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## Religion and Justice

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### “Give Me Your Tired, Your Poor” vs. “Invasion!”

#### Understanding Treatment of Immigrants in the United States by Examining International Laws of War

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#### Abstract

This paper engages in a thought experiment by applying the legal obligations set out in the Geneva Conventions of 1949 to the United States government’s treatment of Central American asylum seekers arriving at the southern border of the U.S. since 2013. It asks what legal obligations the U.S. government would have toward people who cross the border if those people were either civilian nationals, or soldiers, of a hostile power with whom the U.S. was at war. After demonstrating that current treatment of asylum seekers falls short even of legal obligations to prisoners of war, the essay argues that poor treatment of asylum seekers does not, as a practical matter, deter people from coming to the U.S. to seek asylum. It closes by describing how better cooperation is needed at a global level to deal with contemporary movement of human beings, especially the migration of refugees and asylum seekers.

Keywords: asylum, Geneva Conventions, laws of war, religious ethics, global migration

## Introduction

I came to in a German doctor's surgery being stitched up with our pilot and bombardier present too . . . My leg and arm were plastered and 2 days later we were taken by train to Frankfurt-am-Rhein to Dulag Luft, a holding camp, where we were put in solitary confinement.

The Germans did not heat our cells and a damp plaster on one arm and one leg in the middle of a German winter doesn't induce much sleep. . . .

My arm was taken out of plaster at the end of January 1944 and I spent ½ hour 3 times a day "climbing the wall" to overcome the bruising and avoid ankylosis. The leg had a walking plaster put on and a heel made of wood with a rubber tire covering it. . . .

We were fortunate at Belaria to have a few men who had been prisoners for some time to give us advice on life style change. Furthermore, services sprang up quickly which enabled those who were determined and interested in keeping their lives going. Classes in German, French and even Russian started. Other topics were used to give instruction and a library was started with books sent over the years to POWs. A theatrical group developed and a band consisting of a pianist, a trumpeter, a drummer, and two guitarists and, of course, activities related to escaping

Eric Stephenson, Australia veteran and former prisoner of war in a German camp during World War Two

All day and night they listened to the wailing of hungry children.

Here, in a freezing immigration detention facility somewhere in the Rio Grande valley of south Texas, adults and children alike were fainting from dehydration and lack of food.

Sleep was almost impossible; the lights were left on, they had just a thin metallic sheet to protect against the cold and there was nothing to lie down on but the hard floor.

This is the account of Rafael and Kimberly Martinez, who, with their three-year-old daughter, had made the dangerous trek from the home on the Caribbean coast of Honduras to the US border to ask for political asylum. . . .

What they did not expect . . . were days of hunger, separation and verbal abuse that they said they endured at the hands of federal immigration officials. . . .

The "hieleras," or iceboxes, asylum-seekers said, were overcrowded, unhygienic, and prone to outbreaks of vomiting, diarrhea, respiratory infections and other communicable diseases. Many complained about the cruelty of guards, who they said would yell at children, taunt detainees with promises of food that never materialized and kick people who did not wake up when they were expected to. . . .

When the Martinezes gathered with fellow detainees to sing hymns and lift their spirits a little, the guards would taunt them, or ask aggressively: "Why did you bother coming here? Why didn't you stay in your country?"

Andrew Gumbel, relaying stories told to a team from *The Guardian* newspaper who sat in with volunteer doctors and nurses caring for Central American asylum seekers

## Introduction: Asylum Seekers in the United States and the Laws of War

The above narratives provide a window into two experiences. First, the experience of a prisoner of war during World War II; second, a family held in a detention center after seeking asylum at the southern border of the United States of America. Both stories are gripping in their own right, but why set them alongside each other? Each story describes a kind of

imprisonment, to be sure, but what insight do they provide into each other, or into broader issues?

