

# NOTES

## LIMINAL LEGALITY ACROSS BORDERS: EXAMINING THE MIGRANT’S RIGHT TO “HUMAN TIME” ON THE SHIFTING U.S.-MEXICO AND TÜRKIYE-SYRIA BORDERS

SONIA GEBA\*

### ABSTRACT

*Throughout the modern world, refugee-receiving countries are increasingly externalizing their border procedures and restricting access to asylum to deter long-term migration. Although many of these same countries have obligations under international refugee law to recognize asylum seekers’ claims and uphold human rights for those within their jurisdictions—even along their borders—many instead rely on third countries to care for vulnerable populations on the move. This has led to a proliferation of temporary refugee camps and tenuous, informal settlements along borders that create precarious and unsafe conditions for people fleeing violence, persecution, and insecurity. At the same time, as the border has shifted outward, it has also shifted inward as governments have introduced restrictions on asylum and a widening category of statuses that grant humanitarian protection in the short term. Such statuses like temporary protection offer critical safe haven for groups fleeing wars, natural disasters, and other generalized harms. However, as conflict and climate emergencies become ever more protracted and migrants are displaced for decades and longer, such legal regimes are*

---

\* Sonia Geba is an incoming Legal Fellow at Equal Rights Beyond Borders. She holds a J.D. from Georgetown University Law Center (2024). The author would like to sincerely thank her advisors and professors who provided supremely helpful comments and direction as this Note was shaped and reshaped over several semesters. In particular, she would like to thank Professors Elizabeth Ferris and Andrew Schoenholtz for their guidance and feedback on drafts. She would also like to thank Eliza Lafferty and Center for Applied Legal Studies’ Clinical Teaching Fellow, Lauren Hughes, for their additional review and feedback. Lastly, she would like to thank all GILJ staff who helped improve this Note at every stage of the editing process. All mistakes remain the author’s. © 2024, Sonia Geba.

*insufficient to offer the protection they originally intended and instead effectively place migrants in legal limbo, contributing to their further victimization. Recipients of temporary protection in many countries are left in a state of suspension, endlessly waiting for their statuses to be renewed or revoked and unable to properly invest in their lives in the long term. Whether experienced on the border in a camp or inside a country where one’s options are curtailed by legal status, this suspended state of waiting often invites economic insecurity, social immobility, and even outright unsafety.*

*Although many international human rights treaties recognize rights that give value to the temporal dimension of human life (e.g., the right to leisure time, the right to a speedy trial, the right to not be held in arbitrary detention or prolonged incarceration while awaiting the death penalty), none have explicitly articulated the right to “human time.” This Note examines this gap in international human rights treaties and specifically engages with an emerging right to human time as it relates to the experiences of migrants on physical borders and temporary protection recipients in refugee-receiving countries. It investigates the temporal dimensions of legal status using a “liminal legality” theoretical framework to explore the limits of international law’s protections for migrants. Comparing two populations who have been on the move for over a decade—Haitians on the U.S.-Mexico border and Syrians on the Türkiye-Syria border—it concludes that legal limbo and temporary protection regimes that keep certain groups in suspense for long periods of time with few pathways to long-term residence violate an emerging canon of international legal norms. For temporary protection to fulfill the aims of international human rights law, this Note argues that governments must reinvigorate their asylum systems and embrace more pathways to long-term migration.*

TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	329
II.	LIMINAL LEGALITY & LEGAL TIME IN THE MIGRATION CONTEXT . . . .	335
III.	LIMINAL LEGALITY ON THE U.S.-MEXICO BORDER . . . . .	341
A.	<i>Haitian Refugees at the Border: A History of Externalization and Occultation . . . . .</i>	345
B.	<i>Indefinite Temporariness for Haitians in Mexico . . . . .</i>	346
C.	<i>Persistently Temporary Legal Protection for Haitian Refugees . . . . .</i>	348

2024]	LIMINAL LEGALITY ACROSS BORDERS	329
IV.	LIMINAL LEGALITY ON THE TÜRKIYE-SYRIA BORDER . . . . .	352
A.	<i>Persistently Temporary Legal Protection for Syrian Refugees</i> . . . . .	353
B.	<i>Indefinite Temporariness for Syrians in Turkish-Controlled “Safe Zones”</i> . . . . .	355
V.	COMPARING LIMINAL LEGALITY IN ASYLUM ACCESS AND TEMPORARY PROTECTION ON THE U.S.-MEXICO & TÜRKIYE-SYRIA BORDERS UNDER INTERNATIONAL LAW . . . . .	356
VI.	CONCLUSION: TOWARD MORE LASTING REFUGE & GREATER GLOBAL RESILIENCE . . . . .	358

I. INTRODUCTION

Since the drafting of the 1951 Refugee Convention and its 1967 United Nations (UN) Protocol, people forced to flee their countries and seek protection from persecution have been regarded with special international legal status and given rights that shield them from unlawful return to a country in which they fear such threats.<sup>1</sup> Refugees are those who have fled their country of origin due to a well-founded fear of persecution based on individualized grounds of race, religion, nationality, political opinion, or membership in a particular social group.<sup>2</sup> If an individual is determined to be a refugee, their receiving state has a number of obligations to them and the Refugee Convention confers on them a suite of “acquired rights” under Articles 3–34 of the Convention, including rights to non-discrimination, non-penalization, and non-refoulement.<sup>3</sup> The principle of non-refoulement is considered fundamental to the Refugee Convention, so much so that no reservations or derogations may be made to it.<sup>4</sup> It has reached the level of customary international law.<sup>5</sup> As such, contracting states parties shall not expel refugees from their territories, with few exceptions.<sup>6</sup>

1. More specifically, the Refugee Convention defines a refugee as a person outside their country of origin owing to a well-founded fear of persecution “for reasons of race, religion, nationality, membership in a particular social group or political opinion” whose country of origin is unwilling or unable to provide protection. Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

2. *Id.*

3. MARIA O’SULLIVAN, REFUGEE LAW AND DURABILITY OF PROTECTION: TEMPORARY RESIDENCE AND CESSATION OF STATUS, 31 (2019); Office of the U.N. High Comm’r for Refugees, Introductory Note to the Convention and Protocol Relating to the Status of Refugees (Dec. 2010), <https://perma.cc/B6S6-JWFR>.

4. Refugee Convention, *supra* note 1, art. 32.

5. Brief for Global Strategic Litigation Council for Refugee Rights as Amicus Curiae Supporting Complainants, Seventh District Judge in Administrative Matters in Mexico City (Amparo 1279/2021) (Mex.), 15-16 (May 5, 2023), <https://perma.cc/VHF8-HA4W> [hereinafter Zolberg Amicus Brief].

6. Refugee Convention, *supra* note 1, art. 32. Exceptions include “on grounds of national security and public order.”

Yet, for decades, as the level of global migration has risen, nations around the world have increasingly circumvented this international legal principle by externalizing their immigration procedures, physically closing their borders or otherwise restricting the physical access to territory needed for humanitarian protection, and even engaging in brutal deportation practices that run directly counter to their non-refoulement obligations.<sup>7</sup> Asylum is not the only form of protection that is implicated by cutting off access to territory. For example, temporary protection may require that a beneficiary be present in a given country before a set date to be eligible for said protection under various schemes.<sup>8</sup> Temporary forms of protection are a critical extension of the protective power of asylum, enabling states to provide a group-level safe haven from generalized harms like war and natural disaster that do not fall neatly under the Convention's individualized definition of the word "persecution."<sup>9</sup> Thus, limited access to territory restricts multiple legal pathways to safety, even on a short-term basis, and certainly when it comes to ongoing humanitarian emergencies.

Border externalization allows states to evade their responsibilities to asylum seekers by preventing them from approaching territory—that is, the physical border—to seek legal protection.<sup>10</sup> This highlights one of the fundamental conundrums of the international refugee legal order: the Refugee Convention and other treaties obligate states not to refool those determined to be refugees, but these instruments grant no explicit right for migrants to enter a state to seek protection.<sup>11</sup> Migrants have an undisputed international human right to *seek* asylum. This is articulated under the Refugee Convention and a variety of human rights instruments, including Article 14 of the

---

7. See, e.g., Italy: MPs Should Reject "Unworkable, Harmful and Unlawful" Migration Deal with Albania, AMNESTY INT'L (Jan. 22, 2024), <https://perma.cc/7NMF-BW2Z> (warning of a recent Italy-Albania externalization scheme); Bill Frelick, Ian M. Kysel, & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 192, 200-209 (2016) (describing U.S., EU, and Australian policies of externalizing borders to deter migration); Turkey: Syrians Pushed Back at the Border, HUM. RTS. WATCH (Nov. 23, 2015, 12:01 AM), <https://perma.cc/9J5L-8YSW> (chronicling the closure of the Turkish border to control Syrian immigration); Turkey: Hundreds of Refugees Deported to Syria, HUM. RTS. WATCH (Oct. 24, 2022, 12:01 AM), <https://perma.cc/33DV-D5Q4> (recommending that Türkiye not be considered a safe third country for its policy of arbitrary arrest, detention, and deportation of Syrian boys and men).

8. See, e.g., Claire Bergeron, *Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION & HUM. SEC. 22, 35 (2014); *Temporary Protected Status and Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jul. 28, 2023), <https://perma.cc/2SZ5-KEEB>.

9. For a discussion of the use of such protection in Africa, where group-based temporary protection is utilized extensively due to long-standing religious, ethnic, and political conflict that has led to a protracted state of mass refugee movement, see O'SULLIVAN, *supra* note 3, at 20-21.

10. See Moria Paz, *The Law of Walls*, 28 EUR. J. OF INT'L L. 601, 609 (2017) ("Importantly, legal obligation follows on territoriality. To be protected, a non-national must reach the shores of a state. Outside, the plight of the non-national is of no legal concern. But, once the person is physically inside the state, with or without the state's consent, rights inhere in that individual. The state is then held accountable for protecting these rights, regardless of political or financial cost.").

11. Moria Paz, *The Incomplete Right to Freedom of Movement*, 111 AJIL UNBOUND 514, 516 (2017) ("Alas, while these treaties create an obligation for the state not to send back a refugee ('non-refoulement'), they do not provide an individual with a right to enter the state in order to seek protection in the first place.").

Universal Declaration of Human Rights (UDHR), which is binding international law.<sup>12</sup> This right to *seek* asylum implies a more basic right to movement—to leave a refugee’s country and approach border officials of another country to seek protection and refuge. However, externalization, highly restrictive border management policies, and asylum laws distance the border outward for the migrant seeking protection—whether through asylum or other humanitarian relief. Although the UN High Commissioner for Refugees has clarified that the principle of non-refoulement is applicable to both expulsions and non-admission at the border alike,<sup>13</sup> under the Refugee Convention itself, these two forces are not clearly reconciled. Those who find a way to access territory may avail themselves of the international human right to seek protection, while those unable to reach a host state are in limbo, “on a journey without a destination: permanently stuck in transitional locations such as refugee camps or territorial borderlands.”<sup>14</sup>

In this context, some nations have begun to externalize<sup>15</sup> their borders by extending their policies into neighboring, often less wealthy countries and by making asylum seekers wait indefinitely in haphazardly constructed camps or on the streets near ports of entry just beyond border lines,<sup>16</sup> thereby encouraging temporary and insecure settlement patterns and preemptively limiting legal relief in contradiction to the spirit of non-refoulement. While a number of states suggest that externalization does not violate the Refugee Convention,<sup>17</sup> these measures undermine the international refugee regime.

12. G.A. Res. 217 (III) A, art. 13, 14, Universal Declaration of Human Rights (Dec. 10, 1948) (right to leave a country), (right to seek asylum); G.A. 39/46, Art. 3, Convention Against Torture (Dec. 10, 1984); G.A. Res. 47/133, art. 16, International Convention for the Protection of All Persons from Enforced Disappearance (Dec. 23, 2010). The Human Rights Committee has also interpreted the International Convention on Civil and Political Rights to include an implied non-refoulement requirement in its provision prohibiting torture. Human Rights Committee, Decision in *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006). See G.A. Res. 2200A (XXI), Art. 7, International Covenant on Civil and Political Rights (Dec. 16, 1966).

13. U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, ¶ 7 (Jan. 26, 2007).

14. Paz, *supra* note 11, at 517 (“This frame leaves without protection those who are stranded between states—whose state of nationality either is the source of their harm (positive violation) or is unable to remedy their harm (negative violation). They can exit their state, but no state has a corresponding duty to allow them in.”).

15. The UN High Commissioner for Refugees (UNHCR) defines border externalization as: “[M]easures taken by States—unilaterally or in cooperation with other States—which are implemented or have effects outside their own territories, and which directly or indirectly prevent asylum seekers and refugees from reaching a particular ‘destination’ country or region and/or from being able to claim or enjoy protection there.” Madeline Garlick, *Externalisation of International Protection: UNHCR’s Perspective*, 68 FORCED MIGRATION REV. 4 (Nov. 2021), <https://perma.cc/9AEZ-NW2H>.

