Joint Analysis of Lankford-Cotton Bill and Violations of International Law
November 2023

BACKGROUND

The law of asylum in the United States draws upon international law, principally from the 1951 United Nations Convention Relating to the Status of Refugees (the "Refugee Convention"), *opened for signature* July 28, 1951, 19 U.S.T. 6577, and the United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"), *opened for signature* Jan. 31, 1967, which incorporates the key elements of the Refugee Convention by reference while eliminating the Convention's geographic and temporal limitations. The Refugee Convention and Protocol define who is a refugee and prohibit the return of refugees to countries where they would face persecution. This latter prohibition is known as the principle of *non-refoulement*. The United States acceded to the Refugee Protocol in 1968 and incorporated its provisions into domestic law through the Refugee Act of 1980, including the refugee definition (§ 101(a)(42) of the Immigration & Nationality Act (INA), 8 USC § 1101(a)(42)) and the principle of *non-refoulement* (through the withholding of removal provisions at INA § 241(b)(3), 8 USC § 1251(b)(3)). In so doing, Congressional intent to align U.S. law with its international obligations was abundantly clear, and has been subsequently acknowledged by the Supreme Court.

The United States offers two main forms of protection to refugees who are physically in the United States: asylum, governed by section 208 of the INA, and withholding of removal under INA § 241(b)(3). Asylum is the more generous and desirable of these two forms of protection but is a discretionary remedy; withholding of removal requires the applicant to meet a higher standard of proof and provides fewer benefits, but is a mandatory form of relief for those who qualify. Both asylum and withholding of removal require the applicant to establish that he or she is a refugee. In addition, persons who fear torture if they are deported—regardless of whether they meet the refugee definition—may be eligible for withholding or deferral of removal under the United Nations Convention Against Torture (CAT), whose implementing regulations are at 8 C.F.R. § 208.16-18.

LANKFORD-COTTON BILL VIOLATES U.S. OBLIGATIONS UNDER INTERNATIONAL LAW

(1) **Modifying Safe Third Country to Impose a Transit Ban** *This combines Division B, Sections Sections 101 and 103 from HR 2 into a single section which imposes a statutory "transit ban" on asylum seekers and bans asylum for those who enter between ports of entry.*

Under current law, with a safe third country agreement in place, asylum seekers who request protection in the United States may be removed to a "safe third country" and given an opportunity to request protection in that other country pursuant to a bilateral or multilateral agreement. Canada is the only country that has a safe third country

agreement with the United States. Congress has spelled out three requirements that must be met before U.S. officials and agencies can block refugees from asylum on these grounds. As outlined, this proposal would negate existing protections, removing the requirement of a bilateral agreement, and resulting in bona fide refugees being deported to danger.

Violates International Law by

- **Returning people seeking refuge back to harm**. The principle of non-refoulement (see article 33 of the Refugee Convention) prohibits States from returning ("refouler") an asylum seeker "in any manner whatsoever," including "deportation, expulsion, extradition, informal transfer or 'renditions,' and non-admission at the border," "to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion." Nations violate the principle of non-refoulement directly when they return asylum seekers to their country of origin; they violate the principle indirectly, or by "chain" refoulement, when they return asylum seekers to a third country where their lives or freedom are endangered, including by onward deportation from the third country.
- **Failing to implement *any* guardrail for third country agreements**. United Nations High Commissioner for Refugees (UNHCR) issued guidance in 2013 on basic requirements and guardrails for the implementation of any safe third country exception to asylum, that include permitted entry and reception into the receiving State, protection against refoulement, a fair and efficient asylum process in the receiving country that adheres to international standards, and adequate living conditions, treatment, and access to employment, among other protections. **None of UNHCR's basic requirements would be explored, let alone required, under the Lankford-Cotton automatic ban** on asylum seekers traveling through a third country. Under international law, asylum-seekers need not apply for protection in the first, or any subsequent, country through which they transit before arriving in the country where they intend to seek asylum. Transit through a third country is not a bar to asylum under international or U.S. law and sending asylum seekers to any other country-- whether they have transited it or not-- is a process with numerous guardrails under international law, none of which are satisfied by the ban in Lankford-Cotton.