This essay aims to set up and work through a thought experiment, articulated fully in the next paragraph, for which the juxtaposition of these two stories of imprisonment is useful. Some thousands of asylum seekers, primarily from the Central American countries of El Salvador, Guatemala, and Honduras, have arrived at the southern border of the United States in increasing numbers since 2014 (Musalo and Lee: 137). The reception of these asylum seekers at the hands of U.S. Border Patrol, U.S. Immigration and Customs Enforcement, and other agencies is mixed, at best. Many asylum seekers are placed in detention, some are separated from their families, and nearly all experience physical and mental hardship as they seek to make the case that they have a “well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group” (UNHCR 2010: 3). There is no real question that the conditions asylum seekers endure are bad; what this essay seeks is a creative perspective on those conditions, one that can contribute meaningfully to ongoing debates in U.S.-based scholarship, policy, and media about the legal and moral obligations the United States and its agencies have to asylum seekers, and how those obligations fit with the U.S. government’s principles and commitments.<sup>1</sup>

With this goal in mind, I will describe the treatment and conditions of asylum seekers at the U.S. border in the last several years, especially those who are placed in detention facilities, and will consider the following thought experiment: *how does the United States government’s treatment of asylum seekers compare to the treatment the government would be legally obligated to provide either to civilians or to captured enemy soldiers in a time of war?* To make the comparison, I will examine the Geneva Conventions of 1949, which, alongside their Additional Protocols and Annexes, have established the current legally-binding international laws of war. I will imagine a context of war in which the territory and population of the United States is itself under threat, with enemy forces entering U.S. territory and threatening property and people, and ask what sorts of responsibilities the U.S. government would have toward civilians who are citizens of the attacking enemy and who happen to come under U.S. power, as well as toward enemy soldiers who are captured in such a war. In so doing, I will show that current treatment of asylum seekers in the U.S. would be legally (and, I would submit, morally) improper even if asylum seekers were either 1) civilian nationals of a state with which the U.S. was at war, or 2) soldiers serving a hostile state, who (in our thought experiment) would have posed a threat to, and even possibly killed, U.S. citizens prior to their capture.

If pressed, many citizens, politicians, and scholars would presumably agree that people who are legally seeking asylum should at least be treated no worse than those who are nationals of, or especially soldiers serving under, a hostile power. For scholars who study religion and justice, this comparison may prove useful as a lens through which to view and talk about the issue of asylum in the United States. Scholars who study immigration – particularly those who speak from or examine one or more religious traditions – generally agree that there is

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<sup>1</sup> In this essay, I write as a United States citizen speaking to other U.S. citizens, residents, and nationals. Parallels could surely be drawn to treatment of asylum seekers in Europe or Australia, but this discussion focuses on the United States.

something wrong with the U.S. system for dealing with asylum seekers and adjudicating their claims, and especially that there is something wrong with the country's system of immigration detention. Examining what this "wrongness" might entail, through comparison with the laws of war that cover treatment of both civilians and soldiers, can bring forth a creative perspective and a different sort of intervention into debates and conversations over the issue. It may provide scholars and others with something new to say on an issue that, at times, seems to be so polarizing as to defy meaningful debate or movement toward even a partial resolution.

I will proceed by, first, briefly characterizing current discussions and debates in politics, the media, and scholarship around the treatment of asylum seekers who are held in U.S. immigration detention facilities. Then I will explain the rules laid out in the Geneva Conventions for ethical treatment of, respectively, civilians during wartime and prisoners of war. I will consider treatment of asylum seekers in the U.S. in light of these rules of war. After examining the rules of war, I will critique the (incorrect) perception that poor treatment is a practical "necessity" for lowering the numbers of asylum seekers, by explaining current research on migration patterns and asylum. The evidence shows that even very bad treatment does not discourage people from migrating, from crossing the border by any means possible, or from seeking asylum. I will close by responding to a few possible objections to this framework and then will touch on how the ideas laid out here fit into a broader, pressing set of concerns about the world's seeming inability to deal with large movements of people who are fleeing violence and catastrophe.