16. See, e.g., Rafah Camp, U.N. RELIEF & WORKS AGENCY FOR PALESTINIAN REFUGEES IN THE NEAR EAST (UNRWA) (July 2023), <https://www.unrwa.org/where-we-work/gaza-strip/rafah-camp#> [hereinafter UNRWA]; Bertha Alicia Bermudez Tapia, *From Matamoros to Reynosa: Migrant Camps on the U.S.-Mexico Border*, 22 CONTEXTS 30 (2023).

17. Jeff Crisp, *What is Externalization and Why is it a Threat to Refugees?*, CHATHAM HOUSE (Oct. 14, 2020), <https://perma.cc/6GDY-X4JL>; see David Cantor et al., *Externalisation, Access to Territorial Asylum, and International Law*, 34 INT’L J. REFUGEE L. 120, 144 (June 2022) (“The absence of a positive international law right to be granted asylum in any particular country means that the practice of externalising elements of the asylum system through measures such as third country processing is neither explicitly

Not only do they hold refugees in precarious positions in hazardous locales, but they also encourage risky entry practices involving human smugglers, place a disproportionate burden on developing and lower-income countries, and legitimize these practices in other countries beyond.<sup>18</sup> Refugee camps on borders throughout the world represent “temporary” spaces where human life is suspended and the law ceases to offer protection—whether in Kakuma,<sup>19</sup> Rafah,<sup>20</sup> or Reynosa.<sup>21</sup>

This Note investigates the temporal dimensions of legal status on and across borders using a “liminal legality” theoretical framework to explore the limits of international law’s protections for refugees. Limbo or “liminality” is often characterized by lingering temporariness, tenuousness, ambiguity, and uncertainty about a person’s present or future status.<sup>22</sup> This condition has become common to humanitarian-governed borderlands outside of refugee-receiving countries.<sup>23</sup> But the notion of liminality pervades legal status even upon accessing territory for many, especially those fleeing war and natural disasters who are eligible for temporary protection.<sup>24</sup> The ever-presence of limbo outside and inside borders contributes to the creation of a cross-border caste of subordinated people on the move whose chances at social and economic mobility remain limited, to the detriment of the immigrant herself, the refugee-receiving society, and the immigrant’s compatriots in her home country. In this way too, the border—representing lasting access not just to protection but security and belonging in a society—shifts *outward* through

---

authorised nor prohibited in international law. However, international law and policy does impose several important restrictions on where and how such measures can be implemented in practice.”).

18. *Id.*

19. Referring to the Kakuma Refugee Camp in northwestern Kenya. “Kakuma” is the Swahili word for “nowhere.” *Kakuma Refugee Camp*, UNICEF, <https://perma.cc/CFN3-VA85> (last visited Feb. 23, 2024). Such places—defined by their dislocation from community, country, and legal status—have also become increasingly carceral. An example of this is the camp in Al-Hol, Syria, formerly a refugee camp and now used as an open-air detention camp for former ISIS members and victims. See Anand Gopal, *The Open-Air Prison for ISIS Supporters—and Victims*, THE NEW YORKER (Mar. 11, 2024) (quoting a detainee, “The people here are forgotten by the world”), <https://www.newyorker.com/magazine/2024/03/18/the-open-air-prison-for-isis-supporters-and-victims>.

20. The Rafah Refugee Camp south of the Gaza strip and near the Egyptian border has been housing hundreds of thousands of refugees since 1948. The camp is characterized by a “tunnel economy,” an informal, underground system that has allowed smuggling of needed supplies to recover from military operations. The population also relies on UNRWA for food and cash assistance, making this another example of a settlement where normal life and exchange has halted and where protective legal institutions have been replaced by the basic governance of an international organization. See UNRWA, *supra* note 16.

21. The Reynosa Refugee Camp was located on the U.S.-Mexico border in the state of Tamaulipas in Mexico. It replaced the Matamoros Refugee Camp, which had been dismantled by Mexican authorities in 2020 when the newly inaugurated Biden Administration announced an end to the Trump-era Migrant Protection Protocols. The Reynosa Camp arose in the years following as a result of the reemergence of restrictive immigration border policies. It too, like these other camps, represented a zone of lawlessness where kidnapping, extortion, and sexual violence proliferated. Bermudez Tapia, *supra* note 16.

22. See Jennifer Chacon, *Producing Liminal Legality*, 92 DENV. L. REV. 709, 716 (2015); Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL’Y 265, 265-66 (2015); Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOCIO. 999, 999 (2006).

23. See, e.g., UNRWA, *supra* note 16; Bermudez Tapia, *supra* note 16.

24. Menjivar, *supra* note 22, at 999.

externalization and increasingly *inward* through legal tools that restrict long-term status for immigrants residing inside a country.<sup>25</sup> This phenomenon is evident in a number of contexts, but it is worth comparing the asylum and temporary protection systems of two countries with quite different capacities and histories of refugee protection: the United States and Türkiye. Although they are in quite different positions in the chain of migration in their regions, they have similar responses to rising numbers of conflict- and climate-motivated migrants that do not fit neatly under the classical definition of “refugee.”

The United States, for example, though party to the Refugee Convention, externalizes its border processes by relying on Mexico and an assortment of international and religious organizations for maintaining a bare-bones series of shelters and permitting many more makeshift camps to house migrants and asylum-seekers outside of its territory.<sup>26</sup> The few who are granted entry may benefit from seeking asylum or other forms of humanitarian protection for which they are eligible, like parole and temporary protected status (TPS). But these are insufficient regimes for populations arriving from countries that have been in turmoil for a decade or more. For example, many Haitian migrants have been on the move throughout Latin America since 2011 and have been cut off from both territorial access and long-term protection in the United States. These groups need more lasting legal status upon which they can rely.

In a similar fashion, Türkiye, also party to the Refugee Convention (but not the 1967 Protocol removing the geographic restriction), has designated “safe zones,” which essentially function as internally displaced persons (IDP) camps on the Syrian side of the Turkish border.<sup>27</sup> These aim at distancing protection for displaced persons outside of Türkiye. At the same time, Türkiye physically controls Syrians’ movements within Turkish borders to limit the concentration of “foreigners” in certain neighborhoods<sup>28</sup> and has arbitrarily deported large numbers of Syrians.<sup>29</sup> Further, Türkiye does not recognize displaced Syrians as refugees under its domestic law,<sup>30</sup> instead offering Syrians Temporary Protection (TP). This has led to long-term

---

25. See Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility*, in *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY*: AYELET SHACHAR IN DIALOGUE 3, 4-5 (Antony Simon Laden et al. eds., 2020).

26. See, e.g., Emily van Fossen, *MPP Has Created A Refugee Camp in Mexico—Why Aren’t We Treating It Like One?*, NISKANEN CENTER (Feb. 10, 2020), <https://perma.cc/L4EP-Z98S>; David Alire Garcia, *Historic Mexico Church Becomes Capital’s Largest Shelter for Weary Migrants*, REUTERS (Dec. 1, 2023), <https://perma.cc/LLJ3-MPYE>.

27. *Syrians Face Dire Conditions in Turkish-Occupied ‘Safe Zone’*, HUM. RTS. WATCH (Mar. 28, 2024), <https://perma.cc/ADL4-M49E>.

28. *More Neighborhoods to Be Closed to Foreigners, Says Minister*, HÜRRİYET DAILY NEWS (Jun. 12, 2022), <https://perma.cc/9WH8-VMRG>.

29. *Turkey: Hundreds of Refugees Deported to Syria*, HUM. RTS. WATCH (Oct. 24, 2022), <https://perma.cc/U5A7-C6CE>.

30. When Türkiye signed the 1951 Refugee Convention, it did so with a “geographical limitation,” limiting its mandate to refugees from Europe. Mac McClelland, *How to Build a Perfect Refugee Camp*, N.Y. TIMES (Feb. 13, 2014), <https://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html>.

uncertainty and liminal legality for Syrians living in and on the border with Türkiye.

In both contexts, restrictions on physical movement are coupled with offering specific populations temporary status, limiting permanent settlement, keeping refugees in limbo, and raising protection concerns for vulnerable groups. At the same time, both these national groups have endured iterative and cumulative displacements in time and space—not just by war and generalized violence, but increasingly by climate-related disasters.<sup>31</sup> Both Türkiye and the United States alternately enforce and permit “temporariness” in refugees’ physical and legal presence in adjacent borderlands and in their own territory to deter permanent migration. However, there are key differences in how the two countries manage their refugee populations that highlight their unique approaches to integration and border management and the distinct roles they play in their respective regions’ migration dynamics.

These differences are important but should not distract the international legal community from the fact that countries, even with varying capacities and histories of refugee protection, are increasingly restricting access to territorial asylum and refuse to expand pathways to more permanent settlement for people displaced by war and natural disaster. Any effort to expand temporary protection should be lauded, but it does little to uphold states’ legal obligations under the Refugee Convention and human rights treaties when asylum is restricted beyond recognition, both as it was originally envisioned in 1951, as the concept has evolved and expanded throughout the world’s legal systems, and as conflict- and climate-motivated migration rises.

This Note thus examines the mobile entrenchment of liminal legality in specific groups of moving people fleeing long-term and interlocking harms at the intersection of conflict and climate. It compares the experiences of temporariness in pre-border settlement patterns and territorial legal status for two national groups that have been on the move or caught in temporary legal spaces for at least a decade: Haitians on the U.S.-Mexico border and Syrians on the Türkiye-Syria border. The Note begins by examining the concept of liminal legality and the harm inherent in never-ending forms of temporary legal status before an individual crosses a border for protection and afterward. This analysis complicates the true boundaries of the border, as safety becomes an increasingly elusive prospect for certain groups and the violence of legal subordination within a country replaces the violence of lawlessness in physical borderlands. As a counterpoint to this shift in the legal border, the Note will examine international instruments that provide evidence for

---

31. See *Deadly Quake Adds to Haiti’s Misery Following Devastating Floods*, AL JAZEERA (Jun. 7, 2023), <https://perma.cc/H9NK-3Q9C> (chronicling three deadly earthquakes and flooding in Haiti between 2010 and 2023); see also *Türkiye (Turkey) and Syria Earthquake 2023: A Year On*, BRITISH RED CROSS (Feb. 2, 2024), <https://perma.cc/P7RU-X494> (describing the death toll of the Feb. 2023 earthquakes, which killed 55,000 people and affected a region hosting more than 1.7 million Syrian refugees (47% of Türkiye’s Syrian refugee population)).

migrants' fundamental right to "human time" and consider how this right may be violated by systems that function to create castes of temporary people across borders. The Note then launches into an analysis of the two border case studies. It will analyze each case and compare each countries' policies under international law.

I conclude that liminal legality and temporary protection regimes that keep certain groups in suspense for long periods of time with few pathways to long-term residence violate international legal norms. By itself, temporary protection may not be unlawful if it can lead to more certain pathways and if, simultaneously, asylum again becomes the relief it once was. But while asylum is restricted, no amount of temporary protection will help states fulfill their obligations under the Refugee Convention. And more is at stake than just states' reputations among the community of nations. Migrants' daily experiences of liminal legality threaten a host of fundamental human rights wrapped up in one political and philosophical concept—"human time," which is now only implicitly recognized in international law but should be expressly and deliberately protected.

## II. LIMINAL LEGALITY & LEGAL TIME IN THE MIGRATION CONTEXT

The notion of liminality as a social phenomenon was first examined by anthropologists in a range of cultural contexts in the middle of the twentieth century.<sup>32</sup> Much more recently, sociologists like Cecilia Menjivar applied the term to ambiguous legal statuses—those representing a transitional period between two more stable conditions—like TPS for Salvadoran and Guatemalan immigrants in the United States.<sup>33</sup> She noted that TPS afforded these communities protection from deportation, but at the cost of extended periods of uncertainty about the continuation of that status.<sup>34</sup> Sometimes they were protected by temporary legal regimes with multiple deadlines and eligibility criteria and other times not, even arbitrarily so.<sup>35</sup> Almost twenty years ago, Menjivar's analysis pointed out that "[i]mmigration law has effectively produced a population of longtime residents with suspended lives."<sup>36</sup> Since her seminal study, legal scholars have expanded the contours of liminal legality in the context of the U.S. immigration system, introducing a variety of terms to describe different gradations of ambiguous and persistently

---

32. Chacon, *supra* note 22, at 257-60.

33. Menjivar, *supra* note 22, at 1007.

34. *Id.* at 1015.

35. *Id.*

36. *Id.* Menjivar still works on measuring the impact of TPS on recipients' social and economic integration. In 2020, she authored a report measuring integration outcomes for TPS holders, finding that while many have successfully integrated into their communities, more secure status is needed and the precarity of sudden termination of TPS still looms for many recipients. This was especially true under the Trump administration, which intended to terminate TPS for nationals of El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan. Cecilia Menjivar, *Temporary Protected Status for Central American Immigrants: Advancing Immigrant Integration Despite Its Uncertainty*, UCLA LATINO POLICY & POLITICS INITIATIVE, 2 (2020).

temporary status—terms like, “nonstatus,”<sup>37</sup> “twilight status,”<sup>38</sup> “legal non-existence,”<sup>39</sup> and “legal limbo.”<sup>40</sup> As early as 1982, the U.S. Supreme Court acknowledged the danger that uncertain legal status presented for immigrants in *Plyler v. Doe*, referring to those without legal status as a “shadow population” that risked becoming “a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”<sup>41</sup> Though the Court referred mainly to undocumented immigrants in its holding, the danger inherent in lack of status translates well to liminal status, which could imminently become non-status at any given moment.

