims adjudicated in other EU countries, and the will to equalize the conditions in the European Union much more than they are now so that asylum seekers could safely live in a variety of EU countries.

Richard Wilson: Questions? Yes. Here's one here.

Audience: Thanks so much for all of the panelists. Like Maryellen my brain is bursting and I just want to digest everything you've said. But I did want to ask about something that all of you raised implicitly and at least Susan raised explicitly about the lack of political commitment and this is something I'm struggling with in my own work. How do we overcome that? What are some ideas because you know, and I think as legal scholars this is what we all struggle with? We can say all we want about the laws, but if there's no political commitment, and I think underlying this panel is the idea that there's no political commitment to burden sharing. How do we get there? I'd love your kind of comprehensive thoughts on that.

Richard Wilson: Just to add to that, it is worth noting that European citizens have gone through a period of austerity themselves; economic times are not good. All of the national politicians have formally marginal right nationalists biting at their heels which does pressure the space for them to maneuver. And so those political realities perhaps need to be addressed a little more centrally.

Jacqueline Bhabha: I think to some extent one want to exploit self-interest whenever one can and I think both from the demographic dividend argument, but also from the national security argument there's so much to be said from moving towards, you know, a reduction in inequality. When you have such visible differences and everybody can see everything nowadays, you know? People in the poorest places have access to technology that enables them to see how the other, you know, the other 5% live, or whatever. That is an incredibly destabilizing phenomenon and the idea that you can contain people in places where their quality of life is abysmal, in the face of alternatives, I think is really out-moded. It has worked for centuries because people did not have the means to kind of really share other lives, but that's gone. So I do think there is a very, just like, you know the younger generation have impressed upon the older generation the imperative of thinking about the environment. I think this current situation is pressing on policymakers the imperative about thinking about addressing global inequality because it's a very, I mean just for purely, forget the humanitarian impulses or the political kind of generosity imposes, it's a very destabilizing situation. So we see very extreme versions of it, which are only going get worse. So I do think that there is some justification in using, if you like, somewhat base pragmatic arguments, because I actually think they're true.

Tendayi Achiume: I think on the political commitment question, which I think is central, it's necessary for international lawyers and international legal scholars to consider what role law plays in structuring political commitments to international interventions and humanitarian assistance and the various ways states intervene in conflict and in the refugee protection world. I think there has to be a deeper engagement with exactly how international law changes and creates dynamics that then undermine precisely the types of political commitment that we want, especially when the people that suffer the most, I think are often the ones that end up being vilified in the aftermath.

Susan Akram: So I think I would, I just wanted to add very briefly our experience in trying to promote the recommendations from our Syrian refugee report

when we went to Washington and did sort of an effort at lobbying. We were basically told that nobody cares about Syria; that was number 1. But the second was really interesting conversations with staff people who said, if all the refugee advocates and all the NGOs that are involved with refugees came together with a common ask, then there might be a way to move forward. If there was a sort of unified message and a sustained advocacy in Washington, that that's the only path to changing the conversation. So it's clearly an uphill battle because, you know, there really isn't interest in engaging on Syria right now in this administration. Certainly not in Congress, but we can create it I think. And I don't think we as a community have done enough to try to do that.

Audience: Given Professor Fullerton's indictment of the Dublin agreement, I'd be interested in hearing her or anyone else's assessment of the MOU and third country agreement between the United States and Canada which is kind of like our own North American version of Dublin.

Maryellen Fullerton: Audrey Macklin, who can much more eloquently indict the U.S. – Canada agreement than I can, is in the audience. I'm going to merely say that I don't think the U.S. – Canada agreement is a good idea. I think it violates a number of important norms. I will say, though, excuse me Audrey and the rest of you, sending asylum seekers back to the United States or Canada is not the same as sending them back to Greece or Malta or Hungary or Poland. In other words, the impact of the Dublin Regulation is much more dire.

Susan Akram: If you want to make a case though, I think it's, it was an incredibly well done case and I think many of us were sort of provided expert affidavits so all of the issues about the problems with that agreement really were raised in that amazing case. Thank you, Audrey.

Maryellen Fullerton: I'd like to use your question and relate it back to the prior question. When the European Union created the common European asylum system, it was in large part in response to the Bosnian refugee crisis. Germany had received 340,000 Bosnians. France had only 30,000. The UK had only 20,000. There wasn't a current crisis at the time the European asylum laws were developed, but there was a recent historical example. Today, in the moments of crisis it is going to be hard to create refugee programs that are a step forward. It's hard now to see when the current crisis will recede, but when the crisis recedes -- that will be a time to try to learn from the current mistakes and to move forward in the more positive, more holistic directions we've been discussing. I take it very seriously, as our moderator noted, that there are substantial political constraints right now in Europe that are not going to support major humanitarian advances.

Richard Wilson: We had a question here.

Audience: Good morning. Well I certain would applaud the U.S.'s effort to take more than 10,000 refugees, I wonder how that can be done when we've faced our own refugee crisis here with thousands of Central American women and children crossing our borders who do satisfy the definition of refugee but who are unable to get protection here in the U.S. How can we do both? And what can we do to help the individuals who are already here and seeking our protection?

Richard Wilson: Good question.

Maryellen Fullerton: I don't think it's an either/or situation, and I don't think we're anywhere near capacity. I want to reflect on history for a moment. When the 1980 Refugee Act went into effect, the United States resettled 200,000 refugees per year from Asia, in addition to taking smaller numbers of other people who came to the United States and applied for asylum. We have the capacity to do much more than we're doing now. It's very helpful for the American public and for us to reflect on how well we've been able to resettle and integrate asylum seekers and refugees. We accepted 600,000 to 700,000 Cuban refugees in a short time in the 1960s and 70s without the kind of vetting that's going on now, and they have become a vibrant part of our community. I know our panelists this afternoon are going to talk about some of the real challenges asylum seekers coming to the United States are facing. But I don't see the arrival of Central American asylum seekers as a problem. It may be a political problem, but it's certainly not a legal problem or an economic problem or a capacity problem. The United States can accept Central American refugees, and take more Syrian refugees and more Afghan refugees and more Iraqi refugees and more people from the Democratic Republic of Congo. The United States is a wealthy country with a long tradition of welcoming refugees, and we're falling short right now.

Richard Wilson: I think we have time for one more question.

Audience: Thank you very much. This is a follow up I think to Mark's question about the safer country agreement and the Dublin accords. They have many weaknesses obviously, but they have the virtue of being written down and it seems to me there are many examples of the U.S. relationship with Mexico in migration right now would be a local one and I've previously worked in terms of the Israeli relationship with Egypt and asylum seekers trying to cross the Sinai. I've seen essentially many of the same things that the Dublin courts tried to do, but doing it in the shadows and often quite violently. I guess after this panel I'm in a desperate attempt to find some sliver of optimism or light. Is there some virtue in maintaining at least the commitment to rule of law that a written agreement embodies, even when it's a bad agreement, in the sense that I do think that we see the downside with human rights victories and scrutiny critique of these agreements is that governments are able to operate in the dark and then it's even worse?

Richard Wilson: The virtues of writing things down.

Maryellen Fullerton: I believe in the rule of law and therefore I think written agreements are important. I will comment that having written agreements doesn't mean that practices conform to the written agreements. My hope is to change the written Dublin Regulation so that there are better clear rules to determine which country should decide the merits of the asylum claim.

Tendayi Achiume: Well one thought I had is just about being explicit about the costs of the written agreements. I think all too often we rest on the laurels of written agreements. However, part of the challenge is being explicit about what the costs of these agreements are, and at every step evaluating whether those costs outweigh the benefits. So I think I agree with Maryellen that I would rather have a world that didn't have the Dublin Regulation, but for as long as we have it, we have to be very explicit about some of the externalities that are tied to the very agreement itself.

Susan Akram: I think I'd come at it from a slightly different perspective which is that is can work the other way too. I mean here we had the Arab world responding so positively with no frame, no legal framework to the refugees until the states that did have the legal framework came in and messed it all up, to put it mildly. If we do believe in the rule of law then the *Jamma* case and the *MSS v. Greece* case from the European Court are also the rule of law and they pushed back on Dublin. So yes rule of law is really important and when the law is bad, then we need rule of law to counter that as well.

Jacqueline Bhabha: I would just add a last point which is that I think some of the motivation originally behind Dublin was to collaborate in solving a problem and to have a written agreement which reflected that collective will to address what was seen as a continental wide issue of asylum seekers having multiple bites at the cherry or whatever. But I think that motivation to craft joint, you know, EU wide binding agreement to address a pressing need is a very good precedent. I mean what we're seeing is this fracturing of the continent, between the countries who have been the greatest recipients of EU generosity now turning against some of the core EU principles and that I think is what's being lost. So I think that the notion of a collective commitment to continental wide solving of problems is very positive. But obviously what we're interested in is the outcome. So I agree with Susan, if the outcome is better without something binding that people then take as an excuse for avoiding, then so be it.

Richard Wilson: I regret we have to wrap up from there. There's a lot more to come today so stick around and please join me in thanking our panelists for the lively discussion.

PANEL 2 - SOVEREIGNTY VS. PROTECTION: STATE EFFORTS TO DEFLECT AND DETER REFUGEES

Anna Cabot: Thank you so much for coming. My name is Anna Cabot and I teach in the Asylum and Human Rights Clinic at the law school. Our topic for this panel is sovereignty versus protection, deflecting and deferring refugees. And we're examining this topic because many countries, including the U.S., have responded to large scale refugee flows by ramping up their efforts to prevent refugees from arriving in their territories. This panel will examine issues such as the proliferation of border fences, interdiction programs, carrier sanctions, detention, and systems for deflecting asylum seekers to other "safe countries" and we've heard about that so far today. Efforts to combat smugglers and human traffickers also prevent refugees from getting to places where they can seek asylum and certainly can make the journeys more dangerous. We will look at how state's interest in border protection and controlling mass migrations can be reconciled with refugee's rights and protection needs. I'll first introduce the panelists. In the order which they will be speaking.

So first, Peter Tinti will be speaking. Mr. Tinti is an independent journalist and Senior Research Fellow at the Global Initiative Against Transnational Organized Crime. Among other outlets, Mr. Tinti has written extensively on refugees and migrations and his writing and photography have appeared in the "New York Times,"

the "Wall Street Journal," Foreign Policy, Vice World Politics Review, "Christian Science Monitor", Al-Jazeera, "The Independent", The Telegraph, and "Think Africa Press." He has also worked as a consulting producer for Vice on HBO. In 2013, action on UN violence included Mr. Tinti in its list of top 100, the most influential journalists covering our violence.

Second on today's panel is David FitzGerald who is a professor and co-director of the Center for Comparative Immigration Studies in the UC San Diego Department of Sociology. His research program aims to understand the laws and policies regulating international migration as a total system of interactions among actors and countries of origins and destination. Professor FitzGerald codirects the San Diego hub of the Scholars' Strategy Network and was awarded the American Sociological Association's International Migration Sections award for public sociology in 2013. His co-authored book "Calling the Masses: The Democratic Origins of Racist Immigration Policies in the Americas" won best book awards from the ASA International Migration Section, the ASA Political Sociology Section and the American Political Science Association of Migration and Citizenship Sections in 2015.

Barbara Hines is one of my heroes. She is a Senior Fellow at the Emerson Collective and was the clinical professor and co-director of the Immigration Clinic at the University of Texas at Austin School of Law from 1999 to 2014. She's an active member of the RAICES/CARA Pro Bono Project that provides legal services and advocacy around the detention of mothers and children's at the Karnes Detention Center in Texas. Professor Hines was a Fulbright Scholar in Argentina in 1996 and 2004. She has litigated many issues in the U.S. relating to constitutional and statutory rights of immigrants in federal and immigration courts, including the lawsuit leading to the closure of the Hutto Immigration Family Detention Center.

Maria O'Sullivan is a Senior Lecturer at the Faculty of Law in Monash University and Associate in the Castan Center for Human Rights. Her teaching and research interests are administrative law, international refugee law, and international human rights law. Professor O'Sullivan completed her PhD thesis on cessation of refugee status under article 1C(5) of the 1951 Refugee Convention. She is also the author of a number of international and national publications on the subject of refugee law, administrative law, and international human rights law including "Minister for Information and Border Protection vs. SZSCA, Should Asylum Seekers Modify their Conduct to Avoid Persecution," which was published in the *Sydney Law Review*.

Thank you all for being here, and thank you, Maria, especially for coming such a long way. So, Peter?

Peter Tinti: Thank you, Anna. And thank you very much to the organizers of this symposium for inviting me. It is a privilege to be here among so many scholars who come at this issue from a variety of different perspectives and backgrounds. During this presentation I'm going to focus on the migrant smuggling networks that are facilitating what has come to be known as "the greatest refugee crisis in Europe since World War II." More specifically I hope to offer some insight regarding how European policymakers, and by extension the broader international community, have

created an environment that has accelerated the development of a robust and expanding migrant industry while also driving the industry further underground and putting migrants in more danger as a result.

I'll argue that these efforts to combat migrant smuggling are counter-productive because they do not address any of the underlying issues that fuel demand for smuggler services. As a result, we have seen an increase in human insecurity throughout migrant smuggling chains, with criminal organizations being empowered along the way.

If policymakers are going to adequately address the current crisis by engaging smuggling networks, they need to better understand how these networks function, how they have evolved and what impact trying to stop them might have on peace and security in various contexts.

Before I start, let me offer a quick note on language. During this presentation, I'm going to use the term migrant as a catchall for the people seeking the service of smugglers. Some of these people are asylum seekers and refugees. Some are economic migrants. Some defy these neat categorizations. Please do not construe me using the term "migrant" as a commentary on what rights these individuals should be afforded.

According to the United Nations Transnational Organized Crime Convention, migrant smuggling is "the procurement in order to obtain directly or indirectly a financial or other material benefit of the illegal entry of a person into a state party of which the person is not a national or a permanent resident." Put into more comprehensible English, migrant smuggling is when someone enters into a transaction with another person to help them enter a country illegally.

Human trafficking on the other hand, is the recruitment, transportation, transfer, harboring or receipt of a person by means that use coercion. It can be abduction, fraud, deception, the threat of force, and many other forms of coercion. Now, the line between smuggling and trafficking of persons can blur and arrangements that begin as a mutual "willing buyer and willing seller arrangement" can often turn exploitative, but the vast majority of those arriving in boats on European shores have paid a smuggler for services. And in fact, I think this is the most useful and honest way to view and analyze migrant smuggling networks. The people who populate them are service providers.

They are the supply to someone else's demand. In order to meet this demand, many different actors are involved. One such actor is Barka who I met in Agadez, Niger, in 2014. I had gone to Agadez to look into narcotics trafficking networks, but I quickly found that men like Barka, who had spent most of their adult lives smuggling one thing or another between Chad, Sudan, Libya, and Niger, had decided to specialize exclusively in the transport of a less risky and more lucrative commodity: people.

Although Sub-Saharan Africans have been coming to Libya in search of employment for decades, often with the tacit encouragement of the Gaddafi regime, the aftermath of the 2011 revolution in Libya replaced 40 years of authoritarianism, and a consolidated state with state collapse. Violent clashes between competing militias over political and economic control had left the country in anarchy. And

without a functioning government or state institutions, new criminal economies became an important source of income for a range of actors who sought to enrich themselves and to empower their own military and political networks. Smuggling migrants it turned out was a great source of revenue. With the fall of Gaddafi, who regularly warned European leaders that he's the only thing preventing Europe from "becoming black," Europe had lost its most reliable border guard. Though he often used the rhetoric of an expert extortionist and preyed upon Europe's worst xenophobic tendencies, Gaddafi was not wrong when he warned that a power vacuum in Tripoli could mean thousands, perhaps hundreds of thousands of Africans trying to reach Europe from Libyan shores. For Africans who wish to migrate via the North African coast leaving from Libya, this was once a challenge of geopolitics. But suddenly it was really only a challenge of logistics. What was needed was a smuggling infrastructure that could facilitate their aspirations to reach Europe. This meant hundreds of people like Barka, who had the skills and local knowledge and experience to move migrants across the Sahara and across various political, cultural, and ethnolinguistic barriers and into Libya safely, flocked to the migrant smuggling industry. And these days you can sit on the outskirts of Agadez, and on certain mornings and watch dozens of four by four pickup trucks, each with anywhere from 20 to 35 migrants in the back seat, out for Libya.

While it's not surprising that migrant smuggling networks emerged out of north Africa, few would have predicted that an uprising in Syria only a few years ago, a thousand miles away from the chaos in Tripoli would set in motion a chain of events that would completely transform the business of migrant smuggling throughout much of Africa and the rest of the world.

As I said before, these migrant smuggling networks had existed prior to the fall of Gaddafi, but they only really matured and truly began to flourish with the influx of Syrians seeking passage to Europe, many of whom were arriving in Libya, either overland through Egypt or via plane from Lebanon or Turkey. Disparate smuggling networks quickly began to coalesce around this Syrian demand for smuggling services and Syrian purchasing power. We've never really seen a group of asylum seekers that has the ability to mobilize and access resources quite like the Syrians have, both through their comparative wealth compared to many of the other asylum seeking communities, and their access to wealthy diaspora networks. So once these operations were in place, that had been built upon the infrastructure of moving Syrians to Europe, these smuggling networks further amplified demand and filled their boats with the huge population of foreign workers already residing in Libya including those Sub-Saharan Africans drawn to the country for economic opportunities as well as those who sought passage to Europe for asylum seeking opportunities.

From 2012 onward, Libya grew into the main source of regular migrant flows into Europe until the explosion of what I'm going to refer to as the "Aegean route" in 2015.

For a variety of reasons, the development of migrant smuggling networks facilitating the flow of migrants from Turkey to Greece by crossing the Aegean followed a similar trajectory to what we saw in Libya. Smuggling networks had

already existed in Turkey and had existed for decades. But it was the Syrian demand for smugglers that provided the monetary impetus for the development of a more sophisticated migrant smuggling network. When I met a Syrian man named Tony, he was waiting for a bus in Athens. Only a few days before Tony had been in Latakia, Syria, with his wife and daughter. He paid a smuggler $500 to facilitate his passage through ISIS-controlled territory in northern Syria and into Turkey. Once in Turkey, he meandered his way across the country via public transport until he reached the coastal city of Izmir. There he paid a Turkish smuggler, through a Syrian interlocutor, $1,200 to board an overcrowded dinghy. Under the cover of darkness, he and his fellow travelers managed to navigate the Aegean courtesy of an unreliable cheap Chinese motor affixed to the back of a rubber contraption, but it only took 45 minutes and just before dawn they washed ashore on the Greek island of Kos. Now, Tony's dream was to reach Sweden. At the moment I met him, he was waiting to board an unmarked bus leaving from a nondescript intersection located in the heart of Athens. If anyone were to ask the people operating the bus, they would tell you that bus is going to the city of Thessaloníki, but everyone knew that that bus was full, exclusively of Syrians and was going directly to the Macedonia border. From there, Tony would either try to join the wave of migrants who were being ushered through by several local governments which, at certain points in last summer, were happy to be transit countries ushering people into Germany. Or were he to face border closures, Tony would seek out the services of another smuggler and enter into a succession of shadowy arrangements with people he's never met, but has no choice but to trust.

