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## Leading by Example or Undermining Protection: U.S. Compliance with the Refugee Convention at its 70<sup>th</sup> Anniversary

On July 28, 2021, the world will mark the 70<sup>th</sup> Anniversary of the [1951 Refugee Convention](#). In the wake of World War II, the United States played a lead role in drafting this convention, which specifies key protections for people forced to flee persecution. By later acceding to the [Refugee Protocol](#), the United States promised to abide by the Convention's legal requirements, including its prohibition against returning refugees to places where their lives or freedom are at risk.

The U.S. Congress subsequently enacted the [Refugee Act of 1980](#), incorporating the Convention's definition of a refugee and creating asylum and resettlement in U.S. law to protect refugees. But beginning in 2017, the Trump administration launched a [barrage](#) of policies that blatantly violated U.S. legal obligations under both the Refugee Convention and U.S. refugee law. As a candidate, President Biden promised to [uphold](#) the right to seek asylum and end the Trump administration's detrimental asylum policies within his first 100 days in office. In a February 2, 2021 [executive order](#), President Biden affirmed that his administration would "restore and strengthen" the U.S. asylum system.

Yet four months after taking office, the Biden administration has still not taken steps to end many Trump policies that flout the Refugee Convention and is still using a [Trump administration policy](#) to expel asylum seekers in violation of both the Refugee Convention and U.S. refugee law.

On May 19, 2021, the U.N. Refugee Agency's (UNHCR) Assistant High Commissioner for Protection [warned](#) that attempts to deny asylum seekers access to territory at a country's borders, and externalize asylum, jeopardize the safety of those in need of international protection and "threaten the long-respected refugee protection regime." The Assistant High Commissioner warned that: "It is ironic, that, as we celebrate the 70<sup>th</sup> anniversary of the Refugee Convention, attempts are being made to weaken its principles and spirit."

The very next day, in a rare public statement explicitly directed at the United States, the U.N. High Commissioner for Refugees [urged](#) the United States to "swiftly lift the public health-related asylum restrictions that remain in effect at the border and to restore access to asylum for the people whose lives depend on it, in line with international legal and human rights obligations."

When the world marks the 70<sup>th</sup> anniversary of the Refugee Convention on July 28, 2021, will the United States be leading by example by upholding its Refugee Convention legal commitments, or will it still be maintaining Trump policies that subvert the Refugee Convention and [international law](#)? To answer this question, Human Rights First will track the administration's progress – or lack of progress – on the areas identified below, which correspond to key provisions, referred to as "articles," of the Refugee Convention. We will release a brief report on progress in these areas to coincide with the July 28 anniversary. As detailed below, key metrics will include whether the Biden administration has taken steps to:

- Restart U.S. asylum protections at the southern border consistent with refugee law and end the use of Title 42 public health authority to block and expel asylum seekers;
- Fully end the Remain in Mexico program, implementing additional wind-down steps and bringing asylum seekers – including those denied protection under the flawed policy – into the United States;

- Rescind the asylum transit and entry bans which will, if not ended, return refugees to persecution and life-threatening dangers, separate families, and undermine integration;
- Restore protections the Trump administration sought to end for refugees persecuted by deadly gangs and perpetrators of domestic violence, vacating Trump administration Attorney General rulings and making progress towards issuing new regulations;
- Launch legal representation, case support initiatives, and improvements that ensure fair and accurate asylum adjudication, rejecting use of rights-violating detention and barriers to asylum; and
- Increase the number of refugees resettled, expand processing, address backlogs and logjams delaying family reunification and other refugee resettlement, and formally propose a goal of resettling 125,000 refugees for fiscal year 2022.

### Refugee Convention Article 3: Non-Discrimination

The Refugee Convention, like other human rights treaties, contains a provision prohibiting discrimination, specifying that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” Promptly after taking office, the Biden administration [rescinded](#) the Trump administration’s ban on entry into the United States from certain African and Muslim-majority countries and, after some delay, ended discriminatory regional allocations that had been imposed by the Trump administration’s presidential determination. Following significant public outcry, the Biden administration subsequently raised the annual allocation of refugee admissions from 15,000 to [62,500](#) for fiscal year 2021, though the administration will need to significantly step up its efforts to build back the resettlement system.