This concept of liminal legality has long been understood as a space ripe for state violence and social control.<sup>42</sup> As Nina Rabin describes, thin forms of protection from deportation like TPS and other kinds of legal limbo create a “spectrum of precarity,” consigning many to a low-wage workforce and increasingly subordinating groups of immigrants under the weight of uncertainty and fear of adverse consequences if temporary forms of humanitarian protection are terminated.<sup>43</sup> Rabin, referencing the work of Cass Sunstein, likens this dynamic to the development of racial caste in the United States, “systematically subordinating [a group] by social and legal practices ‘in multiple spheres and along multiple indices of social welfare.’”<sup>44</sup> Similarly, Jennifer Chacon calls forth the ancient concept of “banishment” as an increasingly common form of social control that can manifest through threats of deportation and incarceration—both conditions that employ spatial

37. See generally Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115 (2015).

38. David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, MIGRATION POL’Y INST. 1, 4–5 (June 2005), <https://perma.cc/84HB-KW49>.

39. Susan Coutin’s concept of “legal nonexistence,” which she identified as a state that can exist in degrees, was foundational to Menjivar’s development of the concept of liminal legality. SUSAN BIBLER COUTIN, *LEGALIZING MOVES: SALVADORAN IMMIGRANTS’ STRUGGLE FOR U.S. RESIDENCY*, 27 (2000).

40. Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, 35 GEO. IMMIGR. L. J., 567 (2021).

41. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

42. See Abrego & Lakhani, *supra* note 22, at 268. The authors provide a compelling framework for conceptualizing state violence through a “legal violence” framework:

The legal violence framework is especially useful in our analysis because it underscores the central role of law in making possible and providing legitimacy to structural and symbolic forms of violence against immigrants. Unlike more general forms of structural violence located ubiquitously in various social structures, the legal violence framework identifies “the law” as the site that simultaneously generates violence and makes it socially acceptable. Under the current immigration regime, society accepts and normalizes practices that harm immigrants precisely because “they broke the law.” Law provides a widely recognized and respected discourse that inherently justifies mistreatment of people who “did not follow the law.” In this article, the legal violence framework allows us to demonstrate how laws can marginalize even those people deemed legally worthy of humanitarian relief, leaving them not only unprotected but also vulnerable to forms of abuse that the public often understands as “unintended” and acceptable.

43. Rabin, *supra* note 40, at 573–574.

44. *Id.* at 579 (citing Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429–30 (1994)).

exclusion to control populations and their worthiness of belonging in a society.<sup>45</sup> The threat of banishment by termination of status looms over those deemed “temporary” regardless of whether they exist within a social and legal fabric or not—i.e., whether they have crossed a border and claimed such status in a country or not. In both instances, uncertainty causes individuals to live in an indefinite state of preparation, evincing another layer of social control not just through affirmative threats, but, as Susan Coutin describes, “a suspension of time that places individuals in a different order of being, one in which individuals can neither advance nor return to their prior state.”<sup>46</sup>

This last conception within the corpus of U.S. liminal legality theory hits at the core of the issue: legal time in the lives of people on the move is treated differently than those whose status is settled. In fact, it is given less value when countries compartmentalize migrant time into discrete, at times renewable, units,<sup>47</sup> as is the case with TPS. This may rise to the level of discrimination—differential treatment based on nationality or race in combination with status—in potential violation of international human rights laws. Political scientists like Elizabeth Cohen have examined the political value of time in the context of immigration and discrimination, positing that law views time as a helpful and measurable proxy for the values it can represent: age standing in for maturity, a common-law marriage standing in for the time it takes to cement a loving relationship, the time period for adverse possession standing in for ownership of land, or a sentencing guideline standing in for the rehabilitation of moral character.<sup>48</sup> In a similar way, the time it can take to reach permanent legal status in a new homeland may stand in for loyalty, commitment, or meaningful membership in a community or society.

However, Cohen rightly points out that assuming that people are equally situated with respect to time and temporally limiting opportunities for some groups can lead to injustice.<sup>49</sup> When recipients of temporary forms of protection are made to wait indefinitely, never to accrue rights based on the time they have spent building social and political capital, as those on a pathway to

---

45. See Chacon, *supra* note 22, at 711.

46. Susan Bibler Coutin, “*Otro Mundo Es Posible*”: *Tempering the Power of Immigration Law Through Activism, Advocacy, and Action*, 67 BUFFALO L. REV. 653, 661 (2019).

47. As in the case of TPS in the United States, which is renewable every 18 months during a two-month reapplication window. But if a recipient fails to apply within that time, they risk expiration of their standing and can fall into undocumented status. Abrego & Lakhani, *supra* note 22, at 279. For more on the management of identity by creating short-term, renewable legal statuses in the context of temporary status in the Gulf states, see NOORA LORI, OFFSHORE CITIZENS: PERMANENT TEMPORARY STATUS IN THE GULF, 6 (2019).

48. Paulina Ochoa Espejo, Cohen, Elizabeth F. *The Political Value of Time: Citizenship, Duration, and Democratic Justice*, 131 ETHICS 132, 135-36 (2020).

49. *Id.* (“Other injustices arise when some are arbitrarily made to wait, or when time is manipulated to create value . . . This means that, like other political goods, time can be unevenly distributed, and some people and groups can increase their power by devaluing other people’s time. This, again, is the case of immigrants who are made to wait long periods, even when they are eligible, socialized, and capable of taking on the burdens of citizenship.”).

citizenship would, their time is devalued.<sup>50</sup> This devaluation expresses the belief that this group of immigrants is incapable of citizenship—that their time can be extracted from them without consequence or credit, resulting in political exploitation.<sup>51</sup> Such exploitation inevitably leads to exclusion and discrimination by the state, which can use time without limit—and without statutes of limitation—to control migration, moving “the border ineluctably inward.”<sup>52</sup> Just as the state can utilize informality on the physical border to “disrupt migrant multiplicities, mobilities, and temporalities,”<sup>53</sup> so can it use liminal legality and racialized legal time<sup>54</sup> to impose its will and subordinate an emerging caste of “temporary” people within its territory.

Thus, legal regimes that impose temporariness on migrant groups and do not value their time on equal footing with citizens or those on a pathway to citizenship are exploitative and discriminatory under the prevailing political and legal theories that address liminal legality. Whether they are unlawful is another matter. But this legal scholarship rightfully raises the question of whether time can be identified as a thing of normative value—even a fundamental human right—if it is so harmful to a person when it is wasted and irrevocably taken away. Other migration law scholars have identified that time is one of the most important ways states exert legal control over migrants within their territory.<sup>55</sup> However, Martijn Stronks differentiates “human” time from this “legal” or “clock” time by pointing out that the former is unique and has normative value because it is irreversible, always belongs to someone, and unifies a person’s past (i.e., memory) and future (i.e., expectation) through the need for a “temporal present.”<sup>56</sup> In other words, human time is always limited and molded by a person’s present experience of the conscious mind.<sup>57</sup> This differs from “clock” time (i.e., “legal” time), which reduces the lapse of time to “a series of moments that

---

50. Elizabeth F. Cohen, *The Political Economy of Immigrant Time: Rights, Citizenship, and Temporariness in the Post-1965 Era*, 47 *POLITY* 337, 338 (2015).

51. Cohen therefore contends, “If an economic system predicated on extracting free labor from people is considered economically exploitive, then a political system that fails to acknowledge the value of the time that it extracts from people is politically exploitive.” *Id.* at 349-50.

52. MARTIJN STRONKS, *GRASPING LEGAL TIME: TEMPORALITY AND EUROPEAN MIGRATION LAW* 3 (2022) (referencing Bridget Anderson, *And About Time Too ... Migration, Documentation, and Temporalities*, in *GLOBAL INSECURITIES, PAPER TRAILS: MIGRANTS, DOCUMENTS, AND LEGAL INSECURITY* 56 (Sarah B. Horton & Josiah Heyman, eds., Duke Univ. Press 2020); AYELET SHACHAR, *THE SHIFTING BORDER: LEGAL CARTOGRAPHIES OF MIGRATION AND MOBILITY* (Manchester Univ Press 2020).

53. Sebastian Benedikt, *Contested Appropriations: Informal Migrant Settlements as Ambiguous Spaces Beyond Temporal Borders*, *J. OF INT’L MIGRATION AND INTEGRATION* 1, 1 (2024) (acknowledging the precarity of displacement, but arguing that some forms of liminality on the physical border lend themselves to a renegotiation for migrants to regain time, space, and rights).

54. *Id.* at 5 (“While the rhythm of life for (white) European citizens is determined by a ‘white time,’ the ‘no time’ is made up for racialized subjectivities from the ‘colonial time’ beyond the Mediterranean. In this ‘racial time,’ the inequalities of the temporalities of the order regime converge, pointing to the perpetual belatedness of the migrant subject.”).

55. STRONKS, *supra* note 52, at 2 (using what Melanie Griffiths calls “temporal governance” to identify the legal rules at play in limiting a migrant mother’s legal status as temporary despite her living in the Netherlands for over eighteen years).

56. *Id.* at 6-7.

57. *Id.* at 7.

succeed each other” and cannot fully grasp the qualitative and normative experience of developing a relationship or rootedness to places and people.<sup>58</sup> This explains, through a theoretical lens, why legal systems may justify withholding the value of a person’s human time from counting towards the regularization of their status when they enter the legal system through irregular means or via temporary protection avenues.

Building on this theoretical framework, international law also supports the existence of a right to “human” time. A range of international human rights instruments speak to time, usually in the form of a right to “leisure time.”<sup>59</sup> Under the UDHR, which is customary international law and binding on all states, Article 24 provides for a right to rest and leisure.<sup>60</sup> The UDHR is joined by Article 7(d) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article XV of the American Declaration on the Rights and Duties of Man, and Article 31 of the Convention on the Rights of the Child. Of course, leisure and rest are but facets of time in general and are often restricted to the context of working conditions, but they amply reflect a value for at least a portion of time in human life to be undivided and untouched by state authority.<sup>61</sup> Beyond the express right to leisure time, the UDHR also includes several provisions that reflect the value of human time. Under Article 3, the “right to life, liberty and security of person” reflects the right of individuals to make choices with their time as they see fit.<sup>62</sup> Under Article 9, “[n]o one shall be subjected to arbitrary arrest, detention or exile.”<sup>63</sup> Inherent in this prohibition is the acknowledgment that taking away someone’s choices in addition to their presence in the space and time of a community without due cause is unconscionable—and unlawful. This value is echoed in international human rights standards dealing with the due process rights of prisoners and those on death row, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).<sup>64</sup> These rules impose obligations on the length of time a person may wait to be

---

58. *Id.* at 8.

59. *E.g.*, UDHR, art. 24; International Covenant on Economic, Social and Cultural Rights, art. 7(d), Dec. 16, 1966, 993 U.N.T.S. 3; American Declaration of the Rights and Duties of Man, art. XV, U.N. Doc. E/CN.4/122 (Jun. 10, 1948); Convention on the Rights of the Child, art. 31, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

60. UDHR, art. 24.

61. See WILLIAM A. SCHABAS, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES* 878 (2013) (noting the context of the right to leisure as working conditions); Paulo David, *Article 31: The Right to Leisure, Play and Culture*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD* 3 (Tom Liefwaard & Julia Sloth-Nielsen eds., 2006) (“If a large variety of instruments refer explicitly to the right to rest and leisure: they overwhelmingly do it in the particular and restricted context of working conditions. Only child rights instruments do articulate these rights in a broader sense.”). For a discussion of the critiques and defenses of the UDHR’s right to leisure, see generally David L. Richards & Benjamin C. Carbonetti, *Worth What We Decide: A Defense of the Right to Leisure*, 17 INT’L J. OF HUM. RIGHTS. 329, 329 (2013).

62. UDHR, art. 3.

63. UDHR, art. 9.

64. See generally The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), United Nations Office on Drugs and Crime, <https://perma.cc/JV4N-SEW5>.

tried and executed in the case of the death penalty, prohibiting indefinite and prolonged solitary confinement.<sup>65</sup> Furthermore, regional and foreign courts have identified that the length of time prisoners must wait with a death sentence can transform their suffering into cruel, inhuman, and degrading treatment—i.e., torture.<sup>66</sup> While these instruments all support the existence of a normative value of human time in international law, the positive right to time through the concept of leisure alone admittedly falls short of breaking ground on an emerging right to time itself.