Like those in Africa who hire someone like Barka and then another person in order to reach the Libyan coast and finally someone to put them in a boat towards Italy, Tony was traveling under a typology that we often refer to as the "pay-as-you-go" model. Smuggling networks predicated on this model are almost always made up of a network of recruiters, brokers, transporters and operators. They are people who have certain skills. They are people you can think of as criminal entrepreneurs. They are working together to use their own areas of expertise to collectively deliver a service to migrants. In addition to "the pay-as-you-go" model, there are full package schemes and these are bespoke migrant smuggling packages that are tailored to the needs and desires of individual clients. These services are obviously more expensive and out of reach for many migrants and asylum seekers. One person who did use this type of service was Ahmed, from Damascus. Ahmed was determined to stay in Damascus until the very end of the war, but he eventually realized there was no end in sight. For years, he had been carrying a number in this wallet that belonged to someone who could potentially offer him fake documentation and get him to Sweden. He made the call and a few hours later the prices had been negotiated. He paid $36,000 to this person, $10,000 each for him and his wife, $8,000 for each of his sons, and within two weeks the fake passports and air tickets were ready. They drove to Beirut and flew from Beirut to Sweden, migrating through official channels.

These stories in part highlight why efforts that focus on stopping migrant smuggling rather than addressing the root causes are so misplaced. With every barrier that is put in place, the level of criminality involved also increases. This

forces migrants to seek passage to safety by taking more dangerous routes. It forces smugglers, many of whom are really amateurs themselves to try more dangerous methods of getting migrants to their destination and, again, it does nothing to curb demand. As we saw with the Balkans this summer. Smuggling markets are highly responsive to state policies in Europe and neighboring countries. So within hours of a border closing, migration routes are quickly rerouted and new schemes emerge. This is in part because communication and access to information among migrants and between migrants and smugglers is instantaneous. I can think of two examples where I found out a border had been closed and opened via social media used by migrants and smugglers, which was way ahead of actual official press statements. So when policymakers ask what they can do to counteract smuggling, smuggling networks, I think most important point to make from the outset is that unless the international community begins to address demand, then any efforts to combat smuggling networks are completely counter-productive. As I've said, they make the migrant journey even more dangerous, but one thing I think people need to think about when considering interventions that might counteract migrant smuggling, is to consider what the broader repercussions might look like. Who is benefiting from migrant smuggling? Who stands to gain or lose if it is stopped? This is a billion dollar industry, and in many different countries it has enmeshed itself within political economies. In some very weak states where there is a tenuous security equilibrium, the revenues generated by migrant smuggling might actually be a stabilizing force. The Nigerian government will tell you that everyone in Agadez is "eating" off of the migrant smuggling industry. It has turned the city into a boomtown and the government has even admitted that salaries of some military officials operating in the north who are regulating the flow of these migrants, is predicated on charging migrants as they pass. So if the government to were to order that they stop migrant smuggling, as the EU is desperately trying to convince the Nigerian government to do, we need to consider how those who are profiting from the trade, many of whom are ex-combatants and professionals in violence, might react. Uprooting an entire economy could have a destabilizing impact and serious security consequences for the Nigerian government and the region as a whole. I'll conclude by saying, Niger is not the only case. Similar dynamics are at work in Izmir, Turkey, and countless other hubs where entire economies have been retrofitted in some ways to cater to the migrant smuggling economy. And so, efforts to stop migrant smuggling really need to consider the broader political and economic impact from a security perspective in addition to, of course, what I think is the most important component, which is making sure we are not making it more dangerous for those in need of refuge to find it.

Thanks very much for your time, and I look forward to your questions.

David FitzGerald: Good morning. I'm here today as a token social scientist to talk not so much about the law, but about what the actual policies on the ground have produced regarding deflection and deterrence. And these findings are part of an ongoing project on the way that different countries and the global north have used various techniques of remote control to try to prevent asylum seekers from ever reaching a territory where they can ask for asylum.

Specifically today I'm going to be talking about the Mexican case. The fact that there is this robust system of remote control in the U.S. and throughout the Global North reflects part of the basic Catch-22 of asylum policy. And the Catch-22 is this: if you are judged to fit the statutory definition of a refugee, then we'll let you stay here if you come here. But we will not let you come here.

And having recently reread Catch-22, the logic of this kind of policy and all of its Kafkaesque dimensions becomes quite clear. Now, to be clear, many of these policies that are preventing asylum seekers from reaching a territory are aimed specifically at asylum seekers. There are many other policies that are designed to keep out people who are coming for a variety of reasons. Those reasons are often mixed with violence, but people might even be coming strictly for economic reasons or for family unification. They might be tourists; they might be terrorists. There are many different reasons why people move, and there are many different reasons why governments design control policies. Like Peter, I use "migrants" generically to speak about people who are moving for various reasons, some of whom might be considered refugees. But even the policies that aren't in the first instance directed at trying to prevent asylum seekers from reaching the territory are having the effect of keeping them from doing so.

So there's been a lot of talk about Mexico as a buffer with the rest of North America, most specifically the U.S. And if you go to southern Mexico, you will find a 700-mile border, mostly through the jungle region with Guatemala and Belize. At first glance, it does not look like a buffer zone country. We're not talking about the Berlin Wall here. If you go to the primary crossing points, legal crossing points within sight of the bridges where you have the border control authorities, you can see migrants freely passing on rafts. Often there's cross-border petty commerce on these same rafts that circumvents border controls. The migration authorities in Mexico say, "We do not attempt to keep people from entering Mexico." It doesn't really look like a buffer state.

And then if you go a little bit further into Mexico, you'll see large numbers of people riding the train, *la bestia* [the beast], which is also called the Train of Death. Why is it called that? Well, it is also known as the train of death because so many migrants are riding that train and encounter situations of extreme violence at the hands of organized criminal gangs and also at the hands of police. By all accounts they are systematically subjected to various forms of extortion and the police themselves are very much penetrated by the criminal gangs. The last time there was a major effort to give polygraphs to all of the members of the customs force that actually patrols the border, more than half were fired because they could not pass the polygraph.

Well, what Mexico does have, even if it doesn't have a strict border line, is a frontier. It has a very long frontier, what they call in Mexico the vertical frontier, which is all the way up to the northern border with the U.S. It's a border along major transportation routes, both the train routes as well as highway routes. And that is where you see the buffer state come into being with very serious consequences in some cases.

Now, for a long time the U.S. government has financed various measures within Mexico to try to control unauthorized migration through Mexico. This is a very sensitive topic in Mexico given the history of U.S. intervention. Where I live in San Diego, the U.S. Southwest, was formally the Mexican Northwest. There are many other more recent examples of intervention. So Mexican officials typically will say to the media that they do not accept money from the Americans to do the dirty work of migration control. No one wants to be the stooge of the gringos, but we know these activities are taking place, though it is difficult sometimes to know the details. We know, for example, that the U.S. government, has been financing repatriations of third country nationals from Mexico at least since 1991. There have been many different agreements and many different programs of varying levels of opacity. Currently the major framework for funding these kinds of efforts is the Merida Initiative. Merida has done many different things. A lot of it has to do with drug interdiction; a lot of it has to do with judicial reform in Mexico, but there is also an explicit migration control component.

So what does that mean, what can we actually tell that the U.S. has done to make Mexico into a buffer state? Well, a lot of it is in the realm of equipment and providing both software and hardware that can be used to verify migratory documents. The U.S. has been instrumental in the installation of biometric scanning capabilities and the construction of very large databases. These databases are used not only by the Mexican authorities, but they are instantly accessible by all of the U.S. law enforcement agencies and intelligence agencies that you can think of. I had a student who was doing some work in Mexico City, and while she was interviewing an official, another officer came in and asked what to do about one particular case of a person who was trying to enter Mexico, the word came down from Washington, D.C. -- don't let this person in -- and that person was rejected out of hand from entering. So the Mexican and U.S. governments are extremely tight. They're not just in bed together; were talking about carnal relations.

The U.S. has also financed mobile migration units as there has been increased control along the train routes. Migrants are taking to the highways and migration authorities have created more than 120 different mobile units that move around on these different highways leading north. At the fixed points of entry along the border, particularly with Guatemala, there is vehicle scanning equipment that can be used to check for drugs and also for human beings hiding inside of cargo. Until recently, the government didn't even have the capacity to consistently talk to agents in the more remote border posts. They relied on cell phone signals that sometimes worked and sometimes didn't. So under Merida, the U.S. government is providing communications equipment for more robust communications. There's also a lot of softer work that the U.S. is doing in terms of training the agents of the Mexican government agency, INAMI, that is in charge of migration control, and also training prosecutors and investigators in Mexico to prosecute human trafficking. This is an issue Peter brought up. We know that in Mexico, as in many other places, "anti-trafficking" measures in practice are typically used to crack down on all forms of unauthorized mobility. You will not find many people who are in favor of trafficking. It becomes a very useful discursive frame for discussing all kinds of

control efforts, some of which are directed against people who really are being coercively moved and others who simply don't have a legal means to travel and are therefore availing themselves of a smuggling service.

Something else that the Department of Homeland Security is doing in Mexico and Central America is propaganda campaigns, or public service campaigns, if you will. These are non-branded campaigns. They make no mention of the U.S. government and in fact the way they're written, you would think that they are being produced by local governments. So for example, the one on the left is being shown now in Central America. This is the poster version. And it's directed at parents of people who are thinking about making the trip north. It says, "I thought it would be easy for my son to get papers in the United States. I was wrong." And then, presumably this is the parent's son wandering in the desert. "Our children are our future, let's protect them," it reads. And you would assume that when it says, "*let's* protect them," the "we" refers to Mexico and Central America, not the U.S., that is paying for this. In the second poster on the right, which is shown in Mexico -- the gloss here is, "chickening out is a manly thing to do." This is an ad directed towards young men. Here is someone who is either dead or dying in the desert. It says, "Before crossing to the other side, remember that the cemeteries are full of brave people and big macho types." You can also hear radio spots with local music, marimba music, talking about the dangers of crossing. They are very explicitly trying to keep people from ever making the trip. And this is something similar to what European governments, Australia, and a lot of other countries are doing in the countries of origin and transit.

I've been working on migration to, and through, and from Mexico for my entire career and putting together the figures for this presentation from many different sources, I was stunned at the scale of the buffering effort that's been going on. Since Mexico began its serious buffering efforts expelling people-these are overwhelmingly Central Americans --, in 1989, there have been more than 3 million expulsions. These are expulsion events, presumably the same person might be counted more than once. Nonetheless, there have been more than 3 million expulsions from Mexico mostly to Central America during that period. Consistently since 1989, expulsions have been at very, very high levels, and some of this is financed by the U.S. government.

The scale of the expulsions and how important they are as a buffer for the U.S. can also be established by comparing how many expulsions are being made of the three so-called Northern Triangle nationalities-- Guatemalans, Salvadorans and Hondurans--by the U.S. versus by Mexico. So on the graph here you can see in red, expulsions by Mexico, which until 2006 were by far the vast majority. And even since then, we're talking about numbers that are more or less similar to what the U.S. is doing. In 2015, the most recent year for which we have figures available, Mexico is once again expelling far more Central Americans than the U.S. is. And this is very clearly as a result of pressure by the U.S. to prevent so many Central Americans from showing up at the U.S. border and asking for asylum. So Mexico is complying with those requests. All of these activities on the part of the Mexican government are deeply tied up in the broader bilateral relationship and linked to issues of trade, cross

border family ties, and all the many other aspects of the complex, but asymmetric U.S.-Mexico relationship.

The Mexican government has, in its own internal documents, tried to establish to what extent it is being an effective buffer for Central Americans trying to reach the U.S. And for the period between 1995 and 2010, it's estimating that it's capturing half or maybe slightly more than half of those who are trying to reach the U.S. Whereas about 25 to 30%, depending on the year, are being detained by U.S. officials on the U.S.-Mexico border, leaving about 15 to 20% that successfully cross into the U.S. So by its own internal calculations, much more than the U.S. enforcement, it is Mexican enforcement that is creating a barrier to these flows.

Now, Mexico has an extremely robust and very migrant-friendly, and refugee friendly, law of migration and law of general population. There have been a number of reforms in recent years that have done things such as decriminalize illegal entry and illegal presence. Under the new laws, these are just subject to fines rather than incarceration. The framing of these laws is very much in a rights framework: article after article about the rights of people involved in legal proceedings and so forth. But notwithstanding the fact that these laws look like they were designed by the people who sit in this room, the implementation by all accounts has been abysmal and when Central Americans arrive in Mexico, they encounter endemic violence, often at the hands of the authorities themselves. Very few of them are ever offered the chance to apply for asylum. All of the surveys that have been done in migrant shelters as well as other qualitative work show that very few people are applying for asylum in Mexico. Even fewer, around one out of five, are being accepted as recognized refugees in Mexico. The figures in the graph here are not in thousands or hundreds. We're talking about absolute numbers here. So when you see 450, that means 450 people in the entire year. These are minute numbers of people, most of whom are Central Americans in recent years, as well as some people from all over the world, and -- if you go back into the early 2000s, that blue bar represents mostly different nationalities from Africa.

The situation for Cubans is quite distinct and interesting because it points out the different way that the U.S. sees migrants from Cuba. The U.S. has a wet foot, dry foot policy under which Cubans who arrive in the United States on the beach or who show up at a U.S. border such as the border with Mexico are overwhelmingly going to be paroled into the U.S. and in short order will have a green card and live here permanently. Now, if they are caught at sea, they will be returned to Cuba. The distance between Havana and Miami is more or less the same distance between Havana and Cancun. So as the U.S. Coast Guard has made it very difficult to get across the Straits of Florida, many Cubans trying to reach the U.S. started traveling across the straits to Yucatan and then through Mexico to the extent that by 2007, more than half of Cubans trying to reach the U.S. were coming through Mexico.

The Mexican government has not been deeply concerned about this. It doesn't like dealing with this problem because it feels like it's really a U.S. problem and a Cuban problem. In 2008 the Mexican and Cuban governments negotiated an agreement to ease repatriations of Cubans that were detained in Mexico. This was not at the behest of the U.S. This was something that they did as part of their own

bilateral relationship. They established much more cooperation between the Mexican navy and the Cuban coast guard authorities to try to interdict people coming across the straits. Many different categories, but not all categories of Cubans who were apprehended in Mexico, became eligible for repatriation to Cuba, although Cuba reserved the right to not take back people who posed a danger to the island. That is a category that can be interpreted quite broadly, as you can imagine.

Deportations have continued, but there are actually even fewer deportations after this agreement was concluded in 2008 then there were before. Again, these are absolute numbers. So in 2015 fewer than 400 Cubans were officially repatriated by Mexico. And neither are Cubans staying in Mexico as refugees: In 2015, according to government records, zero, the year before, two at most. So what's happening to these folks? Well, they continue to come and they just use Mexico as a transit zone to reach the U.S. In 2015 there were something like 27,000 Cubans who applied for asylum at the U.S. border. And in general this has not occasioned a lot of excitement in the United States. What occasions excitement in the United States is entries by sea, which create the impression of uncontrolled entries, or mass detentions, such as the gymnasiums full of Central Americans, for example, that have a very bad optic in the press. But when you have a small trickle of people coming through airports or quietly coming through official points of entry, that doesn't quite generate the political heat that causes a backlash. So Cubans are continuing to pass through Mexico.

And typically even if they are detained in short order they are given the so-called "*oficio de salida*." It's a permit that gives them a month to leave Mexican territory. Well, what does that mean? That you have a month to take the bus to Brownsville.

Finally, we know that particularly in the wake of 9/11, but a lot of this was happening at a lesser level before 9/11, there is a very robust system of control around the air system of North America, including Mexico. Mexico systematically shares information with the U.S. about every single passenger arriving from abroad in Mexico, even if those passengers do not intend to continue to the U.S. They have shared watch lists, and they have screening protocols that are used for the so-called aliens from special interest counties. The special interest countries are a list of predominantly Muslim countries, and also North Korea. The U.S. has very effectively put pressure on the Mexican government to make it much more difficult for about 40 nationalities to get any kind of visa to come to Mexico. They're not banned, but there is all sorts of special scrutiny if you're coming from the Middle East, many countries in Africa, and Asia. And there's also quietly a system of Department of Homeland Security liaison officers in major Mexican airports that are advising the carriers on whom to let on and whom to exclude. So in conclusion, we can see very extensive buffering of Central Americans. There is a much more limited buffering of Cubans, basically because the U.S. government doesn't care. Finally, there is even stricter buffering of the so-called aliens from special interest countries and foreigners who in Mexico are called the "*extra-continentales*," the people from outside the Western Hemisphere who are trying to enter. Thank you.

Barbara Hines: Thank you so much for inviting me. I am going to talk about the Central Americans who actually get through this buffer zone that David described

There are quite a number of them, although I do agree with David that the efforts of the U.S. have made a difference. We have seen a decrease in the number of people who are arriving at the southern border, although the numbers vary. I am going to be first briefly discuss the context of Central American migration, and then, primarily focus on the response of the Department of Homeland Security that has designed the programs of detention of mothers and children in prison-like facilities in south Texas---which are the issues that I have been working on--, the litigation to try to change this, the legal standards that have been and should be applied and, in conclusion, a few alternative solutions that we can consider.

It is interesting listening to the earlier panelists addressing the number of Syrian refugees and people moving across Europe. Basically the crisis, as it was coined in the United States, in the summer of 2014, involved approximately 60,000 unaccompanied children and 68,000 mothers and children. When you consider the millions of people fleeing Syria and Afghanistan, the Central American numbers are nothing. Nevertheless, the administration and the press framed this migration as a crisis and an emergency which, in my opinion, was a grave mistake from the outset and which has led to the creation of the South Texas detention facilities where we now work.

One of the things that is lacking from the debate, as was similarly mentioned by earlier panelists regarding Syria, are the root causes. Instead of talking about this phenomenon as a crisis in the United States, we should be talking about it as an economic, humanitarian, and political crisis in the countries from which these refugees are coming--the Northern Triangle of El Salvador, Honduras, and Guatemala. Shockingly, Honduras and El Salvador have the world's highest murder rates. These are countries where many civil institutions are controlled by the gangs, leading to extortion, police corruption, and the lack of institutional protections. Domestic violence and gender-based violence are also widespread. There has been little discussion about the push factors that are sending so many citizens of the three countries -- into Mexico and then on to the U.S.

As Anna mentioned, after we litigated the first, failed experiment in family detention in 2006 and the Obama administration ended family detention, I believed that family detention was over and that we could move on to other immigration rights advocacy issues. But instead, the administration's response to the 68,000 mothers and children, coming from Central America in 2014, was to ramp up and reestablish family detention with a vengeance and a size that we never saw during the Hutto detention days. The first facility was open in Artesia, New Mexico at a former Border Patrol training facility. That facility was subsequently closed but there are still three family detention centers. The two largest detention centers are located in Karnes City, Texas, where I work, and in Dilley, Texas, and a third smaller facility in Berks, Pennsylvania. The government messages these places as family-friendly residential centers. My response is that you should send your children there for one day. These are prison-like facilities. The photo on my left is -- the Karnes facility and the other one is Dilley. Dilley is the largest detention facility anywhere in the United States with capacity for 2,400 people. Karnes now has capacity for 800 and will be expanded to hold 1,158 people.