### **Why the Geneva Conventions?**

Let me start by addressing one possible concern about conducting this sort of examination. Why draw on the Geneva Conventions and discuss the treatment of civilians in wartime and prisoners of war, when there are already internationally-recognized treaties and agreements that lay out states<sup>2</sup> obligations to refugees and asylum seekers? Why not simply use the 1951 Convention Relating to the Status of Refugees (hereafter the "Refugee Convention") and the 1967 Protocol Relating to the Status of Refugees (hereafter the "Refugee Protocol") (UNHCR 2010), perhaps alongside the Universal Declaration of Human Rights (UN 1948), to discuss states' responsibilities with regard to how people who request asylum are treated and their cases heard?

There are a few reasons I choose to focus on the Geneva Conventions instead of treaties related to refugees and asylum seekers. First, I am discussing treatment of asylum seekers in the United States specifically, and the U.S. is not a signatory to the Refugee Convention (which covers legal obligations to both refugees and asylum seekers) though it *is* a signatory to the Refugee Protocol (UNHCR 1967). Second, if we were to examine treatment of asylum seekers in light of the "obvious" international documents – the Refugee Convention and Protocol and the Universal Declaration of Human Rights – this work would likely take the form of simply listing the rules for how asylum seekers should be treated and noting where the U.S. is or is

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<sup>2</sup> I use the term "state" or "states" to mean a country or countries (for example, the United States of America, El Salvador, France, Tunisia, etc.). This is the commonly-used term at the United Nations and in treaties, and it avoids the problems associated with use of the term "nation-state" – namely, that "nation-state" seems to imply some fundamental connection between ethnicity (an ethnic "nation") and citizenship in a particular state.

not currently following those rules. There is absolutely a place for that discussion, but for the purposes of intervening in the debate about asylum seekers from a different angle, I wish here to examine the treaties that govern treatment of people on the opposite side of a war, who, due to their association with an enemy power, would presumably be regarded with much greater suspicion than asylum seekers. Viewing the U.S. government's treatment of immigrants in light of its obligations to civilians and enemy forces during war provides a new perspective, by placing the issue of asylum alongside a hypothetical case of armed invasion, which most U.S. citizens and residents would agree is a deeper crisis and greater threat.

Third and finally, the comparison is particularly meaningful because the use of "invasion" language to describe the arrival of Central American asylum seekers at the southern border of the U.S. is already in play. Some political figures and members of the media have in fact described groups of asylum seekers as an "army" or an "invasion." This language is mostly used by anti-immigrant pundits and politicians, but in October 2018 the Associated Press, not usually thought of as having a specific political agenda, posted a tweet describing a much-publicized caravan of Central American asylum seekers as an "army." (The AP later apologized and deleted the tweet [Concha].) Most people will agree that even if they view the arrival of asylum seekers as some sort of "invasion," whatever is happening is not an armed invasion nor an act of war. But the fact that this sort of language is used with some frequency makes it interesting to ask: if indeed this *were* an armed invasion, how would the U.S. be obligated to treat people who enter its territory and are placed in detention? What would the rules of war have to say?

### State of the Discourse

Most readers of this essay are well aware of the nature and scope of U.S. political and media discourse regarding asylum seekers at the border. Hardly a day goes by without some article in a major news source, commentary from talk show hosts or guests, or tweet making some sort of statement about the issue. Since 2014, when the number of Central Americans seeking asylum rose significantly and the issue came to broad public notice, the debate among politicians, pundits, and media figures has run the gamut from hatred and demonization, to welcome and compassion; from arguments that asylum seekers are gaming the system and taking advantage of various forms of social welfare, to descriptions of the violence that many asylum seekers have faced on a daily basis and arguments that immigrants contribute much more to economic and social life than they receive; from support for "deterrence" policies up to and including separation of families, to support for allowing asylum seekers to enter and integrate into communities while their cases are processed.