However, there are also several human rights instruments that provide for a right to personal development,<sup>67</sup> which is necessarily dashed by structures that impose liminal legality and devalue human time. Indeed, even though scholars have focused on the temporal aspects of laws that regulate migrants' lives, the value of the time they lose through such structures is measured precisely in people's ability to attain personal development, however they envision the concept—whether measured by economic, social, or aspirational opportunity costs. Under the UDHR's provision on the right to education, this right "shall be directed to the full development of the human personality."<sup>68</sup> Similarly, Articles 4, 16, 22, and 24 of the African Charter of Human Rights establish a variety of rights oriented toward personal wellbeing, culminating in each person's right to "their economic, social and cultural development" and "the right to a general satisfactory environment favourable to their development."<sup>69</sup> The American Declaration of the Rights and Duties of Man also establishes a right to "advantageous use of [a person's] free time to his spiritual, cultural and physical benefit,"<sup>70</sup> explicitly pulling time into the formulation of the right. And the Convention on the Rights of the Child provides for explicit rights to the development of children, the right to education,

---

65. See Rules 44 and 45, *id.* at 14.

66. E.g., *Human Rights and Confinement on U.S. Death Rows*, Death Penalty Information Center, <https://perma.cc/8QEB-ZEP3> (citing *Pratt and Morgan v. Attorney General for Jamaica*, [1994] 2 A.C. 1, 4 All E. R. 769 (P. C. 1993)) ("Earl Pratt and Ivan Morgan had been on death row in Jamaica for 14 years and had each faced three execution dates. Twenty-three other Jamaican prisoners had been on death row for more than a decade and another 82 for more than five years. The Lords of the council found that 'the inordinate delay' in their cases 'was likely to cause such acute suffering that the infliction of the death penalty would be . . . inhumane and degrading.'"). In 2018, the Inter-American Commission on Human Rights ruled on the case of a Missouri death-row prisoner names Russell Bucklew and determined that,

Russell Bucklew has been deprived of his liberty on death row from 1997 to the date of the present report, i.e., for more than 20 years. The Commission notes that the time spent by Russell Bucklew on death row greatly exceeds the length of time that other international and domestic courts have characterized as cruel, inhuman, and degrading treatment. The very fact of spending 20 years on death row is, by any account, excessive and inhuman. *Id.*

67. UDHR, art. 26.

68. *Id.*

69. African Charter of Human Rights, arts. 4, 24 ("Every human being shall be entitled to respect for life and integrity of person"), 16 ("Every individual shall have the right to enjoy the best attainable state of physical and mental health"), 22 ("All people shall have the right to their economic, social and cultural development") ("All people shall have the right to a general satisfactory environment favourable to their development").

70. American Declaration of the Rights and Duties of Man, art. XV.

and the right to play,<sup>71</sup> which took inspiration from other more adult-oriented human rights treaties like the UDHR and the ICESCR.<sup>72</sup> All of these instruments form the foundation of an emerging legal canon to support a fundamental international right to human time, as Stronks has defined it.

However, even if reasonable minds disagree on the express entitlement to this right under international human rights law, there is an express international human right to non-discrimination based on status or country of origin under the UDHR and other instruments.<sup>73</sup> Liminal legality and other methods of migration enforcement can strip individuals of the value of their accrued time compared to those on a pathway to more permanent status. Granting immigrants who have spent decades in a country different value for the same time invested based on whether they qualified for TPS versus asylum, often based merely on the individualized or generalized nature of the harms they flee, may indeed violate the non-discrimination principle in international law. This is especially difficult to ignore if TPS and other liminal legal statuses are disproportionately granted to racial minorities and other historically marginalized groups.

### III. LIMINAL LEGALITY ON THE U.S.-MEXICO BORDER

On the physical border, where U.S. law often fails to uphold human rights (in contravention of international law), the non-discrimination principle still applies. Countries like the United States are obligated to guarantee human rights extraterritorially as long as they have jurisdiction, including at the border.<sup>74</sup> And discrimination based on time is certainly relevant to migrants when they enter territory and begin to engage with legal structures. On the U.S. border with Mexico, asylum seekers have encountered policies in recent years aimed at managing U.S. border entry and restricting access to asylum. This has led to perpetual cycles of migrants arriving only to be stranded at the border for indefinite periods of time. Trump-era policies, including family separation, an increase in the number of prosecutions for illegal entry, negotiation of “Asylum Cooperative Agreements” with Central American countries,<sup>75</sup> and implementation of the Migrant Protection Protocols

71. CRC, art. 6(2), 28-29, 31.

72. David, *supra* note 61, at 3-4.

73. UDHR, art. 2, 7; ICCPR, art. 26; Refugee Convention, art. 3.

74. See, e.g., H.R. Comm., General Comment No. 36: Article 6: Right to Life, U.N. Doc. CCPR/C/GC/36, ¶ 22 (Sept. 3, 2019); *Families in the Crosshairs: A Human Rights Analysis of the Netherlands' National Security Policies: Submission to the U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, DUKE LAW INTERNATIONAL HUMAN RIGHTS CLINIC 8 (December 2020) (“Under international human rights law, States’ human rights obligations apply extraterritorially to those individuals and entities within their jurisdiction. Such jurisdiction is established, for example, when States exercise “effective control” either when acting individually or as members of international or inter-governmental institutions.”), <https://perma.cc/8G3A-TL5L>.

75. This is in addition to significant funding and support sent to the Mexican government to bulk up border security along Mexico’s southern border with Guatemala. Nick Miroff & Kevin Sieff, *Trump Administration to Send DHS Agents, Investigators to Guatemala*, WASH. POST (May 31, 2019), <https://perma.cc/TF5R-CGW4>; *Biden’s New Border Policies Will Put Further Strain on Mexico’s Struggling*

(MPP),<sup>76</sup> managed to accomplish dual aims. They both prevented entry and encouraged precarious settlement patterns that left refugees with little support and verged on humanitarian emergency on the Mexican side.<sup>77</sup> Under MPP, asylum seekers assigned to the program were physically compelled to remain in Mexico and forced to seek shelter where they could find it, while awaiting the opportunity to present their claims to U.S. officials.<sup>78</sup> Mexican government shelters provided some housing for asylum seekers; however, they were insufficient to meet the need. Some NGOs filled the gaps, but many people were forced to sleep on the streets or in informal tent settlements while adjudicating their claims in U.S. “tent” immigration courts on the border.<sup>79</sup> Many more not already in proceedings, and an increasing number of Haitian asylum seekers,<sup>80</sup> took up residence in informal camps along the Rio Grande River.<sup>81</sup>

After MPP ended,<sup>82</sup> the Biden administration preserved and expanded some border externalization policies. On February 23, 2023, the Biden administration proposed a new border policy<sup>83</sup> meant to replace Title 42, a public health law utilized under the Trump administration to repel asylum seekers from legal ports of entry in the name of COVID-19 prevention, resulting in expulsions.<sup>84</sup> The proposed policy was implemented in May 2023 and its provisions are commonly referred to as the Circumvention of

*Asylum System*, BAKER INSTITUTE FOR PUBLIC POLICY (Mar. 16, 2023), <https://perma.cc/6RGK-PVES> [hereinafter Baker Report] (“The U.S. also financially supported the development of Programa Frontera Sur, Mexico’s southern border program, in 2014; this program deployed federal officials to Mexico’s southern border, which was bolstered by U.S. training of Mexican agents and the provision of scanning units, canine patrols, and mobile migration control posts.”); Walter Ewing, *Trump’s Zero-Tolerance Immigration Policy Treats Parents like Criminals*, IMMIGRATION IMPACT (Jun. 6, 2018), <https://perma.cc/U9Q6-7F63>.

76. Geoffrey Heeren, Note, *Distancing Refugees*, 97 DENV. L. REV. 761, 778–79 (2020).

77. *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process*, HUM. RTS. FIRST 9 (Aug. 2019), <https://perma.cc/U8HD-FDJ8>.

78. *Id.* at 1.

79. *Fact Sheet: The “Migrant Protection Protocols”*, AM. IMMIGR. COUNCIL (Jan. 7, 2022), <https://perma.cc/VCE3-8L3S> (last visited Feb. 23, 2024).

80. Piotr Plewa, *Recent Trends in Haitian Migration to Mexico*, DUKE UNIVERSITY CENTER FOR INTERNATIONAL & GLOBAL STUDIES (Feb. 7, 2022), <https://igs.duke.edu/news/recent-trends-haitian-migration-mexico>.

81. Richard Fowler, *A Black Immigrant’s Mission to Center Black Migrants at the Southern Border*, FORBES (Jul. 29, 2021), <https://perma.cc/4PW3-FPNL>.

82. See generally *Biden v. Texas*, 597 U.S. 785 142 S. Ct. 2528 (2022) (holding that a Texas district court did not have the jurisdiction to issue an injunction stopping MPP under INA §1252(f) (1) and that an October 2021 Biden administration memo announcing an end to MPP was a valid agency action). *Biden v. Texas* also, however, preserved the Department of Homeland Security’s discretionary authority to return aliens arriving by land to Mexico under the same statute. Following this decision, the 5<sup>th</sup> Circuit formally lifted the injunction that initially barred the Biden administration from ending MPP. DHS then stated it would no longer be enrolling new arrivals in MPP and that it would begin disenrolling individuals currently in MPP at their next court date to continue proceedings within U.S. borders. See *DHS Statement on U.S. District Court’s Decision Regarding MPP*, DEP’T HOMELAND SEC. (Aug. 8, 2022), <https://perma.cc/D49V-E7RL>; see also *Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWYERS ASS’N, AILA Doc. No. 19091660 (Oct. 7, 2022), <https://www.aila.org/advo-media/issues/port-courts>.

83. Ari Sawyer, *Biden ‘Asylum Ban’ Rule Would Send Thousands to Danger: US Should Turn Away from Deadly Deterrence*, HUM. RTS. WATCH (Feb. 28, 2023), <https://www.hrw.org/news/2023/02/28/biden-asylum-ban-rule-would-send-thousands-danger>.

84. Zolberg Amicus Brief, *supra* note 5, at 3.

Legal Pathways (CLP) rules,<sup>85</sup> which were further bolstered by an executive order limiting the entry of asylum seekers at the border.<sup>86</sup> The current asylum ban blocks asylum seekers at the border from entering U.S. territory unless they either apply for asylum in a transit country and receive a denial<sup>87</sup> or they successfully book an appointment on the application “CBP One,” which essentially constitutes electronic “metering.”<sup>88</sup> Advocates for the rights of refugees argue that this asylum ban violates the Refugee Convention.<sup>89</sup> Metering was previously held to be unlawful by a U.S. federal court<sup>90</sup> and also likely violates international law.<sup>91</sup> To overcome the asylum ban’s restriction and have the opportunity to enter the United States legally, migrants are required to present themselves at a point of entry to U.S. Customs and Border Patrol, which retains the power to forcibly detain asylum seekers, or prove that they were ineligible for asylum in the countries through which they previously transited.<sup>92</sup> Placing this much of a prohibition on irregular entry so as to limit asylum rather clearly violates the Refugee Convention, which specifically bars signatories from penalizing asylum seekers for illegal entry.<sup>93</sup>

This asylum rule, in addition to the Biden administration’s refugee management deal with Canada,<sup>94</sup> continues a longer tradition of border externalization through “safe third country” agreements. These agreements have been heavily criticized for violating the non-refoulement provision of the Refugee Convention by increasing the risk of chain refoulement. This

---

85. *Fact Sheet: Circumvention of Lawful Pathways Final Rule*, DEP’T OF HOMELAND SECURITY (May 11, 2023), <https://perma.cc/BP5X-ZSK3>. The Ninth Circuit lifted an initial preliminary injunction issued by a district court, signifying that these rules are currently in effect as of the time of this writing. The court has not yet issued a final decision. *See generally* East Bay Sanctuary Covenant v. Biden, No. 23-16032 (May 22, 2024), <https://perma.cc/TCA3-3YWK>.

86. The Biden Administration’s June 2024 Proclamation and Rule, Securing the Border, Congressional Research Service (Jun. 12, 2024), <https://perma.cc/Q5AZ-4CRJ>.

87. *Department of Homeland Security Final Rule: Circumvention of Lawful Pathways*, FED. REGIS. (May 16, 2023), <https://perma.cc/US4V-EH4K> (“Specifically, this rule establishes a rebuttable presumption that certain noncitizens who enter the United States without documents sufficient for lawful admission are ineligible for asylum, if they traveled through a country other than their country of citizenship, nationality, or, if stateless, last habitual residence, unless they were provided appropriate authorization to travel to the United States to seek parole pursuant to a DHS-approved parole process”).

88. *US: Biden ‘Asylum Ban’ Endangers Lives at the Border*, HUM. RTS. WATCH (May 11, 2023), <https://perma.cc/G32J-WAYX>.

89. *Biden Administration Asylum Ban: Widely Opposed Missstep Violates Law and Fuels Wrongful Deportation of Refugees*, HUM. RTS. FIRST 7 (Jun. 2023), <https://perma.cc/DG39-2BJQ>.

90. *Al Otro Lado v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at \*20 (S.D. Cal. Sep. 2, 2021).

91. *U.S. Asylum and Border Policies Resulting in Human Rights Violations*, HUM. RTS. FIRST (Mar. 1, 2022), <https://humanrightsfirst.org/library/u-s-asylum-and-border-policies-resulting-in-human-rights-violations/>.