The Biden administration has still not undone other discriminatory policies. It has been using the Trump administration’s racist and xenophobic [public health ban](#) to expel [Haitian](#) asylum seekers to danger despite escalating political violence, while using the policy to block asylum seekers from Africa, the Caribbean, and other regions from applying for asylum at ports of entry. To assess compliance with Article 3 of the Refugee Convention, we will report on the Biden administration’s steps to:

- End expulsions of asylum seekers and, as discussed below, end the misuse of Title 42 “public health” authority to block and expel asylum seekers;
- End migration detention policies and practices that lock up Black and other asylum seekers of color and deny them parole or other release; and
- End or limit criminal prosecutions for entry and re-entry, under criminal statutes with a [long racist history](#) that are overwhelmingly used to prosecute people of color.

### Refugee Convention Article 31(1): Non-Penalization

Article 31(1) of the Refugee Convention forbids States from [penalizing refugees](#) for illegal entry or presence in most cases. This protection applies to asylum seekers who are present after crossing a border without authorization, including those who are detained or apprehended before they are reasonably able to make a claim for asylum.

But despite this legal prohibition, the United States – particularly under the Trump administration – imposed punitive policies on asylum seekers who crossed into the United States seeking asylum. These impermissible penalties included the notorious Trump administration zero tolerance policy – specifically the criminal prosecution of asylum seekers for improper entry or re-entry and the separation of children

from parents subjected to these prosecutions – and a ban to deny asylum to refugees who had crossed into the country between ports of entry. This asylum entry ban would, if implemented, deliver refugees back to their country of persecution, separate them from their families, and prevent refugees from integrating. Its implementation was temporarily averted due to an [injunction](#) issued in one lawsuit and a [court order](#), issued in a second lawsuit, vacating the ban.

While some of these policies have been suspended or ended in part, many remain on the books and require additional action to ensure they are firmly ended. The Biden campaign pledged to end the separation of families, the [prosecution](#) of parents for minor immigration violations and the systematic [prosecution](#) of adult asylum seekers for “misdemeanor illegal entry.” In his February 2 [executive order](#), President Biden directed the Attorney General and Secretary of Homeland Security to “promptly review and determine whether to rescind” the asylum entry ban.

The Biden administration has made the reunification of families separated by the Trump administration zero tolerance prosecutions a top priority and begun to reunite some of the many families still separated.

To assess compliance with Article 31(1) of the Refugee Convention, we will report on Biden administration steps to:

- Firmly end the Trump administration’s asylum [entry ban](#) (codified at 8 CFR §§ 208.13(c)(3), 208.30(e)(5), 1208.13(c)(3), 1208.13(e)(5), and 1003.42(d)), which, while currently [vacated](#) and [enjoined](#), would punish asylum seekers with return to persecution, family separation, and other deprivations by barring access to asylum for those who seek protection between ports of entry;
- End referrals and prosecutions for improper entry and re-entry and support legislation to eliminate or limit such prosecutions so there can be no repeat of the Trump administration’s zero tolerance family separation policy; and
- Continue to reunite families separated under these punitive policies.

## Refugee Convention Article 31(2): Prohibitions on Restrictions on Movement

Article 31(2) of the Refugee Convention prohibits unnecessary restrictions on the movement of refugees, and Article 9 of the International Covenant on Civil and Political Rights [prohibits](#) detention that is unnecessary, disproportionate or otherwise arbitrary. The UNHCR Executive Committee has [concluded](#) that the detention of asylum seekers should normally be avoided. As UNHCR Guidelines [explain](#), detention is not necessary when other measures can be employed to achieve the government’s objective – for instance, when the provision of legal representation, case management or other alternative measures can support the asylum seeker’s appearance for immigration appointments.

During his campaign, President Biden [pledged](#) to end for-profit and prolonged detention and invest in non-profit case management as the best way to ensure migrants attend required immigration appointments while also enabling them to live in dignity and safety while awaiting court hearings. In May 2021, the President signed an [executive order](#) directing the Attorney General to take steps to expand access to legal representation and creating a White House initiative to increase access to justice “regardless of wealth or status” across agencies.