At the time of this writing in 2019, the loudest rhetoric condemning asylum seekers and advocating for deterrence comes, of course, from Donald Trump and members of his administration, who consistently describe the arrival of asylum seekers using the language of invasion; tend to conflict all asylum seekers with gangs like MS-13 (*New York Times*) while referring to these supposed "gang members" as "animals" (*BBC News*); and attempt to justify policies and practices that harm asylum-seeking families, including family separation, long-term detention, and turning people away without hearing their claims (*New York Times*). Various media figures and journalists have pushed back against the idea that gang members make up any meaningful percentage of the asylum seekers who have come to the U.S. southern

border over the past several years. Journalists have told relatively sympathetic stories of migrants: both of the murderous conditions in the countries of El Salvador, Honduras, and Guatemala, whence most have fled, and of harsh conditions at the border and in detention facilities (Correa-Cabrera et al.; Hunter; Martínez). Among elected officials, Senator Jeff Merkley of Oregon has been particularly outspoken in describing what is happening in detention facilities and speaking against family separation (Walsh). Along the same lines, Representative Lucille Roybal-Allard of California's Fortieth Congressional District has this to say about the Trump administration's proposal for border funding in 2019: "addressing the humanitarian crisis at the border will require Congress and the Administration to work together on a balanced approach to the crisis that *first and foremost* respects and protects the dignity of migrants" (emphasis mine).

Scholars who take on the question of asylum and treatment of asylum seekers focus on a few chief concerns. Some try to clarify the nature and scope of the issue of immigration, and asylum in particular, in the United States. They may describe trends in asylum and other forms of migration as a global issue or in the U.S. and other specific countries, and they may or may not make normative claims about whether changes are needed in the way asylum seekers are treated or in other aspects of the process of asylum (Dutt and Kohfeldt; Gorman; Musalo and Lee; Rabben). The focus may be on providing data and numbers, or on discussing attitudes toward or policies focusing on asylum seekers. Some provide data on or descriptions of immigration detention practices and facilities, and immigrants' and advocates' responses to detention (Arnold: 116-18; Riva; Snyder et al., Spena [on detention in Italy, though many elements are the same or very similar to the U.S.]).

One strand of thought in academic discussions of asylum explores the idea that scholars, communities, and leaders may need to rethink foundational assumptions about state sovereignty and borders. These thinkers argue that the ideology of an international system of states, all of which retain complete control over their borders and have the final (only) say on how people in their territory are treated, is, first, not a reality in practice, and, second, fails to comport with the equally strong ideology of human rights norms that has developed at least since the 1940s (Cornelisse; Jones et al.). Related to concerns about religion and justice in the international order, I have previously argued that the commonly accepted conception of sovereignty ought to be addressed and critiqued by religious ethicists, among others (Alexander: 235-38).

Scholars who write specifically about the detention and treatment of asylum seekers describe multiple different kinds of human rights abuses and bad practices, including separation of families for short or long periods of time, holding detainees far away from and without recourse to family or community support or legal counsel, uncomfortable and unhygienic conditions as described in the Martinez's story at the beginning of this article, or subjecting asylum seekers to various kinds of abuse, whether physical, verbal, or sexual. These thinkers generally advocate for reform of some sort: for instance, better treatment within detention facilities, or practices of detaining fewer, or no, asylum seekers (Snyder; Spena). Normally, scholars who cite international law and treaties related to treatment of asylum seekers focus on the Universal Declaration of Human Rights, the Refugee Convention, and perhaps other human rights agreements such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, or Punishment or the Convention on the Rights of

the Child (Acer and Byrne; Hirsch and Bell; Isaacs and Triggs; Zayas: 123, 222). I have not yet come across any scholarship discussing treatment of asylum seekers in light of the laws of war, as the present essay seeks to do.