92. Baker Report, *supra* note 75.

93. Refugee Convention, *supra* note 1, art. 31(1).

94. Under the U.S.-Canada deal, Canada will be allowed to turn away asylum seekers at its unofficial border crossing point at Roxham Road on the Canadian border with the U.S. state of New York. In exchange, Canada has agreed to establish a program for 15,000 individuals seeking protection from “violence, persecution and economic devastation in South and Central America” to alleviate illegal crossings on the United States’ southern border. Michael D. Shear & Ian Austen, *U.S. and Canada Reach an Agreement on Diverting Asylum Seekers*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/2023/03/23/us/politics/us-canada-asylum-seekers.html>.

involves the heightened risk that a refugee who is transferred to a “safe third country,” often a lower resourced neighbor with fewer refugee protections, may in fact be refouled by that country due to such insufficient protections or poor determinations resulting from low-resourced asylum procedures.<sup>95</sup> While these agreements may not be explicitly prohibited under international law, they usually place the significant burden of refugee processing on lower-resourced countries and border regions, which then have fewer resources to support displaced populations in other ways, such as through social and economic programs, leading to further protection gaps on the ground.

In this context, migrants approaching the U.S.-Mexico border encounter a range of obstacles to seeking protection on U.S. territory. Waiting for entry in limbo-like scenarios in camps,<sup>96</sup> they join a much larger group of migrants whose human time is treated differently from those with settled status. However, Haitians and other Black migrants are also subject to racial discrimination and more frequent abuse and rights violations by Mexican state authorities, making them more vulnerable than many others who are similarly situated.<sup>97</sup>

Time stretches back for this group in a way that is unique among those who seek protection in the United States. A decade of natural, political, and economic shocks has pushed Haitians to move from country to country, seeking more lasting refuge.<sup>98</sup> And stretching even further back, the history of their migration has persistently revealed that the countries around them are unwilling to offer them much more than “temporary” support. From across Latin America to the United States, Haitians, although eligible for TPS, have continually lived in a state of liminal legality across borders. Their degrading state of constantly waiting for protection to begin or end interrupts their ability to establish roots if desired, plan for the future, attain social and economic mobility, and cultivate the personal fulfilment necessary to achieve long-term well-being and human development. Their liminal legal status persists from the camps in which they have waited in Mexico to the communities in which they live in the United States, though in a different form.

---

95. Jacqueline Lewis, Note, *Buying Your Way Out of the Convention: Examining Three Decades of Safe Third Country Agreements in Practice*, 35 GEO. IMMIGR. L.J. 881, 899 (2021).

96. Since the advent of the CLP rules, new open-air camps have also begun to populate on U.S. territory behind border walls in California. Asylum seekers are trapped there, waiting for their CBP One appointments or to be processed by CBP. See e.g., Blake Ellis & Melanie Hicken, *Migrant Children in Open-Air Desert Camps are Suffering from Hunger and Hypothermia, Court Documents Say*, CNN (Feb. 29, 2024), <https://perma.cc/JYZ7-2H47> (“In various locations along the border in the San Diego area, Thursday’s declarations allege, migrants are dropping from a 30-foot wall made of sharp-edged metal bars—some end up trapped between the primary and secondary border walls, unable to escape.”).

97. BLACK ALL. FOR JUST IMMIGR., *The Impact of Anti-Black Racism on African Migrants in Mexico* 47-48 (2021).

98. See e.g., INTERNAL DISPLACEMENT MONITORING CENTRE, *Country Profile: Haiti* (May 18, 2022), <https://perma.cc/F64M-M3U9>; Elazar Kosman, *15,000 Haitian Migrants Beneath a Bridge: A Tale of Abusive Title 42 Policy Implementation*, 36 GEO. IMMIGR. L.J. 491, 492-93 (2021); Beatrice Dain & Jeanne Batalova, *Haitian Immigrants in the United States*, MIGRATION POL’Y INST. (Nov. 8, 2023), <https://perma.cc/3MX4-729W>.

A. *Haitian Refugees at the Border: A History of Externalization and Occultation*

U.S. policy towards Haitian asylum seekers has employed externalization tactics and placed a burden on nearby countries since the 1980s, when thousands of Haitians fled the dictatorship of Jean-Claude “Baby Doc” Duvalier via sea vessels destined for the United States. Before they arrived, the United States and Haiti signed an agreement allowing the U.S. Coast Guard to stop vessels and forcibly repatriate Haitians to Haiti via a process called “interdiction.”<sup>99</sup> From 1981 to 1991, the Coast Guard interdicted and interviewed approximately 24,600 Haitians at sea.<sup>100</sup> Out of these, only 28 Haitians were found to have credible asylum claims and brought to the United States to seek asylum.<sup>101</sup> The rest were returned to Haiti.

In 1991, a military coup in Haiti led to another wave of human rights violations and flight from the island. The United States responded by interdicting and screening asylum seekers at sea and scrambled to negotiate agreements with Belize, Honduras, Trinidad and Tobago, and Venezuela to house refugees with credible claims.<sup>102</sup> The United States began to return hundreds of Haitians to Haiti, but when a district court injunction blocked the returns, the policy shifted to interdicting Haitians found at sea to Guantanamo Bay, where U.S. agents interviewed them to assess credible fear of persecution in Haiti.<sup>103</sup> In 1993, the Clinton administration argued before the Supreme Court that its obligations under the Refugee Convention not to return Haitians to Haiti did not apply at sea, and the Supreme Court agreed.<sup>104</sup> However, because of the interdictions that did occur, upwards of 10,000 Haitians were paroled into the United States after passing their interviews.<sup>105</sup>

Since the 1990s, many Haitians have migrated off the island in response to waves of natural disasters and other destabilizing events. On January 12, 2010, a 7.0 magnitude earthquake hit the island, killing 250,000 people,

---

99. Heeren, *supra* note 76, at 772.

100. *Id.*; see Agreement on Interdiction of Haitian Immigration to the U.S., Haiti-U.S., Sept. 23, 1981, 33 U.S.T. 3559.

101. Heeren, *supra* note 76, at 772.

102. *Id.*

103. *Id.* at 774.

104. Yael Schacher, *US Abuse of Haitian Asylum Seekers is Not New — Change is Long Overdue*, THE HILL (Sep. 28, 2021), <https://thehill.com/opinion/immigration/574257-us-abuse-of-haitian-asylum-seekers-is-not-new-change-is-long-overdue/>; see *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993) (holding that neither domestic immigration law nor international refugee law prohibits the U.S. Coast Guard from intercepting and forcibly repatriating Haitian refugees on the high seas); *but see* UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993) (“UNHCR considers the Court’s decision a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II. It . . . sets a very unfortunate example.”); *see also* *The Haitian Center for Human Rights v. United States*, Merits, Decision of the Commission, Inter-Am. Ct. H.R., (ser. L) case no. 10.675, ¶ 177 (Mar. 13, 1997) Report No. 51/96, OEA/Ser.L.V/II.95, doc. 7 rev. PP 183-88 (1997) (ruling that the United States’ interdiction and forced repatriation of Haitian asylum seekers violated the American Declaration of Human Rights, including the right to seek and receive asylum).

105. Heeren, *supra* note 76, at 773.

injuring 300,000 others, and leaving 1.5 million unhoused.<sup>106</sup> Stemming from these events, about 143,000 Haitians migrated to Brazil.<sup>107</sup> Many others found temporary refuge in other parts of Latin America,<sup>108</sup> but after several years, many Haitians began migrating northward, facing new pressures to move.<sup>109</sup>

From 2019 to 2021, Haitians were the largest national group crossing the Darien Gap between Colombia and Panama, remaining in the top three largest groups in 2022 and 2023.<sup>110</sup> This movement continues, partly stemming from other destabilizing events over the years, like the Dominican Republic's decade-old legal ruling that stripped Dominicans of Haitian descent of their citizenship and its large-scale deportations of Haitians between 2022 and 2023.<sup>111</sup> In recent years, U.S. authorities have increasingly encountered Haitians both on the southern land border and attempting to reach the United States by sea.<sup>112</sup> Now, two forces converge on the U.S.-Mexico border: an increasing number of Haitians looking for a place to seek lasting refuge and a U.S. immigration law system that restricts access to asylum and offers a temporary legal regime that falls short of its international obligations.

### B. *Indefinite Temporariness for Haitians in Mexico*

In 2021, the top three nationalities applying for asylum in Mexico were Haitians, Hondurans, and Cubans.<sup>113</sup> Between 2020 and 2021, the number of Haitian asylum seekers in Mexico increased from 5,917 to 51,337.<sup>114</sup> Despite their large numbers, in 2021, Haitians had the lowest asylum approval rate out of the major asylum-seeking nationalities in Mexico at 23%.<sup>115</sup> For Haitians, the rate of complementary protection<sup>116</sup> approval, around 12%, is also low compared to other nationalities.<sup>117</sup>

---

106. INTERNAL DISPLACEMENT MONITORING CENTRE, *Country Profile: Haiti* (May 18, 2022), <https://perma.cc/F64M-M3U9>; Kosman, *supra* note 98, at 492.

107. Kosman, *supra* note 98.

108. For a description of the refuge many Haitians found first in Brazil and later in Chile before traveling to the U.S.-Mexico border, see S. PRIYA MORLEY ET AL., A JOURNEY OF HOPE: HAITIAN WOMEN'S MIGRATION TO TAPACHULA, MEXICO 16, 44-54 (2021), <https://perma.cc/JWL9-L9GK>.

109. Dain & Batalova, *supra* note 98; see e.g., John Bartlett, *Why Haitians Are Fleeing Chile for the U.S. Border*, WASHINGTON POST (Sept. 26, 2021), <https://perma.cc/7NXE-FK39> (describing increasingly restrictive migration policies in Chile).

110. *Id.*

111. Between November 2022 and August 2023, the Dominican Republic carried out more than 120,000 removals of Haitians. Valerie Lacarte, *Addressing the Next Displacement Crisis in the Making in the Americas*, MIGRATION POL'Y INST. (Oct. 2023), <https://perma.cc/D4BE-UNHU>.

112. Dain & Batalova, *supra* note 98.

113. STEPHANIE BREWER, LESLY TEJADA & MAUREEN MEYER, WASH. OFF. ON LATIN AM., STRUGGLING TO SURVIVE: THE SITUATION OF ASYLUM SEEKERS IN TAPACHULA, MEXICO 1, 6 (June 2022), <https://perma.cc/BT44-KEEK>.

114. *Id.*

115. *Id.* at 37.

116. Complementary protection provides authorization for work permits, but it otherwise does not offer regularization of status or family-based immigration pathways. S. PRIYA MORLEY ET AL., *supra* note 108, at 66.

117. See Plewa, *supra* note 80 ("In 2021 Haitians had 35 percent recognition for refugee status and complementary protection combined and 23 percent for refugee status alone. By contrast, Venezuelans had 97 percent recognition rate, all qualifying for refugee status.").

The low asylum approval rate is due in part to the fact that Mexico has declined to apply the Cartagena Declaration's refugee definition to Haitians, unlike asylum seekers from other Latin American countries.<sup>118</sup> The Cartagena Declaration offers protection to those whose home countries face "generalized violence, foreign aggression, internal conflicts, massive human rights violations, and other circumstances that have seriously disturbed public order."<sup>119</sup> Mexican authorities currently apply this broader definition to Venezuelans, Hondurans, and Salvadorans, but they have yet to extend it to other major asylum-seeking nationalities like Haitians and Cubans.<sup>120</sup> There is little information on precisely why this is the case, but it is likely that Mexico's strategy has two aims. In tandem, it may alleviate its asylum backlog through a simplified asylum procedure that utilizes the Cartagena definition to grant protection to large numbers all at once, while restricting which nationalities avail themselves of relief to control migration overall.<sup>121</sup>

Another possible reason is more egregious. Some scholars assert that there is a widespread selective targeting of Haitians and African migrants throughout Latin America that aims to restrict the mobility of Black migrants for racialized motives that arbitrarily link these nationalities with crime networks.<sup>122</sup> In fact, Haitians face more visa requirements than any other nationality in Latin America.<sup>123</sup> In Mexico, however, their movement has largely been controlled alongside that of other asylum seekers. To seek asylum in Mexico, all applicants must remain in the Mexican state in which they originally applied for asylum until their case is completed, thus prolonging asylum seekers' temporary presence in an area of high poverty and crime irrespective of the likelihood of acquiring asylum.<sup>124</sup> However, Haitians have also been subject to particularly high rates of detention in Mexico, which has curtailed

---

118. BREWER, TEJADA, & MEYER, *supra* note 113, at 24. For a more comprehensive report on Mexico's implementation of the Cartagena Declaration in the context of Haitian refugees in Mexico, see *The Time is Now: Mexico Must Grant Haitians Refugee Protections under the Cartagena*, Centro de Derechos Humanos Fray Matías de Córdova A.C. & the Global Justice Clinic at New York University School of Law (April 2024), <https://perma.cc/6DNJ-TFYS>.

119. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (1984), <https://perma.cc/TN58-EMU2>.

120. Rachel Schmidtke & Daniela Gutierrez Escobedo, *Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing*, REFUGEES INT'L (Jul. 20, 2021), <https://perma.cc/VAV9-2SQK>.