While this may not be an issue in the European context, in the U.S. context it is important to consider what drives these detention efforts. The profit motive is intimately intertwined with family detention or, for that matter, any immigrant detention in the United States. These facilities are run by private prison companies. During the last quarter of 2015, CCA reported $65.9 million in profits, attributed to the opening of the Dilley family detention facility. GEO, which is the other large prison company in the United States, invested $36 million in Karnes to increase its capacity, as I previously mentioned, in order to generate an annual revenue of $20 million. Thus, when we discuss refugee protection in the United States, we are not only dealing with administration policies but also with the tremendous lobbying power of the prison corporations. In addition, in the U.S., we have the bed space mandate. Congress has required that the Department of Homeland Security maintain 34,000 detention beds at all times. And, of course, if you have the beds, you need to fill the beds. That is one of the reasons why we have seen the tremendous increase in detention in general, including the detention of mothers and children in these facilities.

Framed in 2014 as a crisis of border security, rather than a crisis of institutions, violence and lack of protection in Central America, Immigration Customs and Enforcement (ICE), the enforcement arm of the Department of Homeland Security claimed that the migration of mothers and children posed a national security risk. The agency arrested and detained mothers and their children without any access to release, even after they had shown a threshold eligibility for asylum through the credible fear interview. ICE implemented a no bond policy and opposed all requests for release, based on a deterrent strategy to discourage other migrants from coming to the United States. The agency conducted no individualized assessment of flight risk or danger to the community as required by the Constitution and international law. The government may not detain an individual to deter others or to send a message to others not to come. Social scientists and others who work in the field have clearly established that a deterrence strategy is not effective. If a person flees the type of violence that these families have experienced, being locked up is just one more part of the equation in attempting to reach the United States.

The administration also labeled the mothers and children as "economic migrants." That claim turned out to be erroneous. 80% to 90% of the mothers and children in these facilities pass the initial interview, the credible fear interview. What is also remarkable is the fact that migrant fathers with children are not detained and instead, are released, unlike mothers and children, who are detained if there is sufficient detention bed space. This practice demonstrates that these detention policies and security risk claims have no rational basis whatsoever.

People always ask why the government implemented these policies. My response is that they should ask the administration. I do not see my role as providing an explanation or justification. But some believe that the administration wanted to demonstrate to Congress that it could control the borders. It did not want media images of hundreds of mothers and children at crowded churches and bus stations in South Texas. Once families are in detention, they are out of the public eye.

I am going to quickly discuss family detention litigation in my remaining time. There have been two major lawsuits. One was *R.I.L-R v. Johnson*, [80 F. Supp. 3d 164 (D.D.C. 2015),] in which the federal court agreed with what I stated earlier; that is, the government cannot legally detain mothers and children to send a message to others not to migrate to this country. Instead they are entitled to individual hearings to determine if they may be released from detention.

The other case is [*Flores v. Lynch*, No. CV 85-04544 DMG (EX), 2015 WL 9915880 (C.D. Cal. Aug. 21, 2015)], based on a 1996 settlement agreement between the government and a class of detained children regarding detention conditions and the release of class member children. The Flores settlement provides for numerous protections. First, there is a presumption of family reunification and release to a family member. Children must be released within five days and may only be detained in exceptional circumstances. If they are detained, they must be housed in facilities licensed by state child welfare agencies. None of the detention facilities currently have a state license. Last summer, Judge Gee of the federal district court in Los Angeles issued an excellent decision that many of us hoped would end family detention. The judge ruled that the dire conditions of detention in border facilities violate the settlement. When children and families are first arrested, they are detained in crowded, exceedingly cold holding cells that the migrants call "hieleras" (ice boxes) or "perreras," (dog kennels). Judge Gee also ruled that children cannot be held in unlicensed secure facilities and must be released within five days of arrest. However, one reason why we still have family detention is that the settlement provides an escape clause. If there is an "influx," defined in 1996, when the settlement agreement was signed as 130 children in DHS custody. When faced with an "influx," DHS does not need to comply with the five-day rule, although it must have a contingency plan in place and make expeditious release efforts. The government's response to Judge Gee's court order was to argue that families are now being released more quickly and only stay for an average of 20 days. In response, Judge Gee opined that this length of time might be reasonable, but notably she did not sanction nor approve a 20 day average.

In South Texas, we continue to see many families in detention. Although the number of families initially decreased after the summer of 2014, they are rising again. While most families remain in these detention facilities for shorter periods of time, those who initially receive a negative asylum decision and appeal their cases remain in detention for much longer.] While shorter lengths of detention are an improvement, the government refused to accept Judge Gee's decision. The administration could have easily decided to end family detention and comply the court decision. Instead, continuing its aggressive defense of family detention, the government has appealed Judge Gee's decision to the 9th Circuit Court of Appeals.

I have much more to say about family detention, but I am running out of time. In conclusion, we will never resolve this situation unless we focus on the root causes of migration and improvements in security, and development in the sending countries. Regardless, we should not detain families. Family detention violates international refugee law which prohibits the penalization and detention of irregular migrants. From the outset, the Obama administration adopted the most extreme

position, resulting in the detention of women and children, despite the existence of alternatives to detention. As a result of sustained advocacy and Judge Gee's decision in the Flores case, most mothers who pass their initial asylum screening are now released on ankle monitors that resemble shackles. I would urge that one never call these cumbersome devices an ankle "bracelet." GEO, the same for-profit prison company that detains mothers and children at Karnes, owns and administers the ankle monitoring program. These mothers have not been accused of a crime and, in fact, have established a valid, threshold eligibility for asylum [under a civil immigration system.] Recently, a mother, released on an ankle monitor, burst into tears and told me that in her country of El Salvador, only criminals are released on these "grilletes," which translates into English as "shackle."

Most detained families have relatives in this country. They should be released under true community supervision programs that provide social and legal services. When I speak of community supervision programs, I am not referring to programs run by prison companies, but rather programs administered by established social service agencies. Unfortunately, DHS recently awarded the case management contract to GEO. Now the same company detains, administers and monitors mothers on ankle devices, and handles their "case supervision."

So long as family detention continues, we need more pro bono services and fewer ICE obstacles for expanded access to counsel. If anybody wants to come and volunteer at Karnes, you can talk to me afterwards. I am always recruiting.

Maria O'Sullivan: Hello. And thank you for the organizers inviting me to this conference. It's wonderful to see such a great crowd. I do have to say, I feel a bit odd talking about Australia because flying over here I realized just how isolated Australia is. Having said that (and you know, it's just a small country of only 22 million in population), I think Australia punches above its weight in terms of the ramifications that our policy has on, for example, the EU And they are various forms of copying that occurs when you you're talking about refugee policy. And that goes to my first word [on my slide] 'interdiction'. Not to blame Americans (!), but the Australian authorities did look at the interdiction practice of the U.S. Australia did not practice interdiction for many years, we only really started it in the last, say, five to eight years and very much in recent years. So we looked at the *Sale* decision (and the authorities in Australia *do* refer to the *Sale* decision) -- the U.S. Supreme Court decision about interdiction [*Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993)].

Following on from that notion of the copying that occurs amongst countries, there is a link between the Australian policy and what we looked at in Panel 1 with the EU. And that is that with offshore processing, the EU has copied a number of parts of the Australian policy on offshore processing. Particularly with the EU Turkey deal that has just been finalized in the way that it's centered on deterrence: the offshore processing is used as a deterrent, and resettlement - the orderly migration route of resettlement - is prioritized. I think one of the copying issues is that Australia has a link to the U.K. and David Cameron is in contact with Australian authorities. So whilst this is an Australian example, it has international implications.

So what are some of the features of the Australian refugee system? (Because I realize that some of you may not be totally aware of the Australian system.) The Australian authorities very much elevate resettlement as an orderly avenue for people to come to Australia. Now, in comparison to the U.S., which has a very large resettlement program of around 80,000, the Australian resettlement program is comparatively low. It's 13,000 per year. One might argue that internationally, that could be increased, but I think we generally hover around the third or fourth highest resettlement country in the world. And Australian authorities say, compared to our population, offering 13,000 resettlement places is huge.

Contrast that to the issue about boats. I'm going to put a map on the PowerPoint in a few moments, which will illustrate the geographical position of Australia. We are at the bottom of Indonesia and we are in the Southeast Asian region. As a result, we get a lot of boat arrivals, primarily from Indonesia, sometimes from Sri Lanka, and then lesser from India. So one of the fears that the Australian authorities have is this is an unregulated mode of arrival. It also ties in with historical notions about our geographical isolation. We are culturally very close to the U.K. and the U.S. So we are culturally, I guess, uneasy with our geographical location in Southeast Asia.

I'm going be talking today about the so-called 'Pacific Solution'. You may have heard of this. There are two countries which we use for offshore processing, Nauru and Papua New Guinea. These are independent sovereign nations that we fund to undertake detention and offshore processing. Despite this, Australia, again and again, in litigation and in parliamentary inquiries says that Australia is not exercising jurisdiction in those two counties. Despite the fact that we fund those processing and detention centers.

I've also put quotation marks outside the word 'processing centers' [on my PowerPoint], because the actual *processing* of asylum claims only started last year. But these countries have been detaining people that are intercepted at sea for many, many years. One of the problems was that Nauruan law did not have an asylum system and place, and the same with Papua New Guinea. So what happened is that the Department of Immigration in Australia had to train RSD [Refugee Status Determination] officials in those two countries. For those reasons processing has only really just begun in recent years.

One of the other hallmarks is that offshore processing is a deterrent. And previous speakers have talked about propaganda. We spend millions and millions of dollars on propaganda that is shown in Indonesia and other countries, saying 'if you come to Australia by boat, you will never ever be resettled. You will only get resettlement in Nauru and Papua New Guinea'. You may have known from your reading of newspapers (I think in the "New York Times" they talked about the processing centers in the Pacific), that there are huge problems: delays in the processing, and the fact that families and children are in detention on Nauru. Papua New Guinea is slightly different. It is only single males. But we had some litigation recently in the High Court of Australia because children, 37 children, were brought from Nauru to Australia for medical treatment and there was a vast media campaign and civil society which got behind this to say they should not be returned to Nauru.

There are a lot of mental health issues for detainees as well because of the quality of that detention.

So in terms of numbers, historically, in 2010 and '11 there were a lot of people detained in Nauru. Those numbers have dropped, again, because the numbers of *boat arrivals* have dropped. Currently there are 934 in Papua New Guinea and 631 in Nauru. Nauru is a tiny island. It is 21 square kilometers. It is the third smallest state in the world. I think Vatican City is one of the ones that's smaller. And Nauru only has a population of 10,000. This is important because previously, there were two stages of the Pacific Solution. In 2001 to 2008 these countries were used primarily as processing centers. Recognized refugees were then bought to Australia for resettlement. The second stage, 2008 to the present is very different in that now refugees are expected, once they are recognized in Nauru, for example, they're expected to *resettle* in Nauru or another country (*e.g.*, Cambodia or any other country that will accept them).

So when we are talking about a developing nation with a very limited economy, the idea that a recognized refugee from Afghanistan, who doesn't speak the language in Nauru or in Papua New Guinea, can resettle is very problematic. The same issues apply with Papua New Guinea: it is slightly larger, but there are a lot of ethnic tensions between the locals and the asylum seekers.

Now, both countries are parties to the Refugee Convention, but as you would know, there are a lot of rights within the Refugee Convention which are not just about *non-refoulement*, but also about things like primary education of children, social security rights, and there are strong arguments that those two countries cannot provide those rights. So it's not just that they are parties to the Refugee Convention, what are their implementations in practice?

So just to give you an idea, I think [shows photo of tent accommodation in Papua New Guinea's Manus Island Centre]: as you can see in the first photo, the conditions in these countries are very rudimentary. This is a photo from Manus Island. This is where single males are kept. And the average time that people are kept in Manus Island is about 400 days. So again, if it is being used, say, for 20 days or 30 days, maybe, these conditions may be acceptable. But we're talking long-term detention, again, with mental health and physical conditions which are highly problematic. And in fact, one single man died two years ago because there was a riot in Manus Island and then last year another gentleman died because he had a skin infection that was not properly treated. He was flown to Australia, but he died on the way. So two men have died from the Manus Island PNG center.

Just looking at Nauru [shows photo], as you can see, a very small island. Very rudimentary. When we're talking about detention here, because it's a place where families are detained, the idea that children are being detained has been very problematic. It is something that is controversial in the media and in parliamentary inquiries in Australia. There was litigation about this in the High Court, which is our highest appellate court in Australia [*Plaintiff M68*], and as a response, the Australian government declared that Nauru would be an 'open center'. But as you can see by the size of Nauru, the fact that it's open, the fact that people can move around the island - to my mind, does not make it an open center. It's still detention. People just

can't leave - they could theoretically, I guess, get on a boat, on a dinghy - but really, it is still detention there in Nauru.

So just skipping ahead - this map [of Australia and South East Asia] shows the uneasy relationship that occurs in Australia because of our geographical location. It's also interesting that the nationalities of the boat arrivals tend to be from Syria, Afghanistan and so forth. People with a prima facie case for refugee status.

Now, I won't go through the history of penalization of boat arrivals in too much detail, but I just want to focus on that third point [on my slide]: the surge in boat arrivals. This really demarcated a change in Australian policy because we had about 900 people dying at sea, those who were coming from Indonesia to Australia. So 900 deaths at sea. We see that also replicated in the EU in much larger numbers, but, obviously, there's also a humanitarian argument that the Australia government say it is not just about deterrence for deterrence sake, but because it will save lives at sea. And in 2012 in response to that, we developed the so-called no advantage principle: that if you get on a boat, you will not get any advantage from paying people smugglers. You must go to - they talk about 'a queue' - you must go back to the back of 'the queue' and wait for a proper resettlement offer via the UNHCR. So that means, and that's was my point that I mentioned before, boat arrivals will never ever get settled in Australia. The flaw in that argument is that we now have people in Nauru who are asylum seekers that are awaiting processing, but then we also have people who have been *recognized as refugees* and they are on temporary visas. They can get resettled in Cambodia under a very expensive $55 million deal with Cambodia, but only four people have taken that offer up. Thus, it is very expensive. Of those four people, two refugees from Cambodia have since gone back to their country of origin, because they found it too difficult to stay in Cambodia. Again we have the problem that Australia seeks to replicate the EU, but we don't have the same geographical framework that the EU has. Because although Cambodia, for example, is a party to the Refugee Convention, it is a developing nation and again, there were problems in the ethnic tensions of having asylum seekers supported by the Australia government (they were given business grants and so forth), so the ethnic tensions were also a problem. So I think I would flag that as one of the biggest problems in Australia. Not just the interdiction and the offshore processing, but this idea that we are *resettling* people in the South-East Asian region when the issue is far more complicated than notions of a 'safe third country'.

I'm going to just skip pass the interdiction issue a little bit, but I would just flag that legal challenges to interdictions in Australia are very problematic. They're often done in a secretive manner. The other issue is that the Refugee Convention is not domestically, directly implemented in Australian domestic law. And in fact, now in the Maritime Powers Act [Australian legislation which deals with interception of boats] there is a provision that says non-refoulement will not lead to invalidation of an authorization of interdiction. Basically the Australian government says: 'look, we are going to respect refoulement, but if we don't, the Australian courts can't invalidate the interdiction permission we give'. So it's quite a circular argument.

I want to focus in my last two minutes on the legal challenges to offshore centers. Some of these have been successful, but again because of our problem with

international law, our domestic statutes have been the key to protecting refugee rights. We don't have a Bill of Rights, unfortunately. We also don't have a regional human rights system like the Europeans have. And so, that's where, again, we have problems in litigation. In a very recent High Court case [*Plaintiff M68*, Feb 2016], there were arguments lodged by the plaintiffs and also by amicus curiae briefs by UNHCR that Australia exercises effective control and therefore responsibility over people that are interdicted and sent to offshore processing. Australia's argument is that 'no, Australia - funds these offshore processing centers, but the RSD is done by Nauru under Nauruan law and so our financial arrangements don't change it into Australian jurisdiction'. So instead we have to rely when litigating these issues on very limited constitutional arguments and many of those have failed because of a lack of a Bill of Rights.

So in quick conclusion, I think this example from Australia sums up some of the issue with outsourcing. Increasingly states are seeking to outsource their refugee protection obligations, very much for political means, at least in the EU and Australia. In Australia when we have an election, refugee policy is the number two election issue after the economy. So when they do polls, refugee protection is very much up there as an election issue. It also illustrates some of the problems with a 'regional solution'. The EU is a regional solution. That notion breaks down in Australia when we don't have the support via a regional human rights instrument that we have in the European context.

And then, lastly, I guess: some of the implications for this for similar proposals particularly that between the EU and Turkey, is that no matter how hard a state tries to outsource its refugee obligations to other countries, we always have to come back to that notion of effective control, which is quite well-established under international law. So I think that will be something that we can look to in the future to try and make sure that states do respect their obligations under the Refugee Convention.

Thank you.

Anna Cabot: Okay. Thank you, to all of our panelists and right now, since we don't have that much time left, I'd like to open the floor to questions. Right there?

Audience: Hi. I work at the International Rights of Connecticut. And my question is for Barbara Hines. I'm currently in charge of a caseload of 40 undocumented minors. And my job is to go into the homes of these minors who have recently been released from a shelter after detention who are now with a sponsor. Sometime as sponsor is mom and dad who migrated years ago or aunt, uncle, cousin or a family friend. I just wanted to share my frustration because I work for kind of a community program that you were mentioning. The ORR sponsorship and family guidelines have no teeth. So what we've been seeing is that shelters are so overwhelmed, children are just kind of given out to these sponsors and it is great when it is mom or dad and an aunt that really cares about him. But it is problematic when it is a family friend who never met the minor and who spoke with mom and dad 30 years ago in the home country. So what we are seeing as an organization is human trafficking. We are seeing kids who are being literally handed to people who are then abusing them, exploiting them, or putting them to work with no knowledge and no supervision from ORR. And I think what is most problematic is these

sponsors have no legal obligation to us. So I conduct three home visits. The first is when the minor is released and has been two weeks living with the sponsor. And then every two months I do another home visit to see how the minor is doing. But at any time the sponsor can call me and say, I don't want you to which visit us anymore and close their doors and I have no way of knowing what's going on with that minor. Are they being treated well? Are they in school? Are they being taken to the doctor? Or sometimes they will just up and move. A sponsor will call us and say, well, you know, it wasn't working out, so I sent him to live in New York with someone else. And again, there is nothing that we can do to prevent that. So I just wanted to share my frustration as a community worker who does this type of case management. Our caseload in Connecticut is ridiculously high. We have contracts with, you know, ORR and agencies and shelters in Chicago, and Tampa, and Florida, really all over the U.S. I do, maybe, five or six visits a day, all over Connecticut, and I just think that, you know, it breaks my heart when I leave a home or when a sponsor calls me and tells me I don't want you to come to my house anymore to talk with this minor. I worry some that these children are just being handed off to sometimes complete strangers who might not have their best interests in mind. So I loved your presentation and I would love if you can maybe speak to that a little bit or if you have thoughts or suggestions for improvement.