Thinkers who deal specifically with theological and religious ethical concerns about immigration, asylum, and justice generally argue for more openness to and welcome of asylum seekers (and other refugees or immigrants). Their work is based in examination of the history of migration of religious founders, leaders, and adherents of multiple traditions (Cummins:79-80; Rotman 116-18; Timani: 254; Tyagananda: 148-49); narratives of migration and movement described in religious texts and among religious communities, which are found in every religious tradition I have come across thus far (Collier: 149-50, Nizamuddin: 174-75, Sayilgan: 8); and moral mandates, also present in every tradition I am familiar with, for something like hospitality and/or good treatment of strangers, and sometimes of foreigners specifically (Chidanandjee: 42; Clooney: 144-45; Groody 301-2). Religious thought, some argue, can also inject into secular discussions of law and human rights creative, old-and-yet-new ways of conceiving of migration and the human tendency to be on the move. Silas Allard, for instance, has specifically argued that attention to religious anthropologies can inspire a deeper recognition, in U.S. law, of movement as fundamental to human nature (200-207). Again, for scholars of religion and justice (among others) seeking new ways of conceiving and moving forward on the thorny problem of borders and asylum, a discussion of the laws of war provides new insight into the question of movement and how people who come under the power of a government ought to be treated.

### Treatment of “Enemy” Civilians During Wartime

Let us take up that discussion in detail now: what legal obligations would the United States have to people who had come under its power and were being held in its custody (whether in a detention center, or as the subjects of court proceedings), if the arrival of Central American asylum seekers really *were* some sort of “invasion”? What would the U.S. be legally obliged to do, if the country *were* in fact at war and had to deal with civilian citizens of a hostile power – or even more than that, with enemy soldiers? As stated, we will draw on the Geneva Conventions of 1949 to determine the answers to these questions. It is worth noting that the development of international agreements about how belligerents should deal with those under their power goes back at least to 1864, with the *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* signed by twelve states on August 22, 1864 and eventually ratified by 60 states in total (International Committee of the Red Cross). However, the treaties that currently govern conduct in war are the 1949 Geneva Conventions, which lay out quite specific rules and principles for how states and their military forces should act in wartime, including how they should deal with both civilians and members of opposing forces who have been taken prisoner.

The United States has signed and ratified all four of the 1949 Geneva Conventions (Legal Information Institute 2019), has agreed to abide by all the laws set out in them, and is legally obligated to do so. The state’s responsibilities to civilians in times of war are laid out in the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, shortened to Geneva



IV (1949d). This convention covers the treatment of civilians who are nationals<sup>3</sup> of states that are parties to the convention, at any time during which those civilians are under the power of a state with whom their government is at war. Let us take a possible case in which the United States is at war with Canada. Fortunately, though relations between our two countries are arguably a bit chillier in mid-2019 than they were a few years ago, this case is strictly hypothetical. Both the U.S. and Canada are parties to Geneva IV, so their nationals are entitled to the protections laid out in that convention. To emphasize the point once again, we would presume that nationals of a state that is at war with the U.S. would be viewed with (if anything) greater suspicion than asylum seekers who arrive at the border. In our hypothetical case, Canadian nationals would presumably be under suspicion, because they would likely have loyalties to their state that might influence them to act against the interests of the U.S. government or its people, and vice versa for U.S. nationals.

Let us first consider the case of Canadian nationals who happen to be living in the U.S. when our hypothetical war breaks out. These Canadians normally should be allowed to leave the country if they choose, “unless their departure is contrary to the national interests of the State” (Geneva IV, art. 35). If they are unwilling or unable to depart, the U.S. government should, in general, treat them as it would any aliens<sup>4</sup> residing in its territory: it should allow the Canadians to maintain or seek gainful employment, should honor their basic human rights, and so forth (Geneva IV, art. 37-40). In particular, aliens “shall . . . receive medical attention and hospital treatment to the same extent as the nationals of the State concerned”; “shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith”; and “children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned” (Geneva IV, art. 38).