121. *See id.*

122. *See e.g.*, Carmen Gomez & Gioconda Herrera, *State and "Mixed Migrations": Migration Policies Towards Haitians, Colombians and Venezuelans in Ecuador*, in *MIGRATION IN SOUTH AMERICA: IMISCOE REGIONAL READER 77*, 87-88 (Carmen Gomez & Gioconda Herrera eds., Springer Publishers 2022), <https://perma.cc/S9FX-U6FT>.

123. "This Hell Was My Only Option" Abuses Against Migrants and Asylum Seekers Pushed to Cross the Darién Gap, HUM. RTS. WATCH (Nov. 9, 2023), <https://perma.cc/2KNK-PKDX>.

124. Yael Schacher & Rachel Schmidtke, *Pushed into the Shadows: Mexico's Reception of Haitian Migrants*, REFUGEES INT'L (Apr. 28, 2022), <https://perma.cc/JSA9-KJRD>.

the use of alternatives-to-detention programs in recent years.<sup>125</sup> All these factors have accumulated to limit Haitians' movements more than those of other asylum seekers, keeping them in limbo-like scenarios, especially as they made their way through Mexico in 2021.<sup>126</sup>

By late 2021, however, the Mexican government, reversing previous policies requiring Haitian asylum seekers to await asylum registration in southern Mexico, promoted the movement of nearly 30,000 Haitians northward.<sup>127</sup> In short order, within a month of Haitian arrivals in northern Mexico, the Biden administration mobilized Title 42<sup>128</sup> to expel Haitians from the border, chartering 77 flights to Haiti from mid-December 2021 to mid-January 2022.<sup>129</sup> Blocked from seeking asylum in the United States due to Title 42, despite potentially tenable claims,<sup>130</sup> and unable to return south due to a lack of resources, by early 2022, a substantial number of Haitians found themselves in limbo in northern Mexican border cities, with extremely limited access to jobs or essential services.<sup>131</sup> This atmosphere of insufficient pathways to legal protection in Mexico and prohibition on crossing into U.S. territory has created a reliance on temporary sheltering arrangements, resulting in the proliferation of informal settlements and tent camps with little support for those living in them. Indefinite and unstable settlement patterns in the Mexican borderlands have threatened the safety and wellbeing of Haitians, who are often kept hidden from public efforts to expose their needs.

### C. *Persistently Temporary Legal Protection for Haitian Refugees*

Since the 1950s, temporary protection has served as a critical form of U.S. humanitarian relief that aims to grant temporary status to foreign nationals fleeing war and natural disaster.<sup>132</sup> It was codified into U.S. law under the Immigration Act of 1990, which granted relief to all nationals of a particular country without requiring them to prove an individualized ground for

---

125. Some alternatives-to-detention programs exist in Mexico. They mainly release asylum seekers from detention and refer them to shelters in coordination with Mexico's refugee agency (COMAR) and support from the UN Refugee Agency. BREWER, TEJADA, & MEYER, *supra* note 113, at 11–12.

126. Life for Haitian migrants in Mexico in 2021 was a suspended life of isolation and desperation. As one Haitian migrant woman stated in an interview, "All I do is take care of my children at the house and go to the immigration office to follow up on news of our case." S. PRIYA MORLEY ET AL., *supra* note 108, at 62.

127. Schacher & Schmidtke, *supra* note 124, at 5.

128. See *supra* Part III.

129. Schacher & Schmidtke, *supra* note 124, at 5.

130. CENTER FOR GENDER AND REFUGEE STUDIES & HAITIAN BRIDGE ALLIANCE, Protection Delayed is Protection Denied: Factsheet on Title 42 Expulsions, Haitian Asylum Seekers in Tijuana, and the U.S. Government's Ongoing Evasion of Duty, 2 (Apr. 7, 2022), <https://perma.cc/Y8WE-6XNR> ("The vast majority of Haitians interviewed in Tijuana, 92%, expressed a fear of returning to Haiti. The fear ranged from threats of gang violence, attempted murder, rape, kidnappings, theft, destruction of property, or harassment. Nearly one fifth (17.1%) of interviewees left Haiti because they were targeted by opposing political parties due to their direct work in politics or due to a politically influential family member, including even the cousin of the slain Haitian President.").

131. Schacher & Schmidtke, *supra* note 124, at 5.

132. Bergeron, *supra* note 8, at 24–25.

protection, unlike asylum.<sup>133</sup> While the U.S. government has used TPS to express solidarity with nationals of certain countries where unexpected and tragic disasters have arisen,<sup>134</sup> the designation is severely limited for two reasons. First, it provides protection from deportation and work authorization for up to 18 months at a time,<sup>135</sup> but precious little else—no voting rights or public benefits, for example. Second, though its renewal is discretionary,<sup>136</sup> for some groups, the designation has been renewed for decades,<sup>137</sup> creating a long-term impermanence in legal status that is ultimately unsustainable.

This long-term impermanence is a form of liminal legality that is also compounded by a realistic fear of deportation that many TPS beneficiaries report, due to the excessive bureaucratic requirements involved in the renewal process.<sup>138</sup> For example, TPS holders are required to pay over \$500 at the end of each status renewal period to maintain their work permit, among other fees, and they may lose their TPS status if they fail to apply for renewal within a certain period of time, which is inconsistent across national groups.<sup>139</sup> TPS holders have expressed a prolonged feeling of confusion over these processes and insecurity amid family separation, as they are unable to file visa applications for family members or access public benefits.<sup>140</sup> To top it off, TPS holders are not automatically able to adjust their status to become legal permanent residents (LPRs), and those who entered the United States unlawfully, even if they later received TPS, are not considered “admitted,” which is a requirement to adjust to LPR status in the long term.<sup>141</sup> Given the challenges to accessing

---

133. *Id.* The Department of Homeland Security is authorized to grant TPS in the following situations:

(A) [T]here is an ongoing conflict within [a] state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their potential safety; or (B) (i) [T]here has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected; (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state; and (iii) the foreign state officially has requested the designation; or (C) [T]here exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Secretary finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States. Immigration and Nationality Act § 244(b).

134. See Mulry Mondélice, *Facilitating Mobility Through Migration as Humanitarian Protection: Building on Lessons Learned from the North American and European Policies Regarding Haiti and Syria*, 35 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 151, 173 (2022), <https://perma.cc/X2J5-D39H>.

135. INA § 244(b).

136. *Id.*

137. Andrew R. Arthur, “Temporary” Protected Status: The Biggest Misnomer in Immigration, Center for Immigration Studies (Oct. 31, 2017), <https://perma.cc/4259-CLDF> (“How many years? Honduras and Nicaragua were first designated for TPS on January 5, 1999, and have been extended ever since. El Salvador was first designated on March 9, 2001, and continues in TPS. Incredibly, Somalia was first designated for TPS on September 16, 1991.”).

138. Abrego & Lakhani, *supra* note 22, at 279.

139. *Id.*

140. *Id.* at 282 (noting one TPS beneficiary’s thoughts on the designation as, “TPS, you know, it’s a good thing because you can work, but that’s all it gives you. I don’t complain, but you just never know when they’re not going to renew it again and then one is left with nothing.”); Menjivar, *supra* note 36, at 2.

141. Sanchez v. Mayorkas, No. 20-315, slip op. at 8–9 (3d Cir. June 7, 2021).

territory in a lawful manner, this legal prohibition creates an even more precarious situation for those forced to cross borders irregularly after waiting indefinitely in borderlands.

Consistent with the United States' harrowing past treatment of Haitian asylum seekers, the U.S. government has demonstrated a lukewarm approach to providing Haitians with legal relief. After the 2010 Haitian earthquake, the U.S. government offered Haitians TPS, including to those who arrived up to a year later, for an initial two-year period,<sup>142</sup> but restricted major federal benefits and cash assistance to LPRs from Haiti and other countries for the first five years after entry.<sup>143</sup> TPS has been extended for Haitians since 2011 through 2026 as of the time of this writing.<sup>144</sup> Further, new TPS protections, owing to the 2021 earthquake, make those Haitian nationals who have been residing in the United States since November 6, 2022 eligible for first-time registration and TPS protection through the same date.<sup>145</sup> For those who arrived at the border after November, the more recent CHNV Parole Program is available, which allows recently-arrived Haitians with sponsors to be paroled into the United States for two years. It allows individuals near the U.S.-Mexico border to apply for an appointment with Customs and Border Patrol via the CBP One app.<sup>146</sup> However, this avenue is limited to those who specifically did not enter Mexico or Panama without authorization after January 6, 2023<sup>147</sup> and does not apply to those entering through land ports of entry. As a result, more recent flows of Haitians arriving via northern Mexico are not eligible for this parole protection, leaving them with little opportunity to seek asylum or access other forms of relief, frustrating U.S. obligations under international refugee law.

In accordance with the United States' wavering commitment to protect Haitians, when Haitians have managed to gain entry, they remain the most deported nationality in the United States per capita, making up 44% of all detainees in ICE detention facilities in recent years.<sup>148</sup> In 2021, the U.S.

---

142. RUTH ELLEN WASEM, CONG. RSCH. SERV., RS21349, U.S. IMMIGRATION POLICY ON HAITIAN MIGRANTS (2011).

143. *Id.*

144. Temporary Protected Status Designated Country: Haiti, USCIS, <https://perma.cc/UYV7-P385>. The Trump Administration announced it would terminate TPS designations for nationals of El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan in 2019. Although this was challenged in the courts and stopped from proceeding, this form of protection is made even more precarious by the efforts of political actors to eliminate it entirely, likely placing hundreds of thousands of people in danger of deportation to countries ill equipped to safely repatriate them. Menjivar, *supra* note 36; *Joint Press Release: USCIS Agrees to Restore Path to Permanent Residency for TPS Beneficiaries*, CATH. LEGAL IMMIGR. NETWORK (Mar. 22, 2022), <https://perma.cc/TZ6E-W2AA>.

145. Extension and Redesignation of Haiti for Temporary Protected Status, 88 Fed. Reg. 5022 (proposed Jan. 1, 2023).

146. *Information on the New Parole Program Available to Haitians Outside the United States*, REFUGEES INT'L (Jan. 10, 2023), <https://perma.cc/SSJ7-QCK8>.

147. *FAQs – New Parole Program of Biden Administration – English*, HAITIAN BRIDGE ALLIANCE (Jan. 10, 2023), <https://perma.cc/5585-6R6Y>.

148. See DeArbea Walker, *Haitians Are Still Being Deported from the Border. Experts Say Their Plight Exposes Bias Against Black Refugees*, BUSINESS INSIDER (Oct. 1, 2021), <https://perma.cc/E4WU-365F>.

government deported more than 20,000 people back to Haiti, among them over 5,000 children.<sup>149</sup> By October 2022, another 14,703 individuals were repatriated to Haiti.<sup>150</sup> They were also a principal group targeted by Title 42 expulsions on the border that pushed back asylum seekers from legal ports of entry during the pandemic.<sup>151</sup> Pursuant to Title 42, in September of 2021, U.S. border agents were notoriously deployed on horseback to deter Haitian asylum seekers crossing the river in Del Rio, Texas, despite leaked Department of Homeland Security warnings that asylum seekers returned to Haiti “may face harm,” including violent crime, kidnapping, political crisis, and civil unrest.<sup>152</sup> These deportation trends continue, exposing tens of thousands of people to dire risk of harm caused by persistent political upheaval, economic instability, and societal disarray prompted by natural disasters, epidemics, and surges in gang-related violence.<sup>153</sup>

The plight of Haitians arriving at the U.S.-Mexico border and even those already in the country with TPS reveals the disproportionate effects of liminal legality on Black migrants in general and on this particular historically marginalized population. For decades, Haitians have received meager refuge from the United States, which, though it does not share a physical border with Haiti, has an obvious proximity and capacity compared to other countries in the region to uniquely respond to Haiti’s humanitarian crises that result in mass flight. The United States has responded with TPS, which, under current immigration laws, can be a life-saving pathway for thousands. But TPS is insufficient, absent other realistic pathways to long-term status that eliminate the risk of expulsion so that people can thrive—not merely survive. As it stands, Haitians are subjected to an even weightier uncertainty due to their high detention and deportation rates as compared to other migrating nationalities, both in the United States and on the border in Mexico. And their long-term expectation that TPS will continue is tenuous at best. In fact, former President Donald Trump, who seeks reelection at the time of this writing, nearly terminated TPS for Haitian nationals during his first term and intends to roll back TPS if reelected.<sup>154</sup> These conditions directly contravene international law by so starkly limiting the opportunity to live an uninterrupted life

---

149. *Haitians Being Returned to a Country in Chaos*, HUM. RTS. WATCH (Mar. 24, 2022), <https://perma.cc/2MRZ-75CD>.

150. *Migrant Returns and Reception Assistance in Haiti | Air & Sea*, INT’L ORG. FOR MIGRATION (Oct. 2022), <https://perma.cc/GD2N-EC8W>.

151. Sarah Rosen, “Trump Got His Wall, It Is Called Title 42”; *the Evolution and Illegality of Title 42’s Implementation and Its Impact on Immigrants Seeking Entry into the United States*, 14 NE. U.L. REV. 229, 262 (2022).

152. *US: Treatment of Haitian Migrants Discriminatory | Chased by Border Agents on Horseback; Returned to Danger in Haiti*, HUM. RTS. WATCH (Sep. 21, 2021), <https://perma.cc/9RLF-UL32>.