Barbara Hines: Thank you. Okay.

So I can punt a little bit because I don't work with unaccompanied children. So the population that I work with are all parents who are going with their children. But I mean I think number one it goes to what I said before, is we need to look at the root causes and now we can make structural changes in the sending countries. I think we need more funding. I know there has been, there have been, you know, articles in the press about children being released in the situations that you described, but I would say that we need to improve that system. I don't think it means that we should keep people detained and that what we really need is we need more resources and you know more thoughtful ways of how we're going to release children. But I don't really work with unaccompanied children at all. So it doesn't make me back off of my position that for most migrants, some kind of community supervision program has to be the answer rather than keeping them in detention. But, thank you. You know, thank you for your comments.

Audience: During the first panel there was a lot of discussion of international agreements. During the second panel, particularly talking about Central America. The only discussion was the bilateral agreement between Cuba and Mexico. Is that because there are no international agreements in the Americas concerning refugees? And a quick second question is, what are the rights of immigrants into the United States to counsel?

Barbara Hines: Okay. Ah, so we are signatories to the same refugee convention that was referenced in the earlier panel. But I think Debbie Anchor is going to be talking about that more. The problem with it is that the claims that we're seeing from Central America, which is general gang-based violence, extortion and things of that sort don't fit neatly into, at least, U.S. jurisprudence on what is a particular social group, those definitions that we started with. So while the mothers

and children are seeking asylum under the same international convention framework, the problem from, at least that I see, is the nature of the claims, the reluctance of the immigration judges to think in a more expansive way about the kinds of claims based on the reality of Central America, and there is no right to counsel and that was one of my slides that I never got to. About the tremendous obstacle of not having a right to counsel and when you look at the statistics, you know, you have a 14-time better chance of winning your asylum case if you have counsel. So this is a terrible situation and a tremendous challenge.

Audience: I just wanted to pick up on the early point. So on the early point about children being placed in families and then not being properly supervised or not, they're not being enough resources. I think this is a huge problem and it really is a great example of how the failure of the U.S. to ratify the convention, the rights of the child, has concrete implications for the possibility of challenging you as practice. In comparable situations in other highly, you know, stressed refugee receiving countries in Europe, for example, children have access to guardians and the situation like this where a child is left to the mercy of, of an unsupervised family and where a community worker is told not to return and there's no recourse seems, is obviously a complete violation of the best interest principles. So I know that there are some programs in parts of the country, for example, in Chicago, you know, Chicago law school has, has a whole program of creating access to guardianship and sort of mentorship possibilities for children and there are some organizations that are seeking to do this, but it is very concerning when, you know, there just isn't the funding for this as a routine matter in states which have large numbers of unaccompanied children. So I'm very glad you raised it.

Anna Cabot: We have one more comment right here.

Audience: This this isn't really a question, but I wanted to address, I think the, the first comment and the last one about the unaccompanied children. My clinic at university of Nevada, Las Vegas, employs two of our recent graduates in a legal aid project to represent the unaccompanied children from the northern triangle. In their cases in immigration court and in other courts, and it is extremely stressful, but although it is also quite successful, I think virtually all of them there is some legal remedy available, we have seen some of the problems that were raised, although probably not that extreme. I think the main concern in terms of the family structure that we've seen is that the kids are being placed with a relative, sometimes it's a biological parent, but who was not really there emotional parent for a decade or, or more of their life. And given the stress that they're under in these situations, that's, you're going to get the full range of beautiful and not so beautiful family interactions as you, I think, as we would with any group of families. I think we definitely understand it, though, as if they are not here, they're in Dilley. And that's, and it is an irrational policy. It doesn't make a great deal of sense in terms of if you're concerned about deterrents, why the U.S. government would say if you come with a parent you would be locked up, but send your 8-year-old alone and they will be free, which is essentially is the policy. But we try to manage it in that context and I think understanding that some of these families handle it better than others. But that's frankly true of pretty much everyone in our social service system. In Nevada, we

don't really have a lot to be proud of in that category anyway. I'm not really sure that this group of families fairs much worse, particularly given what they up against and, actually most of the families that we see, I mean, we're seeing the custodian bringing their kids to their lawyers meeting day after day, day after day, taking time out of work for people who really don't have the financial leeway to lose income, I think we're seeing mostly the best of family not the worst, but there is always exceptions.

Anna Cabot: Thank you. And one final question.

Audience: Yes. The first gentleman spoke about the extensive smuggling industry in Africa and the Middle East. I was wandering about the extent to which there is a comparable smuggling industry for migrants from Central America and Mexico coming up into the north.

Peter Tinti: Ah, sure. I mean, that's out of my area of expertise, so I'll defer it to some of the other panelists. I will say, though, that one thing that I did see at times interviewing people over there was that there were especially people who had been coming from Lebanon, or Syrians who had been in camps in Lebanon or living in the shadows in Lebanon and decided to come to Greece, more than one person told me about possible deals that they had been offered that would are taking them to the U.S. through Central America. And oftentimes the scheme was a falsified or fake or stolen Brazilian passport and they fly from Beirut to Brazil and then Brazil, onward to Mexico, and then cross the border and seek asylum that way. But I'll defer.

David FitzGerald: Yeah, just a word on the smuggling in Mexican context. There is a very vibrant smuggling industry. The known effect of concentrated U.S. border enforcement since the 1990s to ramp up the number of agents along the wall has been to make that industry much more lucrative. Much more complex. To move from kind of mom and pop family operations to much larger enterprises and the specific challenge of people, especially coming from Central America, they are more likely to use this pay-as-you-go model that Peter mentioned. As opposed to a package deal. Most of the people who were using smuggler services within Mexico are actually getting a package deal where they are deal someone they already know in their hometown. And it is much safer for someone being smuggled if they are dealing with someone with whom they have social ties and there is some sort of accountability. When it is pay-as-you-go service they are much more vulnerable to all kinds of attacks often on the part of the smugglers themselves and there have been some truly specific instances in Mexico of Central Americans in particular, being held by drug gangs, through charges of smugglers, a right of package to use their territories that they control. And one notorious case, similarly executing more than 70 Central Americans who were being held in the northern state of Tamaulipas.

Anna Cabot: Thank you, David. I'm actually going to dare the disapproval and the wrath of the symposium organizers and follow-up on this question just briefly with Maria. I've kind of got the impression of someone who is very far away from your area of the world, that Australia's interdiction system is really efficient. I'm wondering if a smuggling network has built up in response and if so, whether the smuggling network has been able to circumvent the interdiction system in Australia.

Maria O'Sullivan: Yes. The smuggling system is centered in Indonesia. And Australia always complains that Indonesia should stop the boats before they even

leave and there's a big diplomatic problem between Australia and Indonesia, but yes. Our interception, I would say is highly successful. And that we, I think, for the most part, a hundred percent of the time we either interdict and return to Indonesia, we put them on these little orange lifeboats and then we just push them from the high seas into Indonesia territory waters. One time, one or two times, actually, we mistakenly went into Indonesia territory waters and that caused a lot of problems. Yes, but it is very successful (the interdiction program), but of course, some of them do go to Nauru. And that's where the people smuggling model is successful in that people are at least processed somewhere. So that's where the people smuggling model is successful if you like, they still got a market to sell.

Anna Cabot: Okay. Well, thank you very much. And please join me in thanking our panelists.

KEYNOTE ADDRESS

Mark Hetfield: What I'm trying to do today is give some historical perspective to the conversations that have been going on this morning and will continue this afternoon. One slight correction, we no longer call ourselves the "Hebrew Immigrant Aid Society." The National Association for the Advancement of Colored People no longer calls itself that, and likewise we find that the term "Hebrew" is rather archaic. So we know longer spell it out but it doesn't mean we're not Jewish anymore. We are still a Jewish organization but we have changed significantly since we were established in 1881 or even since I joined in 1989. HIAS used to help refugees because they were Jewish and today we help refugees because we are Jewish. But I will be talking mostly about Jewish refugees during this conversation because again for our HIAS is the oldest refugee agency in the world, we're 135 years old now and most of that history – over 120 years of it – was dealing primarily with Jewish people. So I'll be talking mostly about our history of working with Jewish refugees, but just to reinforce the point that we are now a diverse humanitarian refugee agency, I do want to show a very short promotional video that tells the HIAS history in about 2 minutes. And 134 years in 2 minutes so a pretty good deal. It's an efficient use of your time.

[Video]

Thank you. So I want to go over a little bit of that history and talk about why the Refugee Convention is so important for us at HIAS. Toward the end of my remarks, I also want to touch on the U.S. settlement system as it currently stands in coping with the Syrian refugee situation. The resettlement system is a bit of a mystery to many, it kind of lies outside of the law, it's not really a very legalistic program, to say it least. It kind of lies outside the law in many ways so many lawyers are not familiar with it and can't be familiar with it because very little is written about the Resettlement Program and how its run. So I want to shed a little bit of light on that.

But HIAS, as the video noted, was established in 1881 primarily as a response to the pogroms which were launched that year against the Jews in Russia as scapegoating for the assassination of Czar Alexander II. HIAS was launched as a

response to that in New York. 1881 marked the beginning of the biggest mass migration of Jews since they were expelled from Iberia, the Iberian Peninsula by Ferdinand and Isabella almost 5 centuries earlier. The term genocide didn't even exist yet, but the pogroms against the Jews were certainly a genocide committed with the intent to destroy in whole or in part a national ethnic racial or religious group. That's the definition of genocide, it wasn't officially coined until 1944 but it certainly applied to what was going on in Russia in 1881. 40 years of pogroms against Jews in Russia with tens of thousands of Jews killed, raped, their homes looted.

During this 40 year period the Jewish population of the United States grew from 250,000 to 3.5 million. This was not the result of Jews being fruitful and multiplying, this was the result of migration and largely with the work of HIAS on Ellis Island and before that on Castle Garden to make sure that the Jews that arrived there got through the immigration authorities, and got kosher meals while they were waiting and got tickets on to their final destination in the United States. Basically the rule in those days was, and to kind of paraphrase something that's often attributed to Woody Allen, to get refugee status in the U.S. or to get protection in the U.S., you just had to show up. 80% of success was showing up on Ellis Island and then HIAS did the other 20% to get you in, if you were Jewish.

The U.S. was very, very good to Jewish refugees until it wasn't, which happened around 1921 when you see a similar situation to what you're seeing today. And I'm hoping, I'm confident, that today the xenophobia, the anti-refugee sentiments we're seeing will be shorter lived than they were in 1921, but in 1921 those sentiments lasted about another 25 years. It took quite a while to get past that. So I'm hoping that's not the case today. But in 1921 Congress passed the Immigration Quota Act, the first immigration quota act, and what this really was, was a reaction to what was going on in Europe and overseas. It was a feeling that we want to keep the problems over there, over there and not bring them over here. So it was particularly directed against lowering the number of immigrants who were coming from Eastern Europe and southern Europe, really eastern Europeans, Jews and Italians. The Act established for the first time in U.S. history a national quota system meaning that only a certain number of people of each nationality could come over and it reduced the actual immigration numbers by 72% from eastern and southern Europe.

But that wasn't seeming restrictive enough so in 1924 Congress made it even more restrictive and reduced the numbers further, fixing the numbers at 2%. They were based on 2% of the nationalities of the foreign born as existed in the 1890 census. So Congress really tried to turn back the clocks before this big wave of immigration from eastern and southern Europe. This made HIAS's job very, very tough. We no longer had a way to get people in. We had to operate offices overseas for the first time. We were no longer just a New York City agency. We had to go to Europe and open up operations there to try to get people visas because even though they had these low quotas that the State Department was enforcing overseas, the State Department made a point of never filling the quotas. So they applied the rules very, very strictly so the quotas went unfilled every year until basically 1938 when it was really too late. And in 1938, just to note, they did finally use the quota, the full quota

for Germany and Austria, which I think was around 35,000 but there were 300,000 people waiting for a visa number that year, 90% of whom were Jewish.

For HIAS's 40th birthday in 1921, as I said, the present we got was a much more difficult job. We had to open up offices in places like South America, because South American countries were more willing to accept refugees than the United States, Canada and Australia was back then. So we had operations in Venezuela and Ecuador as safe havens for Jewish refugees. The Dominican Republic. We had an operation in Shanghai China. The problem is in those days there was no right to flee. There was no right to protection. There was no right to seek and enjoy asylum. Governments had the right to just turn refugees back at the border and turn them over to their persecutors. With the rise of Hitler in Europe and Nazism, HIAS was again confronted with literally millions of Jews needing to flee but this time we had very few tools in our toolbox to help them. Cobwebs were virtually growing on Ellis Island. And then what happened in November 1938 was *Kristallnacht*, a pogrom in Germany, Austria and Czechoslovakia, the likes of which had never been seen before, with only 91 Jews killed, but 7,000 Jewish businesses destroyed and otherwise vandalized. 1,000 synagogues burned. And interestingly while these were mass pogroms committed against Jews by mobs, 30,000 people were arrested, but those were 30,000 Jews who were arrested after *Kristallnacht*. This was widely reported and of course we realized we really had to get people out. But again, there was no right to flee.

And then my favorite case which is a very obscure decision, and I always love to talk about it, I haven't in a while but I blew the dust off just for you guys, is a case called *Weinberg v. Schlotfeldt*. It's a 1938 decision and if you want the site, it's [26 F.Supp. 283]. And what happened there is there was a Jew called Sol Weinberg from Czechoslovakia. He jumped ship in New York in 1927. He remained in the United States illegally until 1931. He then returned to Europe to visit his dying mother. And then he came back with false papers, falsely claimed U.S. citizenship in 1932 after his mother died. Eventually he came to the attention of federal immigration authorities and he was arrested in Chicago for having entered the United States without a visa, for having violated the 1924 Immigration Quota Act. He was placed in detention and his appeal was heard on October 21, 1938. He had already been ordered deported by the Immigration and Naturalization Service back to Czechoslovakia, but then between the time that the court heard his appeal and the day the decision was actually issued, Kristallnacht happened on November 9 to 10th. The decision was issued 9 days later. It was issued by Judge Phillip Sullivan of the Northern District of Illinois.

What's interesting was that Judge Sullivan invoked the right to protection. He invoked Saul Weinberg's right to asylum, but there was no right to asylum at that time. Sullivan wrote, "under conditions as they now exist it would be cruel and inhuman punishment to deport this petitioner to Czechoslovakia belonging as he does to the race which is thus being persecuted and exiled. I do not believe that the immigration laws contemplate any such strict compliance with the letter thereof as would oblige the court to return at this time a Jew to a country where his property

would be confiscated and where his life might be in jeopardy and from which were he returned, he would be immediately forced to flee…."

So Judge Sullivan basically saved Weinberg's life by issuing that decision but he had absolutely no legal basis whatsoever for doing so. The ruling was not based on the rule of law, it wasn't based on any precedent. It was just based on what the law should have said. It didn't set a precedent either though, unfortunately, and Jews fleeing Nazi persecution continued to be turned away there and elsewhere. There was simply no right for European Jews to seek and enjoy asylum in the United States or anywhere else in the world.

And now, in the archives of HIAS (and people are always asking me about the archives because we're 130 years old so we have a quite a bit of paper lying around), contain thousands of files of families that were not as lucky as Sol Weinberg. Files like that of Ann Frank's family. We actually have Otto Frank's file. This is a copy of it. And this file documents the family's exhaustive attempts to reunite with family in the United States but due to the quota system the Franks could not obtain visas to join Ann's uncles in Boston. And finally Otto Frank concluded, and it's in this file, that fleeing without a visa would be even more dangerous than staying in Amsterdam. Everybody knows how the Frank story ended.

So learning the lessons from recent history, from the 6 million Jews killed in Europe, two fundamental developments in 1948 made HIAS's job much easier and a lot different. One of course was the establishment of the state of Israel which meant that Jews had a place to go to which they had not had for a millennia before that, and the other was Article 14 of the International Declaration of Human Rights which asserted that there is a human right to seek and enjoy asylum from persecution. And that ultimately led to the 1951 Refugee Convention and finally HIAS was able to take a rights based approach to refugee protection rather than a charity approach, rather than just begging for mercy and charity we could actually assert a human right.

In terms of the Refugee Convention, you may know the story of Hillel who was a Jewish sage living around the same time as Christ who was asked by somebody, somebody said, I will convert to Judaism if you can recite the entire Torah on one foot. And Hillel said, okay, what is hateful to you do not do to any other person. That is the entire Torah, all the rest is just commentary. Were Hillel's lesson applied today, it wouldn't be refugees of course, as refugees are people who flee to escape hatred on account of who they are or what they believe but as we've been talking about all day there are now more than 60 million refugees and displaced persons, more than at any time since the second world war.

What does the Refugee Convention say? Standing on one foot, which I will not do, I can tell you that one, it says a refugee is a person who flees his or her countries due to a well-founded fear of persecution on account of who they are or what they believe. Two, a refugee shall not be returned to his or her persecutor. Three, anyone claiming to be a refugee shall be regarded as a refugee until found to be otherwise. And four, refugees are entitled to the same human rights as everyone else. That is the entire Refugee Convention, all the rest is commentary.

But there is flaw which has been talked about, for much of this morning to the Refugee Convention and that is that it is absolute in giving protection to people who

are fleeing persecution. States have to accept them, have to give them asylum. The problem is that the Convention doesn't really offer, some argue that it does, but it doesn't explicitly operationalize international cooperation to help those states that have large influxes of refugees. And this was a problem that was acknowledged at the time the Refugee Convention was drafted. They probably did the best that they could do. If they had put in a responsibility sharing provision that was operationalized, it may have been a poison pill for the Convention, but that flaw, that gap, in the Convention is quite visible today.

You look at the Syrian refugee crisis as the case in point. You look at Lebanon which is the example people site the most. In 2011, Lebanon had a total of 10,000 refugees on its soil. Today it has more than 1.2 million in a country of less than 5 million people. So 1 in 4 people in Lebanon is a refugee, is basically a Syrian refugee. Jordan, it's similar. They had less than 300,000 refugees in 2011, mostly from Iraq. Today they have over 600,000. Turkey, the refugee population grew from 25,000 to 2.7 million over a 5 year period. And the entire world just sat back and watched this happen. Every year the crisis gets bigger and bigger and bigger. It reminds me of when my brother and I used to be busboys in high school in this French restaurant and we thought it would be cool if we took a balloon and attached it to the cappuccino steamer. So we took a balloon and attached it to the cappuccino steamer and watched it get bigger and bigger and bigger and bigger and it got like this big. You wouldn't believe how big it got filled with hot steam. And we knew it was going to end badly but we didn't know what to do about it. We turned it off in time, after the owner saw us and screamed and it did like gradually collapse, but unfortunately the world was not as smart as my brother and I were and they let this situation fester for 5 years. Now you have the crisis of this past summer with hundreds of thousands of refugees fleeing a second or a third time risking their lives, finally culminating in Aylan Kurdi and the photograph on September 2nd that really woke everybody up to the refugee crisis, finally, but it was really too late at that point.