(2) **Heightening Credible Fear Standard** *This adopts Division B, Section 102 from HR 2 to amend section 235 of the Immigration and Nationality Act (INA) by striking the current standard of proof used in Credible Fear Interviews ("significant possibility") and instead requiring asylum seekers to prove it is "more likely than not" they could establish eligibility for asylum and more likely than not that the statements made by them and on their behalf are true.*

The bipartisan U.S. Commission on International Religious Freedom and other organizations have long noted the serious deficiencies and due process concerns of the expedited removal process. These include failures by Customs and Border Protection (CBP) officers and Border Patrol agents to follow basic required procedures to identify individuals who must be referred for credible fear interviews, intimidation and coercion of asylum seekers to withdraw requests for protection, failures by asylum officers to properly screen individuals, detention in abysmal conditions, and lack of access to appropriate interpretation services, counsel, legal orientations, and judicial review. Successive administrations have failed to address these long-documented flaws and limited legal protections for asylum seekers.

UNHCR has stated that international law requires certain due process considerations be taken into account in the use of accelerated procedures to minimize the risk of a flawed decision. In the expedited removal setting, it is nearly impossible for an asylum-seeker to have sufficient support, or for an adjudicator to have ample time to gather information and evidence, for a legally valid negative determination.

Violates International Law by

- **Imposing a burden that many bona fide refugees cannot surmount.** The Refugee Convention specifies that a refugee is someone with a well-founded fear of persecution on account of a protected ground. UNHCR has said that the "more likely than not" standard" is not the same as "well founded fear" and that subjecting asylum seekers to the "more likely than not" standard sets the bar higher than is allowed under international law. Subjecting asylum seekers to that standard in the expedited removal context will lead to the removal of refugees to harm in violation of the principle of non-refoulement.

(3) **Ending Asylum Between Ports of Entry:** *This adopts Division B, Section 103 from HR2 provision, stripping the right to apply for asylum from anyone who does not come through a port of entry, upending four decades of domestic asylum law, and violating the central premise of the Refugee Act of 1980 (passed with near unanimous, bipartisan support) which explicitly permits asylum access regardless of where someone crosses the border.*

Violates International Law by

- **Punishing people seeking asylum due to the manner for which they entered the country.** Article 31 of the Refugee Convention prohibits penalizing asylum seekers based on their mode of entry (as a party to the Refugee Protocol, the U.S. has committed to comply with Article 31 of the Refugee Convention). Congress codified that prohibition under 8 U.S.C. § 1158(a)(1).

(4) **Eliminating Exceptions to One Year Filing Deadline Bar to Asylum** *This would amend § 208 of the INA*

Violates International Law by

- **Returning people seeking asylum to danger solely because of this categorical time limit**. Article 1(A)(2) of the Refugee Convention defines asylum seekers or individuals protected by international law without imposing any time limit under which they are required to seek asylum. Returning any bona fide refugee who falls under the Refugee Convention's refugee definition is a violation of U.S. obligations under international law.

(5) **Adding "One Central Reason" Standard for Withholding of Removal** *This is a new provision not contained in HR2, that would increase the standard to win "withholding of removal," a limited form of humanitarian protection that is available to people who are ineligible for asylum, that is harder to win than asylum and which offers no permanent path to remaining in the USA*.

Under the Immigration and Nationality Act withholding of removal is a limited form of protection that is only available to an applicant who can prove that it is "more likely than not" that he or she would be subject to persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her home country. This steep "clear probability of persecution" standard is higher than the well-founded fear of persecution standard for establishing eligibility for asylum. Some of the bars to asylum, such as the one-year-filing deadline, do not apply to claims for withholding of removal.