To track compliance with Article 31(2) of the Refugee Convention, we will report on steps the Biden administration has taken to:

- End and reduce use of migration detention, including releasing asylum seekers from detention and quickly transferring new asylum seekers out of Customs and Border Protection custody to shelters or other humanitarian reception locations operated by non-profit organizations with humanitarian expertise; and
- Invest in alternative measures – such as case support services and legal counsel – in cases where additional action is needed to support appearance.

## Refugee Convention Article 33: “*Non Refoulement*” Prohibition on Return to Persecution

Pursuant to Article 33 of the Refugee Convention, the United States and other countries are prohibited from returning refugees “in any manner whatsoever” to places where their lives or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. The requirement to protect refugees from such returns is considered the cornerstone of the Refugee Convention and is also recognized as a requirement of [customary](#) international law. The U.S. Congress has enacted [laws](#) so that refugees can apply for asylum and be formally recognized as refugees.

Despite these legal protections, the Trump administration initiated and implemented a series of policies that returned refugees to danger in violation of the Refugee Convention’s prohibition on *refoulement*. The Biden campaign [committed](#) to “restore our asylum laws so that they do what they should be designed to do – protect people fleeing persecution and who cannot return home safely,” and to end the policy of “metering” which limits the number of asylum seekers who can seek protection each day.

In his February 2, 2021 [executive order](#), President Biden directed prompt review of some Trump administration policies, including the Migrant Protection Protocols (MPP), the use of Title 42 public health authority to expel asylum seekers, the asylum entry and transit bans, and the rules relating to agreements to send asylum seekers to unsafe countries. The Biden administration has partially wound down MPP—the illegal policy that forcibly returned 70,000 asylum seekers and migrants to wait in danger in Mexico for their hearings—and has transited approximately [10,700](#) people in MPP into safety in the United States. The Biden administration has not yet announced [additional steps](#) to fully end this policy and ensure safety for the asylum seekers subjected to it.

Of grave concern, the Biden administration chose to continue using the Trump administration’s policy of expelling asylum seekers under a [specious](#) “public health” order – essentially using “Title 42” public health authority to improperly override U.S. asylum law and Refugee Convention legal obligations. In an April 2021 report titled [Failure to Protect](#), Human Rights First documented the harms resulting from the Biden administration’s decision to continue to illegally expel and block asylum seekers from the country – including kidnappings, violent attacks, and bias-motivated assaults suffered by asylum seekers expelled or blocked in Mexico and the return of asylum seekers to their countries of persecution.

On May 20, 2021, as noted above, the U.N. High Commissioner for Refugees publicly [appealed](#) to the U.S. government to “swiftly lift the [Title 42] public health-related asylum restrictions that remain in effect at the border and restore access to asylum for the people whose lives depend on it, in line with international legal and human rights obligations.”

To assess whether the United States is complying with its legal obligations under Article 33 of the Refugee Convention, we will report on whether the United States – under the Biden administration – has taken steps to:

- Restart its asylum system consistent with U.S. refugee laws and the Refuge Convention;
- End [use](#) of public health authority under Title 42 to block and expel asylum seekers;
- End “[metering](#)” [policies](#), which return and block asylum seekers in their country of persecution or risk refoulement to their country of persecution;
- End the [currently-enjoined third-country transit ban](#) (codified at 8 CFR §§ 208.13(c)(4) and 1208.13(c)(4)) which – as Human Rights First has [detailed](#) – led the United States to deny refugees asylum and separate refugee families, in addition to attempting to authorize the return to persecution of refugees denied asylum (due to the ban) who do not meet the higher withholding of removal standard;
- Rescind the asylum entry [ban](#) which would, like other bans, return refugees to persecution and life-threatening dangers;
- Rescind the [rule](#) that authorized illegal agreements to send refugees to unsafe countries – agreements which the Biden administration [suspended and initiated the process to terminate](#) in February 2021;
- Restore protections – that the Trump administration sought to end – to prevent the return to persecution of victims of deadly gangs and perpetrators of gender-based violence, including vacating the [rulings](#) of former Attorney General Jeff Sessions in [Matter of A-B](#);
- [Bring to safety](#) additional asylum seekers under MPP, including those with *in absentia* removal orders and those whose asylum claims were denied due to the egregious due process violations inherent to MPP;
- Rescind the public health [rule](#) banning asylum and other protections based on specious public health grounds, for which the administration has [delayed](#) implementation to examine whether it should be revised or rescinded;
- Rescind the [currently-enjoined](#) “monster” asylum [regulation](#) that sought to override and undo U.S. asylum law and block refugees from protection; and
- End use of the flawed [expedited](#) removal process, which leads to the return of asylum seekers to [persecution](#) without access to asylum hearings.