I do want to say one other thing about the Refugee Convention. So the French recognized this as a problem, that there was no responsibility sharing mechanism in the Convention. And the preamble as was mentioned this morning does make a reference to the need to do responsibility sharing but the French actually introduced the original preamble, as in the draft, was much stronger. It actually said, "…but considering that the *exercise of the rights to asylum places an undue burden on certain countries because of their geographical situation*, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved *without international cooperation to help to distribute refugees throughout the world*…."

The French actually put that in the original draft of the preamble, the refugee distribution provision, in an earlier draft, but it ended up being taken out. Every country said yes, we agree with that, it's a great idea, but it doesn't belong there it belongs as a General Assembly resolution, it belongs maybe in the body of the Convention, not in the preamble. But where it ended up was nowhere. It was just taken out and a much more general reference to the need for international cooperation

was put into the preamble which again is not in the operational part of the Convention. The French inserted the provision because they had taken in 500,000 refugees from the Spanish Civil War and they felt that was an enormous burden which sounds, you know, quite funny today given the numbers that we're dealing with which are considerably larger. Not as funny as the Central American crisis being a huge crisis to this country with the 68,000 that have come in under that. But that provision is constantly being invoked in the preamble and Filippo Grandi the new High Commissioner did invoke it at the March 30 high level meeting in Geneva where the Secretary General was trying to find alternative pathways to admission for Syrian refugees.

So after September 2nd there was an outpouring of support for Syrian refugees because of the Alyan photograph and what it represented. And I want to just really talk about the Resettlement Program, just to lay the context since it is a rather obscure program, even though the U.S. is the biggest resettlement program in the world.

Resettlement is one of the three durable solutions, the other 3 being voluntary partition, local integration in the country of versed asylum and resettlement to a third country. A lot of people refer to resettlement as being the least desirable solution. It's not the least desirable, it's just the least available. Only 1% of the world's refugees can be resettled. Generally speaking, the UN High Commissioner for refugees says that about 10% need it and 1% get it each year. So that's what they're up against. So with 4 million Syrian refugees, the needs are for 400,000 to be resettled. But for any responsible responsibility sharing effort, resettlement has to play a major role as it did during the Indochina crisis as it did during the comprehensive plan of action when more than 2 million Vietnamese refugees and refugees from that region were taken in by resettlement countries, the majority of whom went to the United States.

The Resettlement Program run by the United States is basically the same as our Asylum Program in some ways in that it uses the same refugee definition except it's overseas. And it doesn't have any of the due process protections, any of the transparency that you have in the asylum process here this country. Not anybody can apply for resettlement overseas. To be resettled, refugees have to basically be invited to apply by falling into one of the categories of humanitarian concern or by being referred by a U.S. Embassy or by being referred by the UN High Commissioner for refugees or by having a close relative in the United States who was also a refugee or asylee.

But not anybody can walk into an embassy or even a resettlement office overseas and apply for resettlement. You have to fall into one of those categories or they will not even look at your application. And your application is not even prepared by you, it's prepared by government partners, government contractors including my agency which prepares them for Iranian religious minorities, and Church World Service prepares them in Nairobi for Africans and all around the world there are offices like that that prepare resettlement applications for people.

The U.S. is the biggest resettlement country. Traditionally we have been letting in about 70,000 refugees a year. Lately that's much lower than the number we historically we let in as was mentioned in my introduction. In the mid-1990s we were letting in over 110,000 a year. In the early 1980s we were letting in over

200,000 some years. So what we're doing right now, even though this is the biggest refugee crisis that we've known, is rather insignificant and disappointing. Why? Frankly, it's because after September 11, 2001, the United States started to implement a number of security vetting procedures to screen resettlement applicants.

Now in the Resettlement Program, as I said, unlike the Asylum Program, for those of you who are in law school and are taking Employment Law, there's one thing I remember about Employment Law which is at will employment means you can fire somebody for good reason, bad reason, no reason at all. In the Resettlement Program it's kind of like that. The U.S. government can deny your refugee application for good reason, bad reason, and no reason at all. And they don't have to tell you the reason that it's being denied. They can use adverse evidence against you without sharing that adverse evidence with you and if you are a security threat or you're deemed to be a security threat to the United States they can deny you on that basis without even telling you that that's the basis that they're denying your application for. If you get a letter that says, we're denying you on the basis of our discretion that means that they think you're a security threat.

So the United States installed a bunch of security vetting procedures for refugee resettlement applicants. They have fingerprint checks, they have name checks, and they have security advisory opinions. After 2011 they instituted an interagency check where you are processed through a dozen different law enforcement and intelligence agencies and they all vet you and look through you, and all that has to happen before you get on a plane. And in fact it happens multiple times before you get on that plane just in the event that some adverse intelligence is gathered on you while you're in this very long process while they keep running you through this endless loop of security checks.

We kind of got spoiled when we were processing Iraqi and Afghan refugees since we occupied those two countries we had pretty good access to their police records. We had pretty intelligence so we got good intelligence on Iraqis and Afghans but we can't get that on Syrians. And you'll often hear FBI Director Comey quoted as saying, "We lack intelligence on Syrians." It's true only relative to the amount of intelligence that they had on Afghans and Iraqis. And so for that reason they've instituted yet more security checks for Syrians on top of all the ones that I mentioned. They now also have what's called enhanced case review which means after you've been interviewed by a Homeland Security officer, if you're Syrian, they send your file to Washington and every word in that file and everything you said in your interview is very carefully reviewed for any kind of yellow flags that could again cause your case to be stalled. And then on top of it they also set the average interview for Syrian refugee is about two or three times as long as the average for any other kind of refugee. So they even have a more intense interview process. All of this existed prior to November 13th which is when the tables turned on Syrian refugees.

Aylan Kurdi's image was starting to fade and the Paris attacks happened on Friday the 13th. What happened next that following week? You'll remember that within a 24 hour period, 31 governors, 30 of them coincidently Republicans, 31 governors declared that their states were off limits to Syrian refugees or for the more

liberal ones, just Syrian Muslim refugees. To the credit of this state and this institution, Governor Malloy was not among them.

Interestingly Governor Snyder of Michigan was the one who started this. He was the first one to declare his state off limits and he could not believe that he had 30 followers within 24 hours. Now this is a law school event so I can tell you that there was absolutely, positively no basis in law for any one of those 31 governors. They cannot declare their state off limits to refugees. They can't tell the Federal Government not to resettle refugees in their states. But obviously they did this without checking with their lawyers, they didn't care. And interestingly really in 29 of those states there has been no effort to enforce those measures, but certainly it has created a very hostile environment for refugees that are coming in. So it's extremely problematic.

HIAS is one of the 9 agencies that resettled refugees in the United States, meaning we pick them up at the airport, we put them in apartments, we get their kids in school, and we try to get the parents jobs. That's what we do. That's what HIAS does and 8 other agencies like us. When we open up a new office in different states, the State Department was always adamant about us getting the permission of the state refugee coordinator and the governor's office. Well they don't do that anymore. With 31 governors against the refugee program they don't press that point any longer.

So I could go on about this but I won't because I'm out of time. But I do want to say that lawyers get a bad rap. You know there's lots and lots of lawyer jokes out there that are negative, but we have to remember that when it comes to refugee protection it's really lawyers who are in the forefront of that fight. So for those of you who are in law school, and for those of you teach law here, I want to thank you for either being in or entering a very noble profession. Refugee lives depend on the law to protect them. And as I said, we had to deal for most of our history without having that law and it was not easy. Thank you.

Kathryn Libal: So today we've heard from a number of speakers about the containment paradigm and efforts to restrict refugee support and protection to states immediately neighboring Syria or neighboring the conflict. These talks have underscored, I think, a more immediate lesson that could have been learned from the displacement of some 4 million Iraqis, since the mid-2000s. Indeed, some of those Iraqis, some nearly 1 million of them, were in Syria at the time in which Syria descended into civil war. In the case of the Iraqi refugee crisis, at least in the United States, a coalition of human rights and humanitarian NGOs including, especially some of the resettlement organizations as well as members of the U.S. military, were able to pressure the then Bush Administration to take a small measure of responsibility for the forced displacement of Iraqis. We now see Syrians and, again in fairly sizable numbers, Iraqis (especially who had been in Syria), displaced at a much greater scale and much more rapidly than during the Iraq War and Occupation. We also see even less willingness to responsibly share, to use the words that Mark and others have invoked. So in part I wanted to pose a question today to Mark about us, and that is: Do you see a greater role for institutions of higher learning in tackling the challenges that you've presented? And if so, how might universities such as UConn, not only law schools, but across our institution, contribute to solving some

of the problems you discussed or at least imagining some of the solutions to problems you discussed?

Mark Hetfield: Yes, there are many, many areas and it really is not just limited to law. I think we're talking all day about what law can do to shed light on this and to litigate the refugee issue but it's true that this is an interdisciplinary effort. And it's unfortunate that the U.S. Refugee Program is the, the Resettlement Program I'm talking about anyway, is the largest Resettlement Program in the world that is the least studied. Finland spends a lot more money studying its refugee program than the United States does. We really need to do resettlement better. We need to integrate refugees better. We need to get the United States to share more information about the refugees that are being resettled so that we can do that kind of research, but it's not happening. But we do need to have successful integration, I think the 9 U.S. resettlement agencies, one of which is HIAS, we're pretty good, but just been winging it for a 130 years, it's not based on any studies, it's based on our own experience. And it really would be good to add some rigor and some actual data behind the work that we're doing. In terms of other things, one of my obsessions is that right now the security vetting process takes at best, for Syrian refugees, 18 to 24 months. It should not take 18 to 24 months to get anybody through an adjudication, you know, for refugee status or anything else but it does. We really need some business process specialists to look at this and say, is this really the best that you can do in keeping us secure? Is this is the best use of our money to have a process that takes 18 to 24 months? I just want to throw out one, you know, just to show you how inefficient it is, so as I said, the UNHCR says that we should be resettling 400,000 Syrians. We, being the entire world. So far the UNHCR has referred 109,000. 40,000 of those have actually traveled. 38,000 have been referred to the United States. Only 3500 of those have traveled. So you can see the UNHCR has referred since 2013, 38,000 refugees to the United States but only 3500 have traveled. So what kind of an efficient system is that over a three year period? The United States is getting 30% of submissions but represents 9% of refugees who travel from UNHCR. So again our system is grossly inefficient and could benefit from some business process specialists looking at it. Effective integration I already mentioned. Development and relief, one topic today is protracted refugee situations. The average refugee is without a solution for 17 years and yet it's treated more like refugees, even in those situations are treated more like they're in some kind of an emergency situation where they're given humanitarian assistance. There really needs to be a stronger linkage between refugee assistance and development work. Refugees should be part of a development strategy rather than just being given shelter and food for 17 years while they wait for a solution. There's a lot talk about that now but it needs to be operationalized. And again, that's a role where I think universities will have a major role to play.

What issue that is really vexing us to be honest, and we're among friends here, in terms of integration, refugees are overwhelming successful in their integration but some adolescent refugees actually have a more, not surprisingly, have a more difficult time integrating than others. This can cause problems. Again, it's a small minority of adolescent refugees but it is a problem that warrants study and resolution

and has not again been effectively addressed. So if I were to say, what should be focused on in terms of social work and, that's what I would look at.

Kathryn Libal: We have a few minutes, maybe time for two questions.

Audience: When you say that the adolescent refugees have a more difficult time integrating, do you know if the same applies to adolescent asylum seekers? If the study differentiated or not?

Mark Hetfield: I don't know that although I would assume that it does. Again, the only thing that's worse than the data we have on refugees is the data that we have on asylum seekers. But certainly, especially when you're talking about asylum seekers that came over from Central America, one can imagine for example, that their experience would also create enough, would create plenty of issues. So I can't give you a factual, a fact based answer, but I would assume so.

Kathryn Libal: Gentleman in the middle had his hand up.

Audience: I had a short follow up to the adolescent one which was, actually that wasn't, I have another question, but are we talking about accompanied adolescents that are accompanied by their parents or adolescents who are not accompanied by their parents.

Mark Hetfield: I'm actually referring to adolescents in general, but including adolescents who are accompanied by their parents, which are most refugees. There are, there has been reports, and again it's a very, very small minority of refugees, but of the Somali refugees from Minnesota who have gone back to join Al Shabaab, it's a very small minority but we do find across the board that the most, the group that has the most difficulty adjusting are those who come over during adolescence and even if they come with their families.

Audience: The other question I had was, is there an argument in favor of the containment paradigm or generous argument in favor of it and if you don't think there is one, what do the people who think there is one say is the argument in favor of that? That's a question for anybody.

Mark Hetfield: The basic strategy is to try to make sure they feel safe where they are. Just because that's, because ultimately most refugees do want to go home. But it's obvious that some refugees will not be able to go home or some refugees cannot be safe in the country of first asylum and it's in those instances where resettlement is the best solution. But because resettlement is such a rare opportunity, I don't want to say commodity, but it's so rare that many refugees have to stay in a very dangerous situation far longer or it's obvious that refugees have no integration prospects where they are, but they nevertheless have to stay there because there are no resettlement prospects either. But keeping them close to home and keeping them in a neighboring country in the hope that one day they can return, that's preferable, but only if it can be done, keeping the refugees there safely and keeping them with their dignity. And what we've found in Jordan and in particular is that the quality of asylum was fast deteriorating this year which led to this massive outflow. Like for example, 350,000 asylum seekers were taken off food assistance from the world food program last summer. The Jordanian government was cracking down on employment by refugees. So there was a lot of pressure to move them out among themselves, to get up and go and displace themselves yet another time.

Audience: That was terrific. My question is whether, what is happening to the pace of resettlement from places other than Syria, given how blocked that resettlement is, has there been an increase in the momentum or the rate of resettlement from other resettlement locations?

Mark Hetfield: Yes, that's a good question. The President raised the refugee target this year, the refugee ceiling from 70,000 to 85,000 and that's globally with his aspirations being that 10,000 of those will be Syrian. But the fact of the matter is, so in a way other refugees should be benefiting from this and they are trying hard to meet it, but they're pouring so many resources into the processing of Syrian refugees because they are so far behind in bringing them over with their fiscal year over halfway, and they haven't even brought in a third of the Syrians they promised. They've really had to do a surge in resources and this has basically been taking resources away from the other parts of the U.S. refugee program. The entire refugee program is really broken. It takes 18 to 24 months for Syrians to get through, if they get through at all, but the rest of the program isn't doing a lot better. It's very inefficient.

Kathryn Libal: So I know there are still other questions, but please welcome or thank Mark Hetfield for his talk and catch him on a break.

PANEL 3 - ADJUDICATING REFUGEE CLAIMS AND RESETTLING REFUGEES IN A CLIMATE OF FEAR

Jon Bauer: Good afternoon and thank you all for coming, and thanks to Mark Hetfield for the wonderful speech. My name is Jon Bauer. I'm a Clinical Professor of Law and Director of the Asylum and Human Rights Clinic here at UConn Law School and I'm pleased to introduce and moderate our final panel of the day, which is going to explore some of the challenges faced by the systems that adjudicate refugee claims and manage refugee resettlement. Large scale refugee flows make it difficult to make fair and timely and individualized decisions about who will be granted refugee status. The perception of a mass influx also tends to heighten fears that some of those seeking refugee protection are really economic migrants or pose security risks. The questions that this panel will grapple with relate to how to manage those tensions, how to adjudicate asylum claims and effectively resettle refugees in a time of mass movements and fear. We'll be hearing first from Professor Audrey Macklin of the University of Toronto Faculty of Law who will be speaking about private refugee sponsorship in Canada, a system that's recently been used to resettle large numbers of Syrian refugees. Professor Macklin has taught for many years at Dalhousie Law School in Halifax and now at the University of Toronto. She's served as member of the Immigration and Refugee Board of Canada and was a law clerk to Justice Bertha Wilson of the Canadian Supreme Court, and she has published widely on topics relating to forced migration, refugees, citizenship law, gender studies, and human rights.

Our next panelist, Jaya Ramji-Nogales, is a Professor of Law at Temple University. In her remarks she'll be pushing back a bit at the line that's often drawn between economic migrants and refugees. Professor Ramji-Nogales's research and

teaching focuses on refugee and immigration law, international law, and procedure. She's the coauthor of two path-breaking books, "Refugee Roulette" and "Lives in the Balance," which are studies of asylum adjudication in the United States. And she also serves as Senior Editor of the really cool "IntLawGrrls" blog.

Deborah Anker, our next speaker, is Clinical Professor of Law at Harvard Law School where she directs the Harvard Immigration and Refugee Clinic. In her remarks she'll be talking about the current flow of Central Americans fleeing violence and seeking refuge in the United States, and the challenges in getting U.S. adjudicators to recognize the legitimacy of their refugee claims. Professor Anker is the author of the leading treatise on U.S. asylum law, "Law of Asylum in the United States," which is frequently cited by courts and used constantly by practitioners. Through that treatise and many articles and amicus briefs, she has really spearheaded the development of the human rights-based approach and gender-sensitive approach to asylum law.

Our last speaker – and I've only put him last because his talk is ominously entitled, "The End of Refugee Status Determination?" – is Michael Kagan, a Professor and Co-Director of the Immigration Clinic at the University Nevada Las Vegas Boyd School of Law. Before coming to Boyd, Professor Kagan spent 10 years building legal aid programs for refugees throughout the Middle East and Asia. He's published numerous articles on refugee and immigration law, including a seminal study of credibility assessment in asylum adjudication.

First we'll turn to Professor Macklin.

Audrey Macklin: Thank you for that very kind introduction. I'd like to thank the organizers of the conference for allowing me to be here, for all of you in the audience for listening and the other panelists from whom I have learned so much. Indeed, I have reconfigured my presentation in light of the discussion this morning and earlier this afternoon and what I intend to do is offer my presentation on private sponsorship of refugees as an intervention in the debate about political commitment. And by this I mean that we lawyers and policymakers devise sophisticated legal and policy mechanisms for addressing the refugee crisis, yet we know that without political will very little is possible. And the problem is that we lack similarly sophisticated mechanisms for actually generating political will. I want to think about private sponsorship of refugees as an opportunity to consider how a particular policy can be used to generate political will to accomplish objectives even more ambitious than what the policy itself does at present. Let me begin by explaining what private sponsorship of refugees entails.

In Canada, as in the United States, we resettle refugees from abroad. There are two categories of resettled refugees. One is government assisted refugees (GAR), and the other is privately sponsored refugees (PSR). Government assisted refugees and privately sponsored refugees are both screened overseas for security and health inadmissibility, and to ensure that they meet the refugee definition. They are transported to Canada at government expense, usually as a loan that has to be repaid. Both privately and government assisted refugees access public settlement services. These include language training, (English or French as a second language), as well as job training assistance and more general services to assist in adapting to life in

Canada. They also have access to public education and to public healthcare (as do all Canadians and permanent residents). The main difference between the two groups is that government assisted refugees receive social assistance to enable them to meet their living expenses for 1 year. Privately sponsored refugees receive the equivalent but through money raised by private actors. Private sponsors come together, form a group and then raise money or write cheques to meet the equivalent of a year's social assistance. In addition, the sponsoring group provides the quotidian support and assistance for resettlement.