Violates International Law by

- **Requiring a standard of proof higher than international law, which will result in returning people to harm.**Withholding of removal already fails to fulfill the non-refoulement obligations of the United States under the Refugee Convention and Refugee Protocol and cannot act as a substitute to asylum. Withholding of removal requires a higher standard of proof than asylum—"more likely than not" instead of well-founded fear—and, additionally, if obtained, it carries with it fewer benefits than asylum. Accordingly, as UNHCR and many U.S. commentators have repeatedly noted, treating withholding of removal as compliant with Article 33 of the 1951 Convention violates international standards and fundamental principles, including the right to seek and enjoy asylum and non-refoulement. The "more likely than not" standard adopted by the United States was already out of step with the international standard, and further elevating the threshold with a "one central reason requirement" will widen that gap.

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(6) **Stripping Due Process Appeal/Review Rights in Asylum Proceedings - So Called "Streamlined Screening" and Creating New "Two Bites" Ban For Affirmative Asylum Seekers and An Asylum Ban for Individuals Released at the Border** *These*

are new provisions, not contained in HR2, which would strip the right to appeal of a denied credible fear interview in front of an immigration judge, bar those who are denied asylum in the affirmative asylum process from the ability to raise asylum as a defense in removal proceedings, as well as bar asylum to any person who is released at the border with a Notice to Appear

Violates International Law by

- **Punishing people seeking asylum due to the place where they entered the country and the type of proceedings an immigration officer chose to place them into:** Article 31 of the Refugee Convention that prohibits penalizing asylum seekers based on their mode of entry (as a party to the Refugee Protocol, the U.S. has committed to comply with Article 31 of the Refugee Convention). Congress codified that prohibition under 8 U.S.C. § 1158(a)(1).

(7) **Other Asylum Exceptions:** *This provision adopts Division B, Section 104 from HR2, which imposes a wide swath of new bans on asylum for individuals with even minor criminal records, including potentially conduct for which the person has never been convicted or misdemeanor conduct which may have led to no prison time.* Under these extreme provisions, an asylum seeker convicted in another country for using a false identity document while in flight to seek protection in the United States would be barred from asylum protection. Few Americans would consider such an offense to be particularly serious or to make the person a threat to community safety.

Violates International Law by

- **Significantly lowering the threshold to bar individuals from protections based on criminal history**. The Refugee Convention permits excluding people for asylum protection in rare cases involving criminal conduct, naming the commission of war crimes, crimes against humanity, particularly serious crimes, or serious non-political crimes as narrow situations where a receiving state may justifiably exclude a refugee from protection. U.S. asylum law has already incorporated these as exceptions to asylum eligibility and has extensive case law that explains how the criminal conduct in these cases must be severe.
    - Article 1(F) of the Refugee Convention lists the following serious offenses as exceptions to asylum protection: “a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;. . . a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; . . . acts contrary to the purposes and principles of the United Nations.”
    - Article 33 of the Refugee Convention provides that asylum protections may not be claimed by an individual who, having been convicted of a “particularly serious crime, constitutes a danger to the community of that country.”

(8) **Remain in Mexico and Canada:** *These provisions are taken from Division B, Section 201 of HR 2, and would require that if DHS cannot detain someone who is subject to expedited removal for any reason whatsoever, then they MUST return that individual to the contiguous territory from which they came.*

Violates International Law by

- **Returning people to torture, persecution and chain refoulement to harm.** Forcing people seeking protection in the United States to remain in Mexico as their asylum requests are decided in U.S. immigration courts would, as occurred under the so-called Migrant Protection Protocols (MPP), result in serious violations of fundamental international law obligations. The implementation of MPP resulted in more than 1,500 reports of returned individuals being killed, tortured, raped, kidnapped, and subjected to other grave harms in Mexico as well as reports of onward *refoulement* to other countries of feared torture and persecution. Reviving a Remain in Mexico policy would risk violating:
    - Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits (without exception) a state from expelling or returning a person to another State where there are substantial grounds to believe that the person would be in danger of being subjected to torture, ill-treatment or other irreparable harm.
    - Article 33 of the Refugee Convention, which prohibits a state from expelling or returning refugees "in any manner whatsoever" to a place where their life or freedom would be threatened on account of a protected ground.