If it is truly impossible to maintain national security and order without confining and/or controlling the movement of foreign nationals, the Convention makes provision for “assigned residence or internment” of (in our hypothetical scenario) Canadian nationals. It does not allow any means of control more severe than internment (Geneva IV, art. 41). Foreign nationals who are detained may, and often should, be repatriated to their home countries as soon as possible. On the other hand, and interestingly for our purposes, the Convention makes an exception for refugees from the hostile power: since refugees do not in fact enjoy the protection of the hostile power, they are not to be treated as nationals of that power and thus are not to be interred or placed in assigned residence. To quote: “the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government” (Geneva VI, art. 44). Although the principle of *non-refoulement* (the legal obligation not to return refugees to a country where they will be in danger) was most clearly articulated in international law two years later

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<sup>3</sup> Here I use the term “nationals,” defined as those who are members of a sovereign state. U.S. law defines a national as “a person owing permanent allegiance to a state” (U.S. Department of State).

<sup>4</sup> The term “aliens” refers to foreign nationals residing in the territory of a country other than their own; this term is used in the text of the Geneva Conventions and so I use it here. No derogatory connotation is intended. I mention this specifically because, in public discourse, some commentators do use the term “alien” with derogatory intent, as in “illegal aliens.”

in the Refugee Convention of 1951, the idea of *non-refoulement* was certainly well-known in 1949 and had been applied to certain categories of refugees in the 1933 *Convention Relating to the International Status of Refugees* (Jaeger: 729). With that in mind, article 44 would seem to indicate that civilians who are at risk of violence or persecution in a country cannot be sent back to that country, even if they are nationals of a hostile power. In our Canadian case, whatever suspicion Canadians may fall under as *de jure* Canadian citizens cannot be the basis for denying them freedoms in the U.S., or for sending them back to persecution in Canada.

In short, aliens who are nationals of a hostile power, despite their presumably mixed-at-best loyalties, should be allowed to leave if they wish, but not forced to return to a place where they are persecuted. They should only be placed in internment and/or have their movements restricted as a last resort, and they should be treated like any other foreign national in accord with normal human rights standards. If we compare the treatment of asylum seekers in the United States against these laws, the U.S. government appears to fall short. Attempting to force asylum seekers to remain in their home countries or in Mexico, where they are subject to violence perpetrated by gangs or trafficking rings with no meaningful protection from police or other government authorities (Fontes; Lind; Montoya-Galvez; Moore; Telesur), seems quite similar to attempting, in wartime, to send refugees “back” to the country they technically have citizenship in, although they “do not, in fact, enjoy the protection of any government.” Immigration detention facilities, with their small cells, strict schedules for eating and sleeping, and severe limitations on movement (Gumbel), appear to be more restrictive than the strictest sort of confinement allowed by the Geneva Conventions *even for nationals of a hostile power*. And holding asylum seekers in this sort of detention, when less-restrictive means of keeping track of their whereabouts and encouraging them to attend hearings work quite well,<sup>5</sup> flies in the face of the idea that confinement should be a last resort, used only when it is absolutely, unequivocally necessary for national security – and again, those conditions are meant for time of war.

In addition to its discussion of war-specific issues of internment, employment, repatriation, and so on, Geneva IV also lays out some “General Provisions” that put restrictions on states’ treatment of nationals of enemy powers during wartime, no exceptions allowed. What states *cannot ever* do to nationals of a hostile power include:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
2. Taking of hostages;

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<sup>5</sup> The rate of asylum seekers’ attendance at their final court hearings was 89% in fiscal year 2018, according to the U.S. Department of Justice (Human Rights First). Furthermore, there is reason to believe that the rate can be even higher. A pilot program entitled the Family Case Management Program was begun by the Obama administration in February 2015. The program provided case management services in order to allow immigrant families to remain in communities rather than be subject to detention, help families access services, and ensure their cooperation with immigration obligations. The Office of the Inspector General of the U.S. Department of Homeland Security reported in November 2017 that the rate of overall compliance with the program was 99%, and the rate of attendance at court hearings was 100%. Just 2% of program participants were reported as “absconders.”