Private sponsorship occurs through a few different mechanisms. In the past and still today, for reasons that I'll explain in a moment, faith based organizations have really played the lead. But any group of 5 or more people or indeed any community organization can form a sponsorship group and if they generate the money and make the formal commitment to government, they can privately sponsor an individual refugee or family.

But what private sponsors do in addition to the above is create a personal relationship with the sponsored refugees. This, in turn, confers invaluable tangible and intangible benefits that facilitate the social, economic and cultural integration of refugees. Social scientists would say that private sponsorship transfers social capital from refugee sponsors to sponsored refugees.

Government assisted refugees also receive settlement assistance but they get it from organizations contracted by government to provide it. These agencies are staffed by people with expertise, experience, and who are deeply committed to refugee resettlement. But they do it for many, many people and they deliver those services in the way that you would expect under those circumstances: neutrally, impartially, professionally and with dedication.

Those who are privately sponsored are being assisted by people who are avowedly partial. They sponsor a particular family. They use their social capital -- their social networks, connections, to assist refugee families to find housing, locate doctors and health care professionals, and secure jobs. They are dedicated to meet the particular needs of one family and only that family. It's a different kind of relationship. There is a fair amount of data in Canada about sponsored refugees, both privately sponsored and government assisted. And the data suggests that privately sponsored refugees, as compared to government assisted refugees, tend to integrate along the various dimensions against which that is measured more rapidly. That is unsurprising if you think about the extent to which social capital can aid in the integration process. So, over the short term and even the medium term, privately sponsored refugees fare better than government assisted refugees. So that's important to keep in mind when considering the benefits of private sponsorship of refugees, Although the data is fairly consistent on this point, I must add that the government assisted refugees are more often drawn from the most vulnerable profiles, and that may also contribute to longer or more difficult adjustment periods.

The volume of refugee resettlement, both private and public is very modest in Canada, relative to the size of the refugee population in the world, and even relative to the size of other immigration classes admitted to Canada each year. Indeed, I will emphasize that the number of Syrians resettled to Canada recently (about 26,000,

possibly double by the end of 2016) is in some sense trivial in comparison to the refugee responsibilities born by EU states at present. Situated alongside the refugee populations hosted by front line states – Turkey, Lebanon and Jordan – it is virtually a rounding error.

So I don't want to make more of it than it is, but having said that, I want to, I'm going to promote it and defend it for a few reasons. One is, of course, that every life matters, period. So every life that is saved by resettlement is valuable in and of itself and important. Secondly, I believe that there is something about engaging private individuals in resettlement that I believe could generate the political will for more ambitious policies with respect to refugees. It can awaken our cosmopolitan sense of commitment. Secondly, I think refugee resettlement particularly the private form, has the capacity to stimulate active citizenship, or civic participation among Canadians themselves. What I mean is that quite apart from the good it does for the refugees themselves and quite apart from the good that refugees confer on Canada through their presence and future contributions, the very act of engaging directly in private resettlement is good for the people who do it and good for Canada, if you believe that civic engagement benefits communities as a whole and promotes social cohesion and solidarity.

At present, I'm devising a project to test empirically some of the analytical lenses through which I'm looking at private sponsorship of refugees. Two among them are cosmopolitanism and nation building or citizenship. And what I hope to do ultimately is observe and interview the sponsors as the private resettlement process unfolds in Canada.

From a historical perspective, the roots of private refugee sponsorship in Canada go back a long way, much like the United States. But the contemporary point of departure is the resettlement of about 60,000 Vietnamese refugees in 1979 and 1980. And that resettlement began within a year of the entry into force of a new Immigration Act in Canada which, for the first time, enshrined in legislation a formal regime of government and private sponsorship of refugees that replaced the ad-hoc initiatives toward Hungarians in 1956, Czech in 1968, Ugandan Asians in 1973, and Chileans in the mid-1970s.

The new systems had not been road tested when the Indochinese refugee crisis erupted. In the end, almost half of the 60,000 Indochinese/Vietnamese ultimately resettled to Canada were privately sponsored. And the legacy of that experience was the following: first, Canada has a permanent legal architecture for privately sponsored resettlement that does not exist in the United States; secondly, there is an institutionalized cadre of civil society actors, many of which are faith based organizations, who are committed to sustaining permanent ongoing private sponsorship of refugees into the future and continued to do so after the Vietnamese resettlement drew down. The third was the absence of any particularized connection between sponsorship, private sponsors and the refugees who were sponsored. Of course, diasporic communities also mobilize in times of crisis (for example, the Canadian Armenian community has sponsored many Syrian Armenians), but private sponsorship by faith based or other civil society organizations is almost entirely

indifferent to ethnicity, religion or national origin. Mark Hetfield addressed that point eloquently.

Let me turn briefly to two dimensions I mentioned earlier, cosmopolitanism and nation building. The cosmopolitan ethos postulates we owe obligations to one another apart from those to whom we are related by kinship or citizenship. They may not be the same about obligations as we have to those to whom we experience a closer connection, but we owe obligations nonetheless. Additionally, we have within cosmopolitism an idea that we do not engage with an abstract humanity, but with particular human beings. This produces a strain of cosmopolitan theory that focuses on ideas about hospitality, and you can see immediately how this would be apposite to private sponsorship. The second piece is nation building and citizenship. There is a way in which I think many Canadians and many Germans have responded to the crisis with a desire to act that expresses something about their self-understanding or perhaps aspiration about who they want to be. The Canadian groundswell of support for Syrian refugee resettlement followed the electoral defeat of a government that had actively (though secretly) obstructed resettlement. So we've got a new government and one way of understanding the enthusiasm is as an assertion of a different self-understanding of what it means to act as Canadians. So it's not just an exercise of humanitarian assistance, but it's also filtered through some conception of Canadian identity. Similarly, I think that to the extent that Germans have responded, there's also some notion of acting out German-ness. Clearly the historical trajectory supporting those two inclinations are very, very different but there is a fascinating aspect whereby an outward looking global response is constituted as a manifestation of national citizenship.

The other piece of it I think is for whatever reason, well for reasons in Canada as in the United States, immigration is both a nation building enterprise but it has always been accompanied as it talks about nation building through admission, the obverse of that has always been nation securing through selectively excluding those who are not worthy of joining the nation. So nation building and nation securing. Nation building and national security are often linked in these ways. There is a contingency to a way in which any given non-citizen population will be framed. Does their admission build the nation, or will their exclusion secure the nation? Canada's previous government, and many current federal and state-level US politicians, frame Syrians through securitization. Canada's current government tilts toward nation-building. To some extent, the choice of frame is contingent, it can switch from one to the other on the turn of a dime – or on the explosion of a bomb -- and so I don't suggest that there's anything intrinsic about it.

The last point I'll make is about the politicization of private sponsors. One facet of private sponsorship that distinguishes it from public sponsorship, (and I say this as somebody who's generally not a big fan of privatization), is that when you get a group of people together who have raised their own money and are undertaking to invest their own time and energy and especially when (as at present) you have drawn from the mainstream middle-class Canadian public, who have never been particularly politicized before, and they are prepared to sponsor they become politically activated in a way that would not happen in a purely public regime. Here

is my illustration: The government of Canada undertook to resettle 25,000 government assisted refugees. When it reached 25,000 they said, okay we've done that, now we're going to scale back the intensive resource allocation we have put towards screening and admitting people and we just want everyone to know that it's going to take many months longer to process the remainder of people waiting in the queue for private resettlement. Private sponsors were absolutely irate. They shot back with "We have raised money. We have rented apartments for these people. These are our families, some of them have been identified to us, how dare you do this". I attended a meeting of 500 people a couple of weeks ago who were impatiently heckling the Member of Parliament who attend. They were not lobbing him with the typical NIMBY objection "not in my backyard!" Instead, they were (figuratively) shouting YIMBY, "yes in my backyard! Bring them and bring them now!"

I don't know if this kind of remarkable display will ever be replicated in my lifetime. But the point is, what happens is when you privatize something, you also produce a constituency of political actors who did not exist before, who are themselves developing a particular kind of awareness and motivation. They push government in a way that would otherwise not happen. And with that I want to express some measure of optimism about private sponsorship of refugees, not only in its own terms, but as a mechanism for generating political commitment. Thank you.

Jon Bauer: Next is Professor Jaya Ramji-Nogales.

Jaya Ramji-Nogales: Thank you very much to the organizers and to all of you for being here. I know this is point in the afternoon where your lunch starts to feel heavy in your stomach. Audrey and I agreed that we'd stay awake for each other's speeches. I hope I can keep the rest of you awake through mine as well. I also want to apologize for having to leave before the end of our panel. I actually did book my flight at a time which would have enabled me to remain through my entire panel but apparently the one thing that our absolutely detail-oriented and fantastic organizers didn't manage to control was the Trump rally on the way to the airport. Everything else has been incredibly well-run, so thanks again to everyone from the journal for all of your hard work.

I'm going to try to keep you awake by being a little provocative in my talk. As Jon said, keeping in mind the panel's theme of public fears of mass refugee flows and on restrictions on asylum processes, I'm going to push back on this distinction between refugees and migrants that Peter and David mentioned earlier, and come out in favor of calling everyone migrants. I suppose in some ways I'm an ungracious guest, as I'm going to push back on two parts of the title of today's conference, The Global Refugee Crisis. I'm going to push back on the refugee label and on the crisis label. I'm going to dig a little deeper and think about the source of this problem, these public fears of mass refugee flows. Because this is the international law journal, I'm going to explore the role of the structure of international law beyond international refugee law.

I'm going to start by taking a critical look at public fears of mass refugee flows and this idea of crisis and asking whether this really is a crisis. I'm questioning the

crisis rhetoric, in particular the idea that these migration flows are expected and unpredictable. I want to take a closer look at the underlying structures that actually construct these crises. From an international law perspective there's only one framework that creates binding legal norms around migration: That's the framework that you've heard about today, refugee protection. The refugee law framework. My argument is that international law's single minded focus on refugee protection has created a very dangerous bottleneck. There are no alternate routes for safe and lawful migration. What's actually happened with the predominance of refugee law is this idea that anyone who's not a refugee, and doesn't fit into the refugee definition that Tendayi laid out at the beginning of the day, somehow doesn't deserve protection, doesn't deserve a path to a different life.

Here's where I'm headed in my talk. I'm going to argue that the structure of international migration law is one factor that contributes to the construction of migration emergencies. I'm going to discuss that structure and then explain how it constructs these emergencies. Law inscribes and reifies certain approaches; it eliminates flexibility. This is particularly acute with international migration law because unlike domestic law, there are few routes to progressive development and updating of the law. Then I'm going to think about solutions. This is my attempt to give a short talk on a much longer paper, so please forgive me if I zoom too quickly past a few ideas.[11]

I'm going to start by thinking about the rhetoric of emergency and this idea of crisis. After thinking about the term for a while, the conclusion that I came to is that it's very difficult to define crisis. Crisis means different things to different people. I'm going to give you a couple of examples from Europe. Some people would argue that the arrival of a million Syrian refugees is a crisis of national resources and border control. I want to push back on that numerically. Some folks have already done this today, but the number of Syrians who arrived last summer in Europe constitutes .2% of Europe's population. Similarly, the numbers of women and children who came to the southern U.S. border in 2014 are .02% of the U.S. population. The idea that these very wealthy nations can't afford to support these refugees is questionable.

But crisis rhetoric is used by all kinds of actors on the political stage. Hungarian President Orban is perhaps the one who springs to mind most acutely, , exercising troops at the border to show his strength in contrast to those wimpy Europeans who don't take a stand against the migrant flows. Orban's taking a stand for national security and border control. On the other hand, there's this idea that this humanitarian crisis should prompt generosity and allocation of resources. This crisis language is also used by UNHCR and others to raise funds.

Emergency rhetoric is put to work by a variety of players because it's powerful, because it's flexible, because it draws public attention and it draws resources, it draws other benefits. But there's a cost: Emergency rhetoric implies an unanticipated problem with a discrete cause. It distracts attention from processes that create problems and towards specific events. All of these events that people have talked

11. I elaborate on the issues discussed here in a forthcoming article in Volume 68 of the Hastings Law Journal.

about today should have been anticipated and were anticipated by people who work in the field. The first refugee camps for Syrians in Turkey were set up in May of 2011. The U.S. numbers, everyone started talking about this surge at the border in 2014, those of us who pay attention to U.S. statistics know that the numbers of women and children had been increasing steadily since fiscal year 2012. The numbers of Central American migrants seeking safety increased not only at the U.S. border but also in countries throughout Latin America.

This focus on crisis leads to temporary solutions that avoid examining these core causes that others have spoken about today. It depicts migration as a choice unmoored from long term structural causes and most importantly it masks the role of what I'm going to call "international migration law" in constructing the crisis. What does that mean? Let me start by talking about the architecture of international migration law.

International migration law is not exactly a field of law, especially if we view the role of international law as coordination. We see massive global flows of human beings, the majority of whom are barely governed by international law. In contrast, international law has played a significant role in coordinating global trade, global communications, and even global finance. What should international law be doing? It could be coordinating state's interests and migrants' needs around labor, around vulnerability. It could be creating safe and lawful routes of transit crucial in preventing mass influx, but the international law that we have largely defers to domestic law. It doesn't enable orderly and predictable and safe migration flows, neither human rights law nor labor law nor trade law nor the law of the sea. Transnational criminal [law] actually has some bite, but as we've heard earlier today it has a very carceral focus. It's focused on criminality rather than safe passage.

What we do have in the field of international migration law is the principle of non-refoulement about which others have spoken today. It's an incredibly successful yet narrow principle based on the Refugee Convention drafted in the wake of World War II. This Convention of course has many states parties. It was viewed as a useful political tool during the Cold War, when the UN High Commissioner for Refugees became strong and powerful. UNHCR retains its influence and ability to command donor dollars today. The principle of *non-refoulement* also comes from other international legal sources. There's been a lot of development of this law. But as Tendayi explained and others have explained, it protects only this narrow group of those fleeing persecution on a certain set of grounds. It's not a response that was designed for the complexities and subtleties of the modern world. What's more concerning, from my perspective, refugee law doesn't offer a route to entry. There is no right to enter the U.S. to be protected, you've got to get over the border first as David mentioned in his talk. That takes me to the issue of mass influx.

Mass influx was actually anticipated and feared by the drafters of the Refugee Convention, who saw large groups of stateless people throughout Europe as they were drafting the Convention. These were sovereigns wanting to protect their territory, raising clear parallels with today. If you look back to the *travaux préparatoires*, the legislative history as it were of the Convention, this was viewed as a national security issue rather than a humanitarian problem. There's nothing in

the Convention dealing with mass influx; the drafters just decided to ignore it and exclude it. We do have some non-binding law, some soft law that suggests various helpful approaches to mass influx, but that law has no teeth. It's hard to enforce. There are some regional processes in play, but these have not been successful in enabling orderly movement. Law has played a problematic role here.

This path dependent approach without mechanisms for progressive development has inscribed and reified the architecture I just described. This is a factor in migration emergencies. There's an entrenched set of norms and institutions that are insufficiently attentive to both state interests and migrant needs. Questions of equitable distribution, of labor needs, of vulnerability are trumped by geographic proximity and physical ability to overcome barriers to entry. If you can get here and cross the border you can be protected. But who is it who can get here and get across the border and who is it who can't? And who's most vulnerable?

There's also moral deference to the refugee law framework, and insufficient critical analysis of whether the substantive lines drawn are morally appropriate. It's questionable under U.S. asylum law whether the women and children coming from Central America would fit within the definition of a refugee under U.S. law; some would, and others wouldn't. These are children fleeing torture and death. They should fit within anyone's idea of a vulnerable population that needs protection, but the law just isn't there. The law hasn't caught up. There's also a deference to process that's deeply concerning I'm sure to Barbara Hines and anyone else who's been on the front lines. These are adjudication procedures that make a mockery of procedural due process, but people see this decision as being in the hands of the experts and if the process determines that someone is not a refugee, well of course they don't deserve protection and we can just send them back to where they came from. But for anyone who knows anything about the process, that's incredibly disturbing.

We have this entrenched system that fails to coordinate state behavior or shift norms. This is a recipe for mass influx, or migration emergencies. There's no other option for those seeking work or protection. The states default to these existing legal obligations, rather than seeking a more effective approach, and voila, we have a crisis.

Of course the critique is easy, but the solutions are much harder. Let me just spend my last couple of minutes talking about the road ahead and what it might look like. In terms of process my suggestion is that a temporary regime be created. This would be an international legal regime that has states agreeing for 5 or 10 years to undertake certain obligations that then can be revisited. This could help to frame the debate around the permanent regime. Part of the reason that we see no changes in the law is because people are understandably terrified of reopening the Refugee Convention. They fear we may get something that's far, far worse and assume that states are not going to take on more extensive obligations. That's why we've seen subsequent efforts fail. Maybe a temporary regime could change norms and preferences in a way that's less politically threatening than a permanent regime. It could also be a much less cumbersome process. It takes a long time to draft a treaty so a temporary regime could come into place faster. We might include non-state actors including NGOs and market actors in this effort.

In terms of substance, and here is where I push back on the crisis idea, migration flows should be anticipated and expected. They're here to stay. These are not crises; this is the modern era and migration is going to continue to happen. It's not going to be stopped. Law needs to play a role in regulating it. This argument I think should appeal the states as well as to advocates for migrants, if you think about the exploitation, the inefficiency and the crises that result from the current approach.

I'm advocating for a comprehensive approach that draws on a variety of fields of law. Pushing back on the refugee/economic migrant distinction, this regime should include ideas about labor migration. Even trade law might come into play. Of course we shouldn't forget about vulnerability and there should be some other types of regulation, but this approach sees the migrant as a whole person who has not only protection needs but also labor needs and labor skills that might come into play. Finally, most importantly, safe transit routes for migrants are needed. These can be differentiated depending on the type of migrant but that's really crucially what's lacking in the current regime. The big question is how we enable the creation of this law and that was my question to the first panel, which I think they answered quite ably.

Thank you so much and I look forward to the rest of the panelists.

Jon Bauer: Our next panelist is Deborah Anker.

Deborah Anker: Thank you to the organizers of the conference. It's really been wonderful and I've learned so much. I'm going to talk about "Third Generation Gangs," warfare in Central America and refugee law's political opinion ground.

The rise of powerful gangs in Central America since the late 1990s, particularly in the northern triangle countries of El Salvador, Guatemala and Honduras, and the efforts to suppress them, have resulted in the increasing flight of Central Americans to the United States. There was a major surge in Central American migration in 2013, including mothers with children. Particularly notable was an influx of unaccompanied children in 2014, estimated at approximately 250,000, described by officials including the President, as a "humanitarian crisis' though it is increasingly, and I would say unfortunately, described as an enforcement and containment crisis.