(9) **New Expulsions Policy (i.e. Title 42 without public health pretext):** *These provisions are taken from Division B, Section 201 of HR 2, and would allow a new "immigration Title 42" expulsion authority whenever the Secretary deems it necessary to obtain "operational control" of the border*. In ruling on the prior Title 42 policy, the U.S. Court of Appeals for D.C. Circuit ruled that under U.S. law - incorporating international treaty obligations - the government "cannot expel [individuals] to places where they will be persecuted or tortured."

Violates International Law by

- **Returning people to torture, persecution and onward refoulement to harm.** Expelling individuals without an opportunity to apply for protection in the United States will result in serious violations of fundamental international law obligations. Expulsions under the prior Title 42 policy resulted in reports of thousands of individuals returned to killings, torture, rape, kidnapping, arbitrary detention, and other grave harms in Mexico and other countries of expulsions. Reviving such expulsions would risk violating:
    - Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits (without exception) a

state from expelling or returning a person to another State where there are substantial grounds to believe that the person would be in danger of being subjected to torture, ill-treatment or other irreparable harm.
    - Article 33 of the Refugee Convention, which prohibits a state from expelling or returning refugees "in any manner whatsoever" to a place where their life or freedom would be threatened on account of a protected ground.

(10) **Mandatory Detention for All Migrants:** *These provisions are taken from Division B, Section 201 of HR, and mandate mass detention of all people seeking asylum, banning DHS from releasing migrants on parole or through bond until they complete the asylum process, which could take months or years. The United States' restriction on the liberty of asylum seekers, often in jail-like facilities and without a defined end date, stands in sharp contrast to the majority of the world in the disproportionate use of arbitrary detention for civil violations.*

Violates International Law by

- **Running afoul of numerous obligations including the prohibitions on torture and arbitrary detention.**
    - Arbitrary detention is prohibited under international law, including the International Covenant on Civil and Political Rights (ICCPR). Article 9 of the ICCPR provides that "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Executive Order 13107—Implementation of Human Rights Treaties requires compliance with the ICCPR.
    - Arbitrary detention is also prohibited by customary international law, which results not from any formal agreement but from a general and consistent practice of States that is followed out of a sense of legal obligation. The foundational 1948 Universal Declaration of Human Rights prohibits arbitrary detention. The United States has also recognized the prohibition of arbitrary detention as a *jus cogens* or peremptory norm of international law, meaning that it is binding at all times, everywhere, under any circumstance.
- The United Nations Refugee Agency admonished that the detention of asylum seekers should be avoided and a "measure of last resort," because detention runs afoul of the fundamental rights to liberty and freedom of movement.
- The U.N. Working Group on Arbitrary Detention has explicitly recognized the U.S. immigration detention system as punitive, noting the degrading conditions that migrants are subjected to while detained.

(11) **Mandatory Family Incarceration:** *These provisions are taken from Division B, Section 401 of HR, and would require ICE to detain families with no exception for children, a policy which was ended by the Biden administration.*

Violates International Law by

- **Detaining children on the sole basis of their immigration status.** In addition to the above protections against arbitrary detention, detention of children because of their migration status is prohibited under international laws, as confirmed by international rights bodies and experts:
    - Immigration detention of children violates the rights enshrined in the U.N. Convention on the Rights of the Child (CRC). More than a decade ago, the Committee on the Rights of the Child concluded that "regardless of the situation, detention of children on the sole basis of their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable." As a signatory to the CRC, the U.S. is bound to not take actions that would "defeat the object and purpose" of the treaty.
    - The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, called on states to "expeditiously and completely, cease the detention of children, with or without their parents, on the basis of immigration status," concluding, "The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity," and "becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children."
    - U.N. human rights experts on migrants have concluded that: "detention of children on grounds related to their own or their parents' migration status is never governed by the principles of exceptionality, and never responds to the best interests of the child; it is therefore always prohibited under international human rights law."

Endorsing Organizations:

Human Rights First • Refugees International • National Immigrant Justice Center • Center for Gender & Refugee Studies • Women's Refugee Commission