## Refugee Convention Article 34: Naturalization and Integration

Article 34 of the Refugee Convention requires that the United States “shall as far as possible facilitate the assimilation and naturalization of refugees.” The U.S. Congress created an asylum system so that people determined to be “refugees” would be granted asylum, with very limited exceptions – and as a result, be able to reunite with their immediate families, apply in one year to become legal permanent residents, and then subsequently apply to naturalize.

But the Trump administration tried to prevent refugees from integrating, blocking the path to naturalization for many by issuing bans and bars aimed at denying them asylum so that they would either be returned to their country of persecution or left only with “withholding of removal,” a [deficient](#) form of protection from deportation that leaves them permanently separated from families and barred from stable status and a path to naturalization. The Trump administration also issued multiple policies aimed at depriving asylum seekers of legal permission to work – essential to the very survival of refugees and their families as well as their ability to integrate.

The Biden administration [promised](#) to stop “tearing apart families” and has taken [steps](#) to begin reunifying families ripped apart by the Trump administration’s zero tolerance policy. The Biden administration has also included in its [legislative proposal](#) a provision that would eliminate another unjust ban – the bar on asylum due to the filing deadline – that both risks *refoulement* and thwarts integration.

To track whether the Biden administration has taken additional steps towards upholding the objectives of Article 34, we will report on its steps to:

- Rescind the [transit ban](#) that was used by the Trump administration to deny refugees asylum, prevent refugee families from reuniting, and block them from legal residence and naturalization;
- Reverse other Trump administration bans and policies that similarly prevent refugees from integrating and naturalizing including the asylum entry [ban](#) and the public health [rule](#) banning asylum and other protections based on specious public health grounds; and
- Rescind regulations that [curtail](#) access of asylum seekers to [work authorization](#) which prevents asylum seekers from supporting themselves and their families.

## Refugee Convention Preamble: Cooperation & Resettlement

The Preamble to the Refugee Convention specifically recognizes the importance of international cooperation in addressing refugee situations. International cooperation through resettlement can help support front-line countries that often host large numbers of refugees, encourage their continued respect for nonrefoulement or other refugee rights, and demonstrate support for the Refugee Convention itself. Under its statute, UNHCR is required to facilitate the resettlement of refugees as one of the three permanent solutions to refugee situations.

To undo the damage wrought by the Trump administration and again lead on refugee resettlement, the Biden administration must sharply step up its efforts to restore the U.S. refugee resettlement program by welcoming as many refugees as possible this fiscal year under the new refugee admissions goal and honoring President Biden’s promise to rebuild the program to resettle 125,000 refugees in fiscal year 2022. At the same time, the Biden administration must also take steps to protect and evacuate Afghans at risk due to their work with the United States, and prepare to step up support for protection and resettlement to address any additional displacement from Afghanistan.

To assess U.S. progress in facilitating international cooperation relating to resettlement, we will report on steps the Biden administration takes to:

- Improve and expand overseas refugee resettlement processing and invest in rebuilding the domestic infrastructure to enable a swift increase in refugee resettlement;
- Address [various backlogs and logjams](#) delaying refugee family reunification;
- Formally propose an FY 2022 refugee admissions goal of 125,000;
- Appoint a senior-level White House coordinator for refugee resettlement;
- Address delays in security checks that have operated to restrict entire nationalities with a disproportionate impact on Muslim refugees and that have particularly vulnerable cases in need of meaningful resettlement consideration; and
- Resettle as many refugees to the United States as possible, ensuring we redress harm caused by the delay in formally revising the FY 2021 refugee admissions goal.