The number of claims based on fear of "gang" persecution has also grown. Although an increasing number of immigration courts are granting asylum to those resisting recruitment or opposing Central American gangs and some federal courts are granting these claims, partly based on approaches suggested here, many other decision makers have denied and continue to deny them. I'm going to address some of the challenges in these so called "gang persecution" cases, primarily focusing on, and urging an increased use of the political opinion ground of the Convention's refugee definition.

Until recently, the political opinion ground has been virtually ignored in the jurisprudence (particularly involving Central American gangs) but I believe it should and, as I noted, it is beginning to play a more prominent role. I'll begin with some brief background on the growth in influence and power such "Third Generation" Central American gangs. I'll then speak about the political opinion ground and some categories of claims that are emerging in cases of Central American refugees that can

be framed using this ground. Some of the ideas here are discussed in my treatise, Law of Asylum in the United States, which is about to be released in a 2016 edition.

The rise and growing sophistication of powerful gangs in Central America was fueled beginning in the mid-1990s to a great extent by the deportation of large numbers of Central American youth who joined gangs in the United States after their families migrated to flee the Central American wars of the 1980s. Many of these youth formed gangs initially as a defense against already established Chicano street gangs in places like Los Angeles. In 1996 changes in U.S. immigration law resulted in mass deportation of these gang youth as well as others, on the basis of expanding categories of what are now defined as deportable "criminal" conduct. Between 1998 and 2005, more than 200,000 individuals were deported from the United States to Central America and fledgling criminal justice systems in these receiving countries were unable to cope with the large scale arrivals, especially of youth who had little or no family support in their countries of origin, which they had left so long ago. The gangs grew exponentially.

Some experts, including military authorities, report that these Central American gangs have developed a degree of politicization, sophistication and international reach to qualify them as "Third Generation" gangs. Third Generation gangs are distinct from First Generation gangs (described as traditional street gangs or with a turf orientation), and second generation gangs (described as entrepreneurial and drug centered) in their evolved political aims, global reach and sophistication. As one military strategy professor at the Strategic Studies Institute of the United States Army College, Professor Manwaring wrote "in describing the gang phenomenon as a simple mutation of a violent act we label as insurgency, we mischaracterize the activities of non-state organizations that are attempting to take control of the state." Professor Manwaring continues to explain, "[w]e traditionally think of insurgency as primarily a military activity and we think of gangs as a simple law enforcement problem yet insurgents and third generation gangs are engaged in a highly complex political act, political war."

National security and military experts also note that Third Generation gangs look to depose or replace the incumbent government, control parts of regions within the nation state and work to change the values in a society to those of the gang. U.S. A.I.D. reports that these gangs "exercise their own justice and demand certain behavior of citizens; like a government they collect taxes by extorting payments from bus drivers, cab drivers and local businessman, among others." They present a challenge to the state's monopoly on controlling violence, elevating gang leaders to the status of warlords or barons thus "clearly taking the gang into interstate war or non-state war." The sheer size of the gangs alone makes them a formidable threat. One study for example estimates that MS13, one of the most prominent gangs in Central America, has 27,500 members in El Salvador alone. By comparison during the El Salvador Civil War, the guerilla group FMLN had no more than 9,000 to 12,000 members at its peak. Still, it was strong enough to negotiate an end to the Civil War without surrendering.

Another U.S. military expert, notes that the so called northern triangle of Guatemala, El Salvador, and Honduras is the deadliest zone in the world outside

active war zones. In terms of violence, and I think this is something that Barbara Hines mentioned before, the Central American conflicts now rival the conflicts of recent years in Iraq and Afghanistan.

I will now focus on the Convention's political opinion ground and my argument that many of those who flee Central America do so for reasons that are political and raise claims that fit within established interpretations and jurisprudence regarding this ground. Important to this analysis is what we call, the non-state actor doctrine: which I can talk about I more during the question and answer period. It is well established that the term, persecution encompasses not only serious harms by state actors but also by non-state entities that the state is unable or unwilling to control. While political opinion certainly encompasses beliefs associated with formal political parties or organizations that oppose a party or regime, the established interpretation of the political opinion ground does not require the applicant's adherence to a formal political ideology or the platform of an official political party. As Atle Grahl Madsen, who was the original commentator on the Refugee Convention, cited in *INS v. Cardoza-Fonseca* [480 U.S. 421 (1987)], the seminal U.S. Supreme Court decision interpreting the Refugee Convention, refugee protection is "designed to suit the situation of common people, not only that of philosophers." The instinctive or spontaneous reaction to usurpation or oppression is as equally valid as the educated cultivated reflected opinion." Refugee protection is not the exclusive domain of the elite. Applicants need not be sophisticated in the expression of their beliefs and applicants may sometimes be reluctant to characterize their conduct as political. Political opinion can be expressed through word or action. Persecution of persons who assert basic human rights, for example, the right to express a dissident viewpoint, the right to organize in any association or the right to be free from torture or serious physical abuse is persecution on account of political opinion. Again, in the words of Grahl Madsen, "Any real, alleged or implied opinion which leads to persecution and violation of the Universal Declaration of Human Rights qualifies as political opinion."

Persecutors may impute a political opinion to an applicant based on past associations, family ties, race, nationality or social class, among other characteristics. The acceptance and elaboration of this doctrine of imputed political opinion is one of the most significant developments in interpretation of asylum law over the last 30 years. The doctrine of imputed political opinion focuses on the persecutor's perception of the applicant's belief. The applicant's own opinions are irrelevant. In the classic words of one federal court decision," if the persecutor thinks the person guilty of a political opinion, then the person is at risk". The doctrine is now well established in the Federal courts and our administrative asylum systems.

So what are some examples of types of political opinion claims that are emerging in the Central American context? First, are claims based on organizational membership and association? Courts in other contexts have found that membership in organizations promoting cultural, social, political or economic rights to be evidence of protected political opinion. Some classic examples include membership in labor unions, farmer's' cooperatives, religious-based organizations, student organizations and organizations promoting the rights of national or ethnic minorities.

Persecution on account of political opinion therefore should be found where a Central American gang persecuted or targeted a person because of his or her membership in a group viewed as oppositional, even if the group does not self-identify as political. In one recent case granted on remand the applicant, Jose Colocho, was a leader of a soccer team that admonished youth to avoid the gangs and its values, urging them instead to join the soccer team. Colocho spoke out against the gangs in public spaces and his opposition to it was otherwise known. Because of his positions and statements, he was viciously attacked. He maintained that rather than being a random and passive victim of gang violence, he had clear beliefs that caused the gangs to attack him.

A second category of claims are those of individuals exposing abuse and testifying against, for example, these Central American gangs. Political opinion in this context may include refusal to be an informer or exposure of corruption or of human rights abuses. An example from the Central American context is Henriquez-Rivas where the Salvadorian applicant witnessed the killing of her father by members of the MS18 gang when she was 12 years old. She later testified in open court about the killing, was consequently threatened and then fled the country. The court, in the decision *Henriquez-Rivas v. Holder* [707 F.3d 1081 (9th cir. 2013)], found that she was a member of a particular social group of witnesses who testified against gang members. Our clinic filed an amicus brief supporting the argument that, in these circumstances, the act of testifying constituted a political opinion.

A third category of political opinion claims is those where the applicant refused to join or support an organization. A classic case, decided two years ago, is that of *Pirir-Boc v. Holder*, [750 F. 3d 1077 (9th cir. 2014),] where the applicant refused to join the gang because of his belief that they were "criminals who raped women and robbed people." Pirir-Boc's younger brother, however, joined the gang and in front of gang members, Pirir-Boc openly told his brother to leave the gang and eventually succeeded in convincing him. Gang members came looking for him and after trying unsuccessfully to hide from them he fled the country. This claim was also formulated under the particular social group ground (resulting in a remand), but I believe had it been properly formulated under the political opinion ground, the result would have been a clear grant.

In one remarkable, case (won before the immigration judge) of a Guatemalan represented by Professor Bauer and the UConn Asylum and Human Rights Clinic, the Mara 18 gang extorted the owner of a mechanic shop. When he refused to pay any longer, gang members viciously beat him, including striking him in the face with a machete. He reported to the police. Experts testified that gangs view refusal and certainly reporting to the police as an attack on their respect, power and ability to maintain power. The immigration judge granted the claim, purely based on a theory of imputed political opinion.

I have to wrap up here. Thank you so much, and again for more on the subject of the political opinion ground as well as evolving interpretation of other grounds in the Convention's refugee definition, you may want to reference my treatise on asylum law. Just as we are developing new interpretations of the political opinion ground, we (collectively) have transformed, the interpretation of gender as a defining

element under the particular social group ground. There is reason for optimism, as we move forward case by case, advocating for an inclusive and principled approach to interpreting international and domestic refugee law. Thank you.

[Off-microphone discussion concerning the need of two panelists to depart earlier than expected in order to catch their flights because of increased traffic due to Donald Trump's presence at a rally in Hartford.]

Jon Bauer: Why don't we take one or two minutes to take audience questions for Jaya Ramji-Nogales or Audrey Macklin, before they depart? We can do that before we hear from our last panelist. Yes, you have a question? The mic is coming.

Audience: My question is for Audrey. I missed the first few moments of your remarks, so excuse me if you addressed this somewhat, but I was wondering if you could tell us about the dynamic, what it is, between the private and public sponsorship. In other words, has there been concern that the government would sponsor fewer places and allocate fewer resources because it was expecting private sponsorship to step up there?

Audrey Macklin: So one could imagine this going in many directions. Again it's contingent, but here's what happened so far. Private sponsorship has not displaced public sponsorship, although you could imagine how it could. It hasn't happened. What does happen though is that government assisted refugees tend to be those with higher needs. So they tend to have greater medical problems, often larger single parent headed households, lots of kids. The private sponsorship families tend to be somewhat smaller and have fewer of those problems. And I should say that that may also contribute to the differential economic outcomes of private and publically sponsored. The other piece that hasn't happened is trying to use private sponsors to defend resettlement over asylum. But again it seems that as people become involved in resettlement they're actually more generally supportive of refugees. So it does that seem that they have been used to create a wedge between asylum-seeking refugees and resettled refugees. But let me add that this is impressionistic. I do not have data to support this.

Audience: And just a quick factual follow up, what's the percentage of each?

Audrey Macklin: Between public and private it has fluctuated a little bit, but it's usually about 50/50. I will say that the previous government started to nibble away at private resettlement but that's not happening now. In addition to that, certainly the experience of the Vietnamese resettlement is that they egged each other on. So the feds, the public sponsorship of Vietnamese refugees started at 5,000 and then private resettlement kicked in and they both propelled each other forward until the final numbers of the Vietnamese resettlement was about 70,000 and about 40/60, private to public.

Audience: I have one question for Jaya and Audrey, and then a follow up question for Audrey. First of all, when are your papers available on your presentations? Because we would love to read them. That's number one. Number two, Audrey, what you're describing as nation building is so fascinating and very, very exciting, and I wonder whether there are ways in which it's nation-exploding as well, or at least conceptually, nation-exploding, because it seems to really be pushing back against a very kind of fundamental understanding of what it means to

build a nation, and what it means to be a political community. But, these people on the outside and the state sort of dictates who comes in and who comes out, but here you have individual citizens who are, you know, engaging in practices that seem to explode conceptions that seem very dear in international law. So I'm wondering whether it's possible to conceptualize what you're describing as doing both, nation-building and also nation-exploding in really radical and interesting ways.

Audrey Macklin: So no paper exists as of yet. Some day. To respond to your second question, this is why I'm trying to line up a cosmopolitanism and citizenship and nation building and understand the interaction between them rather than posit them as antithetical to one another. The curiosity here is that you have woven into a national narrative an idea of cosmopolitanism as reflective of the nation. Which is interesting and that's probably all I can say about it for the moment. You know, there is much more I want to do thinking about it theoretically and drawing on different disciplines. I am inclined to see it as cosmopolitism from the ground up. At least in my most romantic view of it.

Jon Bauer: Jaya, do you have any comments?

Jaya Ramji-Nogales: My paper will be in your inbox soon, beware. It will be available for general consumption, hopefully, by the end of the year.

Jon Bauer: So I just want to, since they do have to go to evade Donald Trump traffic, I want to again thank Jaya and Audrey and then in a moment we'll continue.

Audrey Macklin: Thank you.

Jon Bauer: So now we have the patiently waiting Michael Kagan.

Michael Kagan: We wish them luck in evading Mr. Trump.

So let me start by saying, this is my second time in just a couple years at a human rights or refugee related conference at UConn and I think that's something really to be proud of in that, this day in age it can be difficult, even in academia to get interest for anything outside our local borders and that includes in law schools, so I'm very grateful to be included and I hope to go for three times in the future. Let me also say that I'm the great grandson of HIAS clients so I'm proud and honored to follow Mark Hetfield's talk earlier and I also think it's quite helpful because I think in a time when we look at what's going on now, it's impossible not to be, at least I find it impossible not to be overwhelmed with a sense of hopelessness, I think, to take a long view as he advised us. This is not the first refugee crisis, unfortunately, and it also won't be the last. That's I guess, core to our statement, but it does mean that we can look over the long term at what works and helps us even when we go into a valley to keep the overall trend line heading in the right direction. And I hope that what I might offer may be useful for some of that.

Now refugee law, as we've heard, is based around a definition. And having a definition, the definition has generated a great deal of debate as we heard, I think both Jaya's presentation and Debbie's in different ways and has pros and cons. But at the core we have a definition. And whenever in law we have a definition, you must have a process to figure out who falls within that definition. And that process here is called, Refugee Status Determination. I worked abroad for 10 years so I had to learn when I came back that a lot of immigration lawyers didn't know what I was talking about when I said, RSD, but we would call it applying for asylum here in

some form, although I find that kind of imprecise. But essentially RSD is done in most places or pretty much anywhere where international law is implemented in any way with regard to refugees. It's literally, at least set up theoretically as the gateway to the rights that refugees are supposed to have. We don't know who we're not supposed to refuse if we don't know whose life and freedom is in danger. So we have to have a process. In terms of an academic institution and in terms of university, RSD is set up and supposed to play the role of the admissions office. It's through that process that we get the advancement of our understanding of the substantive definition that Debbie's been at the forefront of. It's how building on the refugee definition, how we've also come to have a better understanding of what torture means and how it applies in different situations. And on the bright side there's been a number of situations, considerable advances in due process in this, in the Refugee Status Determination process. Refugee Status Determination, there's a lot of people in this room who have been intensely involved in this. It's a painful process, incredibly intensive, and it's also sometimes a quite beautiful process in certain ways. I love it and hate it at the same time probably because I have an asylum merits hearing on Monday, but they have, every asylum system, every RSD system is imperfect, but there are some pretty good ones. On the bright side, one of the largest in the world outside of, you know, the U.S. and Canadian system that are often held up as being relatively good, the UN High Commissioner for refugees operates Refugee Status Determination in 50 to 80 countries and that's all in the global south which goes against the general perception that I heard when I was in law school that this is something that's only done in the north. When I started my career, and it's very much why I got into refugee work, UNHCR did this very badly. My first client was, found out he was rejected through a crumpled piece of paper that said REJ on it and that's all he got. But since 2003, UNHCR has started a slow process of reforming its RSD procedures. Its recognition rate climbs so it's now among the highest in the world, usually around where the U.S. and Canada are compared nationality to nationality. And most recently now embraced a number of what we see very basically as due process safe guards like the right to see the transcript of your own interview, the right to council and so on. So that's the good news. The bad news, and I think where the title of my talk comes from, is that I'm worried that as the numbers have grown, that this process that conceptually is at the core of international refugee law and is in danger of becoming irrelevant overall. There's a symbolism to RSD that's very important. RSD is an individualized process and it's for that exact reason that it has never been available to most refugees. It's just too labor intensive. We cannot, there's no way to do RSD for 10 million people. The number of attorney hours, adjudication hours, interpreter hours, resources, private office space, and so forth and so on and to do this with a semblance of fairness would be impossible. But I think people who study mass media, who study sociology would tell us that when people, particularly foreigners, stranger are depicted as a mass, that's when xenophobia and fear as a reaction will be at its height. RSD is an institutionalized process by which our government deal with asylum seekers as individuals and that is extremely important because when we can actually look or even force our countries to look at asylum seekers and refugees as individual people, it becomes easier to humanize

them, to get cut past the fears that a mass of strangers has. And we know the photos that we see of the packed boat and I think for the people in this room, the packed boat is a cause for alarm and sympathy, but it's a cause for panic for many people in our public.

So let me talk about why I'm concerned though that this is becoming a process that's not really available or functioning as we designed it. I'll start with the United States. The U.S. Asylum Office, which has gone through many waves of reforms and improvements and my experience with it in Los Angeles has been quite positive compared to what I was used to in the Middle East beforehand, however, unless you either know someone, which Egyptians call (Indiscernible), or are an unaccompanied minor, for the most time, the wait time to get an asylum interview in Los Angeles is 4 to 5 years right now. In Chicago it's 3 years. For some reason the New York office is more efficient, so for the non-Americans who are here, if you don't think you can go home, it's only a 2 year wait for an interview at the New York office. But these delays are really pretty recent that you had to wait that long at the U.S. Asylum Office. Actually the whole system set up by Congress assumed a decision within 90 days or so. You get a work permit within, you can ask for a work authorization after 6 months and the whole idea of that was that they thought your case would have been finished by then but clearly not. The reasons for the backlog is easy to see. The UNHCR publishes annual statistics, they're usually about 18 months behind so the last statistics that I have are for 2014. The number of pending cases at the beginning of 2014 for the U.S. Asylum Office was 39,000. End of 2014, 77,000. We can see this in other countries and it's not surprising where. Here's a few examples. Germany of the year, 86,000, end of the year, 150,000. Italy went from 13,600 to 45,700. And that's just a few selective countries in the western world but it's not only there. UNHCR's office in Cairo, its backlog climbed in 2014 from 21,000 to nearly 24,000. UNHCR's office in Malaysia, its backlog climbed from 42,000 to 50,000 in 2014. So this is a global phenomenon and the result of which is that it's hard to get to the process. So instead of acting like an admissions office Refugee Status Determination is like graduation. You have to survive for several years just to get to this process that was supposed to be the gateway. So if we're serious about refugee rights, it means that we have to worry about, intentionally about what rights refugees will have before they've even been determined to be refugees. We also get, in addition to, we need rights before process, which is very difficult for lawyers, what we have and we've heard actually a lot today, various forms of process before process. So this is, it's natural in a time when this resources is scarce, it's natural to triage and one response is to come up with vulnerability categories since really we won't be able to get to this huge stack, who among this huge stack should we pull to the top? But of course this whole stack are asylum seekers. So we're going to be looking for the vulnerable of the vulnerable. And this is an endless cycle. First, we'll start to say that we want unaccompanied minors but that's too many. Unaccompanied minors under 16. Unaccompanied minors missing a limb. You can go on and on until it becomes absurd because the entire category is vulnerable to begin with. But this is also done in darker ways that we've heard about. So I think Maryellen Fullerton's presentation earlier about the litigation about where to adjudicate asylum

cases is an example of this. They're spending, as she explained, a lot of resources to decide where to actually decide something rather than deciding it. Often detention criteria and security criteria are very tied in really to how your case will be channeled through this system, when it will actually be heard. Resettlement criteria often play a pretty influential role behind the scenes in who gets to Refugee Status Determination, especially in the global south because sometimes that's the main benefit of going through RSD. And so we either formally or informally, whoever is prioritized for resettlement will be who can get to Refugee Status Determination.