153. Diana Roy, *Ten Graphics That Explain the U.S. Struggle with Migrant Flows in 2022*, COUNCIL ON FOREIGN RELATIONS (Dec. 1, 2022), <https://perma.cc/K66J-FEKT>.

154. Menjivar, *supra* note 36, at 2; Ted Hesson, *How would Trump crack down on immigration in a second term?*, REUTERS (Jun. 24, 2024), <https://perma.cc/26EB-25HF>; compare *id.* with Julia Ainsley, *Biden administration gives temporary protected status to 309,000 more Haitian migrants*, NBC NEWS (Jun. 28, 2024), <https://perma.cc/6T2G-3XZ7>.

and pursue personal development that individuals and families from Haiti seeking refuge in the United States are forced to live a half-life, robbed of their human time. While the United States is not the only country that employs policies to restrict migration in this manner, it plays an important role on the world stage in setting precedents and enabling such practices to continue elsewhere.

#### IV. LIMINAL LEGALITY ON THE TÜRKİYE-SYRIA BORDER

The combined strategy of closing borders, externalizing entry procedures, and selectively offering short-term refuge to those fleeing cycles of violence, war, and natural disaster is not unique to the U.S.-Mexico border. While the United States has struggled with its own border management especially over the last decade, plenty of other countries across the globe have approached the rise in global migration similarly. The U.S. border context is often likened to the European Union (EU)'s; however, shifting one's analysis just one country over outside of the eastern EU border reveals two glaring realities. First, countries far smaller and less resourced than either the United States or the EU can accommodate long-term settlement by large numbers of neighboring migrants. Second, even vastly different migration contexts reveal that long-term settlement characterized by large-scale, seemingly never-ending temporary protection schemes results in exploitation, discrimination, and marginalization of refugees blocked from acquiring social and economic mobility while unable to return home.

When scholars discuss border externalization policies in the Turkish context, much attention is given to the EU-Turkey Agreement reached in 2016, which aimed to reduce the mass irregular crossing of refugees through Türkiye to Greece and demonstrates Europe's own efforts to externalize its immigration procedures. Under the Agreement, Türkiye agreed to receive refugees from Greece who had traveled there irregularly and, in exchange, an equal number of refugees in Türkiye would be resettled in the EU.<sup>155</sup> The EU also promised Türkiye 6 billion euros in aid partly to support Syrian refugees displaced from the Syrian Civil War with humanitarian needs like food and shelter as a form of delegating refugee care to Türkiye.<sup>156</sup> However, Türkiye, citing insufficient funding to support refugees while paying overhead costs to international organizations,<sup>157</sup> has also engaged in its own form of externalization. As a result of this and in response to political opposition, domestic anti-refugee sentiment, and valid resource strains owing to its hosting of

---

155. See *Press Release, European Council Conclusions*, EUROPEAN COUNCIL (Mar. 17-18, 2016), <https://perma.cc/D98G-6TRC>.

156. *Id.*

157. Lewis, *supra* note 18, at 893.

Syrian refugees from the beginning of the crisis, Türkiye has distanced its responsibility for refugee populations to spaces outside its borders.<sup>158</sup>

While Türkiye has hosted over 3 million Syrian refugees in the last decade, at the height of the Syrian refugee crisis in 2015, Türkiye effectively closed its border and began to summarily push back Syrians as they tried to cross.<sup>159</sup> It then began to manage camps along the border, where growing numbers of displaced Syrians lived.<sup>160</sup> In May 2022, Turkish President Recep Erdogan announced that Türkiye would begin to resettle one million refugees in northern Syria, in areas not controlled by the Syrian government. The Turkish government reportedly began arbitrarily arresting, detaining, and deporting hundreds of Syrian refugee men and boys by July 2022.<sup>161</sup> According to Human Rights Watch, 37 of the men and boys who were deported in this wave all said they were forced to sign forms agreeing to voluntary repatriation.<sup>162</sup> Though the “voluntary return” initiative,<sup>163</sup> as the Turkish government terms it, would involve repatriating Syrians to non-government-controlled areas in northern Syria effectively controlled by Türkiye, there are concerns with repatriation. One concern is the feasibility of repatriating Syrians to locations where war has dealt huge blows in the realms of housing and infrastructure, where about 1.7 million internally displaced persons remain in camps.<sup>164</sup> Another concern is with the “voluntariness” of the proposed repatriation. These issues underscore the reluctance in Türkiye to provide more enduring avenues for refugee integration.

#### A. *Persistently Temporary Legal Protection for Syrian Refugees*

Though a party to the Refugee Convention, Türkiye maintains a critical reservation that alters its definition of a refugee as compared to most other state signatories to the Convention and impacts the level of relief available to displaced persons in Türkiye. Specifically, it preserves the geographic limitation that initially existed in the Refugee Convention before its 1967 Protocol eliminated the temporal and geographic scope of the Convention, which only provided refugee protection to persons fleeing events in Europe.<sup>165</sup> Türkiye is

---

158. *Turkey: Hundreds of Refugees Deported to Syria*, HUM. RTS. WATCH (Oct. 24, 2022), <https://perma.cc/3NCS-L72K> (quoting Nadia Hardman, refugee and migrant rights researcher at Human Rights Watch, “although Turkey provided temporary protection to 3.6 million Syrian refugees, it now looks like Turkey is trying to make northern Syria a refugee dumping ground.”).

159. *Turkey: Syrians Pushed Back at the Border*, HUM. RTS. WATCH (Nov. 23, 2015), <https://perma.cc/JE8P-QZLS>.

160. *Turkey: Hundreds of Refugees Deported to Syria*, *supra* note 158.

161. *Id.*

162. *Id.*

163. Hosam Salem, *Fear Among Syrian Refugees Over Turkey ‘Voluntary Return’ Plan*, AL JAZEERA (Jul. 20, 2022), <https://perma.cc/SSY7-7Z8M>.

164. Reva Dhingra, *Northwestern Syria Needs Humanitarian Assistance. Getting It There Must Be a Priority*, BROOKINGS (Feb. 8, 2023), <https://perma.cc/SSY7-7Z8M>.

165. *See States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/UVV8-SR5E>.

now only one of four countries to maintain this geographic limitation, and therefore only recognizes refugees of European origin.<sup>166</sup>

To those non-European refugees, Türkiye grants a right to “asylum seeker” status before resettlement to a third country in cases where an application for asylum is accepted.<sup>167</sup> The Turkish government labels these persons “conditional refugees,” and permits them temporary residency in Türkiye<sup>168</sup> while barring them from long-term residence permits.<sup>169</sup> Under Turkish law, conditional refugees are required to reside in particular provinces and report to authorities “for reasons of public security and public order” in some cases.<sup>170</sup> They are also obligated to register their addresses and report them to the government.<sup>171</sup>

Displaced Syrians, however, are not considered conditional refugees. Instead, they fall under Temporary Protection (TP), which allows those fleeing a country in a mass outflow to be legally present in Türkiye<sup>172</sup> subject to similar registration requirements as conditional refugees but with less concrete of a protection framework.<sup>173</sup> This weakened legal protection is exacerbated by a general lack of supportive shelter. Under Turkish law, TP beneficiaries (i.e., Syrian refugees) must provide for their own housing accommodations.<sup>174</sup> A 2015 housing study conducted in a southern border province with a group of over 30,000 Syrian refugees found that about two-thirds of them were residing in accommodations ranging from buildings with poor insulation and heating problems, to tents, garages or unfinished buildings, and public places.<sup>175</sup> Under the EU-Turkey Agreement, although Türkiye was provided with 6 billion euros in aid to support Syrian refugees<sup>176</sup> and has accommodated over 200,000

---

166. *Id.*

167. Ercüment Tezcan, *Legal Status of the Thousands Fleeing from Syria*, 5 USAK Y.B. INT’L POL. & L. 283, 283 (2012).

168. See Law on Foreigners and International Protection, Law No. 6458 of April 4, 2013, art. 62 (Turk.) [hereinafter LFIP].

169. *Id.* art. 42.

170. *Id.* art. 82(1).

171. *Id.* art. 82(2).

172. *Id.* art. 91(1).

173. See Sarah Bidinger, Note, *Syrian Refugees and the Right to Work: Developing Temporary Protection in Turkey*, 33 B.U. INT’L L. J. 223 (2015).

174. LFIP, *supra* note 168, art. 95(1). While Türkiye is not obligated under international law to provide housing to displaced Syrians, sponsorship programs that provide housing at lower cost with locals are common in other countries in emergency situations. See e.g., Press Release, *IRC Report Reveals Urgent Needs of Ukrainian Refugees in Poland Amidst Legal Uncertainty*, INTERNATIONAL RESCUE COMMITTEE (Sept. 27, 2023), <https://perma.cc/6BPE-Q5HF> (describing Ukrainian refugees’ challenges with one kind of sponsorship program in Poland that allowed refugees to access housing at lower costs and subsidized by the Polish government).

175. Buildings with poor insulation and heating problems (43.3%), tents (17.9%), garages or unfinished buildings (4.96%) and public places (0.55%). See AMNESTY INT’L, *No Safe Refuge - Asylum Seekers and Refugees Denied Effective Protection in Turkey* 1, 25 (2016), <https://perma.cc/QXR2-BAUF> [hereinafter *No Safe Refuge Report*].

176. Kyilah Terry, *The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint*, MIGRATION POL’Y INST. (Apr. 8, 2021), <https://perma.cc/5WEK-2EVZ>.

refugees in camps, only a small percentage of Syrians reside in available shelters.<sup>177</sup> In addition, several Reception and Accommodation Centers Türkiye built in 2015 meant to accommodate a growing number of refugees were ultimately converted into detention facilities.<sup>178</sup> As a result, these EU-funded centers were used to detain refugees looking to leave Türkiye irregularly rather than receiving them in a non-penalizing humanitarian capacity.

B. *Indefinite Temporariness for Syrians in Turkish-Controlled “Safe Zones”*

Because of Türkiye’s policy of sealing the Türkiye-Syria border to prevent inflow of refugees, a system of camps has proliferated in northwest Syria since the start of the war.<sup>179</sup> Although the camps are physically located in Syria, they are not subject to Syrian protection regimes but are managed by Turkish authorities and have received varying levels of Turkish assistance in the form of container housing and air protection over the years.<sup>180</sup> The Turkish government considers these regions “safe zones” for refugees and has pushed for this designation since 2012.<sup>181</sup> However, despite the Turkish government’s recent proposals to resettle Syrians in northwest Syria, conflict-related protection concerns remain in the midst of war.

While these camps in the Türkiye-Syria borderlands benefit to a limited degree from Turkish support, displaced Syrians living in these camps are invariably left almost entirely unprotected under any international or domestic framework. They are not refugees, as they are still in Syria, so they have no special status, not even a limited TP status like those Syrians living in Türkiye. They cannot access those protections while Türkiye maintains a closed border policy. Finally, they cannot appeal to any other government because their own government, which would in other cases have jurisdiction over the way camp justice functions,<sup>182</sup> is hostile to them.

The experiences of displaced Syrians in and on the border with Türkiye parallel the liminal legal status of Haitians in the U.S. context. Denied access to long-term residence, they are held in a suspended state at the mercy of a government unwilling to acknowledge their right to human time and even intent on terminating that mercy at the first sign that its obligation could be offloaded, with reckless disregard to the rights, dignities, and lives of those displaced for over a decade. Türkiye is another example of global borders shifting inward and outward—through temporary protection and safe zones

---

177. *No Safe Refuge Report*, *supra* note 175, at 32.

178. *Id.* at 28.

179. Kemal Kirişçi & Elizabeth Ferris, *Not Likely to Go Home: Syrian Refugees and the Challenges to Turkey—and the International Community*, BROOKINGS 1, 4–5, 13 (Sept. 2015), <https://perma.cc/LV4K-TNKR>.

180. *Id.* at 13.

181. *Id.*

182. See generally Kelsey Kofford, *An Examination of the Law, or Lack Thereof, in Refugee and Displacement Camps*, 35 HASTINGS INT’L & COMP. L. REV. 173 (2012).

outside the scope of domestic and international law. For displaced Syrians, time is suspended both within Türkiye and in its trans-border safe zones in Syria, allowing the state to devalue the time Syrians have accrued within the country and in its care. They wait in statuses and spaces of legal and physical immobility, caught between legality and illegality (i.e., deportability)—ultimately for a fundamental change in the Syrian regime that has no end in sight. By placing Syrians in this frozen condition, especially on Turkish-controlled Syrian territory, the Turkish state has interrupted Syrians' personal autonomies and effectively stripped them of fundamental freedoms, including the basic right to seek asylum in a country with a functioning asylum system, which constitutes indirect refoulement in violation of international law.<sup>183</sup> With such a similar dynamic developing on the U.S.-Mexico border, albeit crucially without the use of militarized zones to warehouse refugee populations, it is high time that U.S. leadership consider new and innovative ways to reform its migration protection framework.

#### V. COMPARING LIMINAL LEGALITY IN ASYLUM ACCESS AND TEMPORARY PROTECTION ON THE U.S.-MEXICO & TÜRKIYE-SYRIA BORDERS UNDER INTERNATIONAL LAW

The enforcement of temporariness in legal status and humanitarian-governed borderlands just beyond the territorial lines of countries like the United States and Türkiye has created a range of protection gaps for Haitian asylum seekers and Syrian refugees in limbo in both contexts. Both governments have placed physical and legal barriers on their borders to deter arrivals, distanced their care and shelter to a neighbor country or a law-lacking “safe zone,” and effectively externalized their borders. In both countries, pushbacks have been central to policing borders. U.S. pushbacks have largely been justified through a combination of Title 42, metering, and asylum bans, while Turkish pushbacks have taken place with little justification beyond national security reasons in some cases and as a means of penalizing irregular entry in others. Both countries have ramped up their border deterrence policies due to political mobilizations of xenophobia and security concerns. In addition, both countries have engaged in brokering safe third country agreements with neighboring countries that are widely considered to be unsafe for refugees. In effect, both borders are closed to those seeking asylum and both countries have placed asylum seekers in a deceptively “temporary” position waiting on a border for relief and access to safety that is unlikely to come.

---

183. See Zolberg Amicus Brief, *supra* note 5, at 17; see also Cantor et al., *supra* note 17, at 136 (“Pushbacks that do not allow for access to adequate individual determination of claims for asylum or international protection raise serious questions of legality under international law. They are likely to breach the prohibition on collective expulsion, a well-established principle of international law, which is also expressed in UN and regional human rights treaties. In essence, the prohibition translates to a due process right for each individual to have the act of removal administratively and judicially assessed. In principle, it applies to all aliens, including those who have just crossed or are about to cross an international border, and regardless of lawful residence or irregular immigration status.”).

However, there are crucial differences between Türkiye and the United States regarding their approaches to refugees. Türkiye was one of only a few neighboring countries to broach an open-door policy towards Syrians fleeing the Syrian Civil War at the very beginning of the conflict, despite its later border closure. Pursuant to the EU-Turkey Agreement, it has a stake in resettlement of Syrians in the EU, barring the controversial nature of that agreement. While Türkiye maintains the geographic limitation on its refugee definition, it has not detained refugees upon arrival, though it does maintain a policy of deporting apprehended refugees for irregular entry. Türkiye also assists, though in limited ways, with the management of IDP camps in northwest Syria, providing humanitarian assistance, food aid, and temporary housing support. A considerable overarching difference in the case of Türkiye is that it is actively involved in the military conflict with Syria, and in a way that is likely detrimental to the very population it supports. While legally considered a “safe third country” by the EU, Türkiye’s increasingly sinister deportation tactics, including repatriating Syrians with TP against their will and calling it “voluntary,” call for a serious reassessment of this designation.

In contrast, the United States has demonstrated a less active approach and consistently failed to adequately respond to refugee emergencies in nearby countries, Haiti among them. It has broached far from an open-door policy, though its border may be a bit more porous and open to a range of nationalities through parole programs. Though it is effectively a closed border with externalized policies in place to deter entry, the United States has instituted more programs aimed at managing border entry by creating tight windows of legal access for particular groups at particular times.<sup>184</sup> In the time it takes for those windows to open, it relies almost entirely on Mexico for the formal and informal sheltering of asylum seekers who arrive at its land border, creating large risks for those residing in temporary living arrangements who are susceptible to violence and insecurity of many kinds. It also retains a policy of detention upon apprehension by border patrol and maintains opaque, legalistic rules barring access to entry and asylum.

While these differences in part speak to each country’s unique position in their geopolitical region, the enforcement of temporary legal status coupled with lack of sufficient support for individuals forced into perpetual temporary settlement arrangements in borderland regions is a key feature of both borders. Border-related tools for deterring immigration like asylum bans continually undermine the international refugee protection framework by encouraging any means to escape a stranded state, including illicit ones like smuggling and dangerous irregular migration on rafts and through deserts.<sup>185</sup>

---

184. See e.g., Ari Sawyer, *Biden ‘Asylum Ban’ Rule Would Send Thousands to Danger: US Should Turn Away from Deadly Deterrence*, HUM. RTS. WATCH (Feb. 28, 2023), <https://perma.cc/ED62-V7RZ>; *The Biden Administration’s Humanitarian Parole Program for Cubans, Haitians, Nicaraguans, and Venezuelans: An Overview*, AM. IMMIGR. COUNCIL (Oct. 31, 2023), <https://perma.cc/AAM2-8EUU>.

185. Crisp, *supra* note 17.

They also force people who are unwilling to undergo a further dangerous border crossing to endure unstable living situations that create risks to health and wellbeing in the long-term, whether through exposures to violence and extortion in refugee camps or through unsafe living quarters in war-ravaged apartments susceptible to collapse during an earthquake.

These policies raise serious questions on the part of much poorer countries tasked with the burden of taking in increasing numbers of displaced persons through safe third country agreements. If wealthy countries are unwilling to take on more of the burden, what obligation or incentive is there for lower-resourced countries to shelter people? There are financial incentives baked into agreements with wealthier countries, but when vulnerable groups become bargaining chips in a larger inter-state negotiation, what moral obligation prevails to uphold the principle of non-refoulement for each individual human person at stake? Certainly, these policies create a poor precedent for other countries to preserve the spirit of protection underlying the Refugee Convention. For these reasons, border externalization policies and restrictions on longer term in-country protections represent a significant threat to the international refugee regime, compromising both the right to seek asylum and the right to non-refoulement enshrined in the Refugee Convention.

## VI. CONCLUSION: TOWARD MORE LASTING REFUGE & GREATER GLOBAL RESILIENCE

What many states miss is that the Refugee Convention is not the only consideration under international law—there are also economic and social rights implicated in restricting access to the physical and inwardly-bound administrative border. By restricting access to asylum, even while expanding temporary forms of relief, states contribute to the creation of a worldwide, cross-border caste system that implicates a range of basic human rights implicitly and explicitly enshrined in international law. Abutting many of these basic rights is an underlying and emerging right to human time, characterized by the ability to pursue personal development, leisure, and other aspirational activities outside the purview of the state and legal systems. This implicit right in international law also protects migrants from prolonged states of suspension in legal status and endless expectations of deportation at any given time that, like indefinite incarceration on death row, constitute degrading treatment, if not torture itself.

A violation of the right to human time necessitates the violation of a whole host of rights to life, liberty, and human development by interrupting migrants' ability to presently invest in their future. Subject to ousting at the border or deportation at any point in the future, with no statute of limitations on a person's removability, recipients of temporary protection are recipients of an elusive relief not envisioned in the spirit of the Refugee Convention. Though granted momentary safety from war and natural disaster, recipients

of temporary protection are often perennial guests with little ownership or belonging in the society in which they stay, but who, through years of extensions of their status, become permanent guests with no option to develop their ownership or belonging to their fullest potential. Although permitted safety from the worst and most cataclysmic harms, they are compelled to replace permanent catastrophe with a possibly permanent limbo state that seems protective on its face, but is in fact precarious, uncertain, anxiety ridden, and ultimately a poverty and safety trap for many. As global disasters and conflicts become ever more protracted, without a more concrete legal pathway, more time to create options for themselves, and an explicit recognition that human time is a human right, temporary protection effectively curtails migrants' humanity under the law.

The violation of these rights also perpetuates the cycle of forced migration and limits opportunities for building resilience in the communities where immigrants find temporary safe haven and in the communities they leave behind in their countries of origin. Especially in the case of climate- and conflict-motivated migration, many of these social ties are still intact despite long-term migration patterns. However, the impacts of liminal legality limit the possibilities for interrupting cycles of forced migration. If states abided by their legal obligations, global migration might be much more manageable and burden-sharing much more equitable.

Beyond states' legal obligations, there are compelling economic and social reasons to encourage access to territory coupled with pathways to uncompromising, long-term status. These can include tax- and labor-related benefits that immigrants bring to the communities in which they settle and the remittances they send back to their home countries.<sup>186</sup> These have been shown to contribute substantially to wealth creation, poverty alleviation, and addressing the root causes of migration<sup>187</sup>—perhaps leading to more sustainable migration levels overall and possibly strengthening climate- and conflict-resilience in countries that disproportionately experience these devastations.<sup>188</sup> Disrupting cycles of poverty both at home and abroad can only benefit communities on either side of the border. Beyond the economy, immigrants bring invaluable social benefit to countries in the form of a diverse array of beautiful cultures, traditions, cuisines, arts,

---

186. Remittances made up 22% of Haiti's GDP in 2022. Diana Roy & Claire Klobucista, *What is Temporary Protected Status?*, COUNCIL ON FOREIGN RELATIONS (Sep. 21, 2023), <https://perma.cc/5WUR-ZY9Y>.

187. *Temporary Protected Status is Critical to Tackling the Root Causes of Migration in the Americas*, CENTER FOR AM. PROGRESS (Oct. 28, 2021), <https://perma.cc/2B2K-4F68>.

188. See Soukeyna Kane, Dilip Ratha, & Michal Rutkowski, *Remittances to Countries in Fragile and Conflict-Affected Settings Bounce Back in 2022*, WORLD BANK BLOGS (Jan. 6, 2023), <https://perma.cc/99G3-V7PQ> ("FCS [fragile and conflict-affected settings] countries are recovering from the effects of the pandemic at a slower pace than other countries—which means families who are reliant on remittances remain more dependent than ever on these cash flows to buy food, medicine, and to send their children to school rather than to work. Making sure that this support reaches them is essential to get these communities back on track toward a recovery that is inclusive, resilient and sustainable.").

and political will. Immigrants often bring new perspectives into politics and many diasporas even play a role in peacebuilding efforts in their home countries from abroad.<sup>189</sup>

Finally, there is reason to encourage greater asylum access, a wider definition of what constitutes a “refugee,” à la the Cartagena Declaration, and expanded eligibility for legal permanent residence if TPS protection continues for a reasonable period of time,<sup>190</sup> based on regional solidarity mechanisms that have been employed in other contexts. Colombia, for example, has taken the lead in regional solidarity and responsibility towards Venezuelan migrants, hosting 2.9 million Venezuelans and granting most of them ten years of protected status with the possibility of transitioning to permanent residency.<sup>191</sup> U.S. migration scholars and even Congressmen and women have proposed a three-year TPS minimum with avenues to LPR status in certain cases.<sup>192</sup> Laws and policies like these that aim to provide a longer-term and more concrete expectation of protection would lift legal regimes like TPS and TP up to the standard they should already meet under international law.<sup>193</sup>

Complementing meatier versions of these protections that provide for greater social and economic mobility with a healthier asylum process will also relieve asylum backlogs, like the one currently in the United States. The backlog is partly the result of many people arriving, recognizing the fragility of their status, and seeking to ensure greater certainty for themselves (and the ability to stay for at least a few years) by applying, even if their claims are not cognizable under current law.<sup>194</sup> Expanding protection with concrete terms under the law will reduce the “spectrum of precarity” inherent in various intermediary forms of humanitarian protection and support asylum seekers in having their cases adjudicated more quickly.<sup>195</sup>

Many of those who receive temporary protection remain in a receiving country for decades at a time. They contribute substantially to their communities in cultural and intellectual diversity, send remittances to their country of origin with the power to lift their family members out of poverty, and contribute to climate and political resilience for receiving families in their countries of origin. Much of the critique of expanding TPS has been around deterring

---

189. See e.g., *How Do Migrants Contribute To Society?*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <https://rosanjose.iom.int/en/blogs/how-do-migrants-contribute-society> (last visited July 8, 2024).

190. See Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 NW. J. L. & SOC. POL’Y. 1, 1–2 (2019).

191. Lacarte, *supra* note 111.

192. Schoenholtz, *supra* note 190, at 30–31.

193. For a more comprehensive discussion of how Temporary Protection systems could more effectively embody international legal principles, see Meltem Ineli-Ciger, *A Temporary Protection Regime in Line with International Law: Utopia or Real Possibility?*, 18 Int’l Community L. Rev. 278 (2016).

194. See Miriam Jordan, *One Big Reason Migrants Are Coming in Doves: They Believe They Can Stay*, N.Y. TIMES (Jan. 31, 2024), <https://perma.cc/MWS9-6328>.

195. See Rabin, *supra* note 40, at 573–74.

magnet migration, but TPS does not contribute to this phenomenon,<sup>196</sup> and in any case, long-term migration should not be a dirty word. While perhaps politically difficult due to xenophobic attitudes towards foreigners on native soils, migration that provides stable, long-term options for migrants contributes to the stabilization of migration globally. In a world suffering from greater and more intertwined combinations of generalized violence, climate disaster, and systemic poverty, refugee protection should ensure just what it promises—protection in the fullest sense of the word. This means protection from violence, certainly, but also protection from economic insecurity and social isolation that result from temporary protection policies that violate the right to human time. An analysis of the benefits to refugee-receiving states should not just turn on economic benefits in terms of labor or tax income, but on the level of human and community development that is made possible by migration. Especially as anti-immigrant ideologues wield ever more powerful policy tools and position themselves to take back public office around the world, enacting meaningful expansions of human rights is critical in an increasingly insecure and inhumane global political landscape.

---

196. Schoenholtz, *supra* note 190, at 15.