Now we have always had in refugee law some alternatives in individual Refugee Status Determination, but they lead to, they are supposed to connect to some very unsatisfactory results. So there's long been prima facial recognition, group based statuses and that was usually seen as the predominant system in Africa and in Asia but there's often been a close correlation between not being able to access individual RSD and not getting any real rights. And that is not surprising, as I said, because we tend to be more able to see someone as a person with rights when we see them as an individual human rather than as a mass group in a camp, like a big aerial photo that we see of refugee camps. I think it's easier for the public to be satisfied like, well someone's bringing flour and cooking oil and that's enough. So I think this is a role lawyers can play, to keep fighting for waves for procedures. Sometimes courts are very reluctant to meddle with the substance of immigration control. But courts I think in many parts of the world are more comfortable with process and procedure and with the idea that there should always be a door open to a process. Now as I said, it's literally impossible to do an intensive process like this for 10 million people, however, we can be creative as lawyers with a lot of different types of process. We ought to be looking more and more, and some people are in the UN and elsewhere, to find rather than just quicker ways to screen people out, accelerated ways to screen people in. Coming back to the U.S. immigration system after being abroad and having to learn and relearn some of the, all of the various visa categories and form numbers and so forth and the language that American immigration lawyers speak, how much more intensive the asylum process is than many other visa categories. Many other visas are adjudicated faster, they're done on the paper work, if more evidence is needed, it's just a written request for more evidence and if there a personal interview, it's done in selected cases where it matters most for some reason whereas the requirement that we seem to always have in asylum of doing it in every single case. I would be interested in, and these are to some extent brainstorms that I frankly have not fully thought through, are there ways in which we can use things that lawyers know like, class action style litigation that would allow individual right focus but would have some of the benefits of a group based status, but without the way group base statuses usually corresponded to half a loaf versions of rights. In a large group of asylum seekers, could random sampling be used? So certain numbers of people will go through individual RSD. I say all of these things, mainly in the sense that I think there's room for creative thinking, but I think in the long run there's a great value and a particular role for lawyers in insisting on these individual processes. That people need to go through them because there's power in it, not just for the rights that the individual may gain through them, but in institutional bureaucratic

way of saying, these are individual humans each with their own story and with rights that flow from that. To close, I think governments work to avoid going to this process for a reason. Even though many governments actually rig their RSD processes. You can see this if you look at acceptance rates say in Hungary or Greece. Even still, governments work pretty hard to actually prevent people even from getting into those processes. And think they're smart to do that. And for that exact reason, lawyers can play a particular role in pushing the necessity of going through those processes even when they're highly imperfect. And I think over the long term we have found, and I think Mark's description, I actually only heard part of it, unfortunately because I had to go talk to an expert witness for our individual RSD procedure, but the presence of being there, essentially if we look at the image of all of us being there on Ellis Island to see an individual person or individual family through is incredibly powerful. When I think of 5 million I can't possibly think of anyway, any solution, but when I think of one person I can. And I think that we all can actually play a tremendous role by pushing for that and I think a particular role where universities and lawyers can be quite effective. Thank you.

Jon Bauer: We now have about 10 minutes for comments or questions.

Audience: Professor Anker touched on this at the end of her presentation and I'm curious to ask all members of the panel: What are the unique legal and non-legal challenges we face as a result of the gendered treatment of refugees throughout the entire course of the process?

Deborah Anker: I'm sorry, I didn't really understand the question. What are the legal and non-legal challenges? Or are you quoting back to me?

Audience: I'm asking, regarding the different ways that men and women especially, are treated, through the course of this process, what are the unique challenges that result because of that?

Deborah Anker: There's been a -- to tell you the context from which I'm coming there's been a long history since 1995 of efforts to get gender taken more seriously within the asylum process. There were guidelines that were originally developed by the Canadians, the U.S. then developed them in response to drafts that our organization and our clinic as well as others worked on. And most recently we have been successful in getting the authorities to adopt the notion that domestic violence can be a basis for asylum. So you know, it's not like, as Barbara was certainly describing, it's not like women and children, or women are treated well and gender obviously is also a broader category than just women. But it's an area in which we've made a tremendous amount of progress, I think.

Jon Bauer: I have a question and then, Barbara Hines, we'll take your question too. On the issue of finding more efficient ways to process cases on an individual basis, one idea that's been floated sometimes is allowing asylum officers in the U.S. to be able to just grant asylum at the initial credible fear screening interview in clear cases, which might take care of some cases right at the outset. Also, one thing that has struck me, particularly in doing cases for Central Americans, is the burden that's put on each individual applicant to come forward with very complex evidence of country conditions. Sure, there's a State Department report, but it's not very detailed. I just wonder, and I think this is a question for both of you, what you would think

about having a process where there were more standardized packages of country evidence. UNHCR has done a lot recently in coming up with great compilations of country's evidence for certain countries in Central America, like El Salvador. One could imagine having standardized packages available that individual applicants could supplement. Do you think that would help improve the system?

Michael Kagan: Short answer is yes and yes. So let me take each one. I think there are a number of ways, I think again if management techniques could be helpful here. A lot of the degree and expense and time that we spend on asylum procedures is based on distrust of asylum seekers. And that's, can be a more reasonable concern for governments in some situations and others, but a form of profiling I think used in a favorable way here, could be very helpful. The U.S. Government or Canadian Government or UNHCR would know that certain nationalities as a whole sometimes have, even when they go through the full intensive procedure will end up with an acceptance rate of over 85%, and sometimes higher than that for some groups. And you could probably break that profile down even further and figure out, so who are the 7 people we rejected? And what exactly, so, in streamlining a procedure, what is it that we're looking for? Eritreans, let's say, that's a group that has a very high acceptance rate, and not waste anyone's time and the stress and trauma of going to this interview? I would probably look to empower the asylum officers, I think not just a reasonable fear interview would be a stage where a skilled asylum officer with maybe a supervisor sign off could say, yes this is going to definitely go through. To accept on the paper in any situation. And also there are some, specifically in the U.S. system we have some inefficiencies built in that the Senate Immigration Reform Bill would have fixed, that's the asylum can't grant CAT protection for instance, or withholding. And leads to inefficiency because even if they can see you're eligible, they have to send you to Immigration Court and spend a lot more time. I think that this issue of, the difficulty and the amount of time that I see, say our clinics, like the three of all represent, clinics, the amount of time that we put in to find that evidence when we know there's a lot of other Salvadorian cases out here that don't have anyone working for them. That invites very dangerous mistakes and I think it comes partly from the fact that the government is in an adversarial position. DHS is there to defeat the asylum claim. Rather than having anyone, arguably, the immigration judge is supposed to be devoted to making the right decision, but in practice there isn't anyone else there to say, let's make sure we get the best evidence available.

Jon Bauer: Did you want to add to that?

Deborah Anker: Yes. I sort of like your idea of packages of information that then can be supplemented by and that adjudicators could rely on. I have some technical sort of comments, but probably too technical for this audience.

Jon Bauer: Okay. Barbara Hines.

Audience: Yes. So I actually was going to make some of the same comments to sort of, I thought it was interesting for us to begin to think about ways to streamline the asylum process because working in these detention centers it's clear that we can't represent everybody. And so I have thought a little bit about what Michael mentioned about a non-adversarial process. For example, for unaccompanied minor children, we don't have to go to the immigration courts. And I don't know that people

or anyone's actually talking about this for other kinds of claims, but I do think that the adversarial process, if we're thinking about a policy push, it's an adversarial process. Because I don't think that happens in many other countries. I've done a lot of work in Argentina and I'm always thinking about, people just sort of write a declaration and they go in and they have an interview and a lot of people are granted asylum. I understand that it's the real idea act which for other people that don't live and breathe this stuff, it does put the burden of proof on you to have the evidence. But I would want to think about non-adversarial process. And then the other thing that during the Haitian migration there were the immigration courts that did use these standard packages of evidence. And I think that's another thing that, I don't know if people talking about this, but I think these are really, they are very provocative and important things to be thinking about.

Deborah Anker: I just think it's important that those not be seen as exclusive, the standardized pieces of evidence. And guess the other, I'll let you respond. No, I mean the other thing, we have an adversarial process and the asylum officer, the asylum officer process and I don't know what it's like elsewhere, but in Boston our asylum officer and I hope nobody from the Boston Asylum Office is here, but we're having significant difficulties with that office and our judges are actually much more open to hearing cases and much better adjudicators.

Jon Bauer: So I think we have time for one more question.

Audience: This is directed mostly towards you, Professor Anker. MS13 and MS18 obviously also have a huge presence in Los Angeles and other cities along the border with Mexico. Do you know of any trends of violence towards asylum seekers in cities like Los Angeles from the gangs that they originally fled in Central America?

Deborah Anker: Any increase in violence in those areas?

Audience: Just any trends of violence towards people seeking asylum in America that fled Central America, by the same gangs that they were fleeing originally.

Deborah Anker: We have had incidents. We've had one of our clients killed by a gang here in the United States. Fled a gang and then killed by a gang here. Which maybe goes to addressing root causes. I don't know what else to say about it. Barbara's point. And I don't know about trends.

Michael Kagan: We have represented some people who were in gangs or in drug cartels and then became informants for the U.S. Government and they are in danger pretty much wherever they go. And actually when they're in DHS custody we have particular concerns because, you know, most of the people in DHS prisons in Arizona will be, you know, Latino people with drug convictions, so it's exactly the wrong population for those clients to be with. At the same time our clients I think, I've often asked them about this and they will say, still much better here than back in Mexico or back in El Salvador because they, because while the gangs may operate in Los Angeles they're under a bit more control. They can't operate quite as freely as they do where they're coming from and it's easier for someone to stay out of trouble.

Jon Bauer: Can we do one more? Okay. One more question.

Audience: Thank you. I actually just wanted to go back to the keynote for just a moment if I may just to point out two things. I'm with the International Institute of Connecticut, like one of the people that spoke this morning and we do refugee resettlement in Bridgeport, Connecticut. So to the question about how long are other populations waiting for admission, about 65% of the refugees that we're resettling are coming from the Democratic Republic of Congo and many of them are spending generations languishing in camps. So while there's been a lot of discussion today about Syria, we have people who are arriving here age 18 and saying, I was born and raised in a refugee camp and their only other home now is Bridgeport. These families are also huge so to the question of refugee youth, as Mark said, it's an incredibly under served and under resourced population so I really thank you, Mark, for bringing that up. And we're trying to develop a pilot in Bridgeport to serve refugee adolescents. And the last thing I would say on the question of what can higher education do? Many people in this room are working with our immigration legal services program and one of our attorneys is here. We have pro bono attorneys, we have law students who are supporting the asylum applications, the TVs and UVs application. So there is a lot that people can do and increasingly federal and private foundation donors are looking for evidence. They want data. So I think a lot of academic institutions can really help with that as well. Thank you.

Jon Bauer: Thank you for raising those very important points. Sometimes the focus has been so much on Syrian refugees that we lose track of the fact that there are many other dire and protracted refugee situations around the world.

I want to thank, once again, our panelists.

CLOSING REMARKS - THE RIGHT TO ASYLUM AND STATE SOVEREIGNTY

Ángel R. Oquendo: We seem to have started a war of attrition, but still have plenty of soldiers and therefore must be brief now, so as to keep them in position. By the way, I will compulsively try to avoid using initials or acronyms in my remarks, yet obviously cannot guarantee success in this daunting undertaking. In addition, please accept my apologies for any mispronunciations when naming you. People whose names I mispronounce should feel free to do the same with mine.

In any case, this symposium's discussion reminded me of a story that I once told my students and originally heard from a wacky preacher in Puerto Rico. In the tale, a woman is chasing her husband at home with a broom. He first escapes into the kitchen; but she follows him there. He then takes to the bedroom. As if possessed, she continues the mad chase and finally catches up with him, screaming: "I'm going to spank the hell out of you." Cornered, he notices the bed close by and slides under it. In response, his wife peeks down at him and shouts: "Come out right away. I'm going to get you anyway." After a short pause, he retorts: "I'm not coming out; no way. And I'm the boss in this house."

To some extent, the law finds itself in a similar predicament. It appears to be speaking with a voice of power, yet from under the bed with respect to politics and the economy. In particular, the right to asylum purports to bind the authorities, but, in fact, merely begs them for recognition and all too often comes to naught in the

face of their restrictions and outright violations. One almost inevitably harks back to the old Marxist interpretation of the legal or even the political order as superstructure, with the forces and relations of production as the basic structure. The former simply supports the latter or pathetically tags along.

In truth, a dated conception of international law that refuses to die lies at the heart of today's global refugee crisis. It posits states as sovereignly impervious and self-contained units and as the only relevant actors on the world stage. Efforts to incentivize countries generally to welcome more people seeking refuge and specifically to adopt fair standards of entry crash against this still entrenched outlook. Hence, activists and practitioners must simultaneously debunk the prevailing standpoint, construct an alternative *Weltanschauung*, and prepare for a protracted pitched battle. At the end of the day, the move from the few and far between victories that our contributors have highlighted to a more coherent and humane take rides on an unlikely broader transition to an understanding of the main players on the globe as polities pursuing self-determination while embedded in a complex and inextricable web of relationships with and commitments to individuals and collectivities.[12]

Not surprisingly, governments cling on to their sovereignty, along with the principle of nonintervention, in order to decline even to think about opening up to the multitude knocking on the door. They can thus appease and control their own population by responding to and reinforcing its fear of the other. Regular human beings, whether inside or outside, whether citizens or not, cannot really fight back, if they ever wanted to, because, for all practical purposes, they do not count or even exist within the predominant paradigm. Under these circumstances, the inter-state dynamic referenced by some of our panelists unfolds to boot, with powerful states bullying their weaker counterparts and passing the buck in a very real sense. All in all, the first panel's call for openness quickly runs into what the second panel decried as a blockade, which, in turn, assumes the form of the legal obstructionism exposed by the third panel.

The situation at hand evokes for me a saying common in Brazil and perhaps elsewhere: "For my friends everything; for my enemies nothing; and for everybody else the law."[13] In an age of globalized tribalism, people avidly demarcate those they deem fit for friendship from those they consider worthy of enmity. Of course, they often place an immigrant in the latter category or, at best, in that of legal subjects. Actually, this distinction evanesces when the law entitles her to essentially nothing anyway.

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12. *See, generally*, Ángel R. Oquendo, *The Politicization of Human Rights*, J. TRANSNAT'L L. & CONTEMP. PROBS. (University of Iowa) (2016) (forthcoming), § I.A.

13. José Nêumanne attributes the phrase "'For my friends everything; for my enemies the rigors of the law'" to former Brazilian President Getúlio Vargas. José Nêumanne, *O governo contra a lei*, O ESTADO DE S. PAULO (Mar. 9, 2016). João Pedro Henriques, for his part, credits Portuguese politician António de Almeida Santos with the phrase, "'For my friends everything; for my enemies nothing; and for everybody else apply the law.'" João Pedro Henriques, *O melhor Presidente*, DIÁRIO DE NOTÍCIAS (Jan. 20, 2016).

Our guests have analyzed instances of this last phenomenon. Susan Akram spoke of the "'containment paradigm'" in refugee administration, Maryellen Fullerton of the "flawed" European Union "asylum law," Barbara Hines of the Department of Homeland Security's "family detention" strategy, Maria O'Sullivan of Australia's "interdiction and offshore processing regimes," Peter Tinti of the European Union's shift of asylum seekers to non-European territory, Deborah Anker of the resistance of "U.S. jurisprudence" to view "Central American migrants . . . as refugees," Michael Kagan of the "delays" in "individualized refugee status determination," and Jaya Ramji-Nogales of "international law's single-minded focus on refugee protection."

Concurrently, however, some of our visitors have identified glimmers of hope: Tendayi Achiume brought our attention to a possible "Comprehensive Plan for Action for the Syrian refugee crisis," Jacqueline Bhabha to a proposed "more holistic approach to refugee and migration policy," David FitzGerald to the 1951 United Nations Convention on Refugees and its 1967 Protocol before their subsequent perversion, Michael Kagan to the improvement in "individualized refugee status determination" by the United Nations High Commissioner for Refugees, and Audrey Macklin to Canada's "private refugee sponsorship system." All the same, they would likely all recognize the isolation and relative dimness of these points of light within the overall desolate picture.

The new ideal, previously mentioned, desperately needs definition and elaboration. As a whole, it must manage to re-imagine the planet as inclusive of the traditionally excluded: such as non-governmental organizations; non-organized groups; societal communities, persons of all races, ethnicities; genders, and religions; animals; plants; minerals; and so forth. As a most elemental part of this narrative, self-determining and only partially sovereign nations may neither do as they please within and at their borders nor expect to be left alone in so doing. Instead, they must honor their responsibilities to a wide array of private and public parties, both at home and abroad, while acting autonomously and resisting heteronomy or domination.[14]

Granted, this vision sounds like what the Spanish language sometimes refers to as a "dream of pregnant birds,"[15] or of the unreal and impossible. It certainly constitutes a piece of unreality; and probably of impossibility too. One may nonetheless embark upon this path of the imagination not only hoping to realize the

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14. *See, generally*, IRIS MARION YOUNG, *Two Concepts of Self-Determination*, GLOBAL CHALLENGES: WAR, SELF-DETERMINATION, AND RESPONSIBILITY FOR JUSTICE 50-51 (Polity Press: Cambridge, UK) (2007) (". . . self-determination for peoples means that they have a right to their own governance institutions through which they decide on their goals and interpret their way of life. . . . Because a people stands in interdependent relations with others, however, a people cannot ignore the claims and interests of those others when their actions potentially affect them."); *id*. at 57 ("A relational concept of self-determination for peoples does not entail that members of the group can do anything they want to other members without interference from those outside. It does entail, however, that insofar as there are global rules defining individual rights and agents to enforce them, all peoples should have the right to be represented *as peoples* in the fora that define and defend those rights.").

15. The expression may derive from a seventeenth century poem by Peruvian Juan del Valle y Caviedes. *See* JUAN DEL VALLE Y CAVIEDES, OBRA COMPLETA 95 (Line 10) (Daniel R. Reedy, ed.) (Biblioteca Ayacucho: Caracas) (1984) ("pájaros preñados") ("pregnant birds").

highly improbable, but also in an attempt to attain occasional moments of happiness, such as those described during this conference.

At any rate, I would like to thank the principal organizers of this event, my dear members of the Connecticut Journal of International Law, including Willie Biddings, Katherine Peccerillo, and Afua Akoto, and invite them to the podium to pronounce a final word of appreciation directed at other key participants and at all of you who have attended. Here we go.