3. Outrages upon personal dignity, in particular humiliating and degrading treatment;
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples (Geneva IV, art. 3).

If one thinks that asylum seekers should at least not be treated *worse* than the nationals of a hostile power during war, the “no taking hostages” rule here is intriguing. In our hypothetical case of a war with Canada, these provisions would seem to prohibit the United States from threatening to imprison or kill the Canadian nationals under its power in order to intimidate the government of Canada into taking specific actions. The U.S. also presumably cannot threaten the families of Canadian nationals, under threat of harm to their family members, to spy for or otherwise assist our government in its war endeavors.

But when it comes to asylum-seeking families, the U.S. has, in reality, threatened parents with the loss of their children in order to coerce them into signing supposedly “voluntary” deportation orders. In the summer of 2018, several outlets reported that Immigration and Customs Enforcement was presenting a form to asylum-seeking parents whose children had already been taken away from them (Ainsley and Soboroff; Blitzer). The form gave two options: be reunited with your children and then deported, or be deported while your children remain in the U.S. There was no option for being reunited with one’s children *and* continuing to seek asylum. Lawyers for some of the families alleged that parents were also told in person by immigration agents that they would not be allowed to see their children if they continued with the asylum process (Chapin). This starts to look an awful lot like hostage-taking. States are not legally allowed to hold someone’s child hostage in order to coerce that person into assisting with the state’s endeavors, even in the extreme circumstance of war. It would seem as bad, or worse, to detain children in order to force their parents to give up a legal and human right – the right to seek asylum – when their presence is not a threat and there is no reason to suspect them of loyalty to a hostile power.

The issue of hostage-taking may be most striking, but there are other provisions in Geneva IV that have implications for treatment of asylum seekers. Geneva IV, as we saw, also forbids “outrages upon personal dignity, in particular humiliating and degrading treatment.” What sort of treatment counts as “humiliating and degrading” is something of a matter of interpretation. But it is not a stretch to assign these descriptors to the practice of confining asylum seekers, including women and children, in the cramped and freezing holding rooms known as *las hieleras*, as described in the Martinez’s story above and in multiple other reports (Lawler). “Degrading” also seems to describe the pattern of abuse of immigrants and asylum seekers by guards at detention facilities, ranging from verbal taunting up through physical attacks and sexual assault (Washington). There are times when this abuse takes the form of racist remarks or practices of humiliating detainees for perceived sexual orientation or for their country of origin, which is particularly troubling given the stipulation in Geneva IV (and international human rights documents) that people “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria” (Geneva IV, art. 3).

One final note on treatment of particularly vulnerable groups. The Convention states that some groups are to be provided with particular protection in “hospital and safety zones,” namely “wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven” (Geneva IV, art. 14). In other words, there is a legal obligation for states to specifically assist and protect people who are likely to be vulnerable to health problems, or for whom the effects of violence, insecurity, and stress are likely to be worst. Providing medical care and humanitarian aid for people who fit these categories is required by law *in time of war*. In other words, even the violence and chaos of war is not considered an appropriate excuse not to provide medical care for and ensure the safety of children, expectant mothers, and so on. But again, we do not have to look very hard to find that often asylum seekers in these vulnerable groups are subject to abuse, lack of medical treatment, and conditions of fear that compound stress and vulnerability (Grabell; Heffron).

### Treatment of Prisoners of War

Now we can go a step further. If we again consider the language of “invasion” and the references to violence that frequently appear in discourse about asylum seekers at the southern border of the U.S., it seems appropriate to ask: what would the obligations of the U.S. government be if people crossing the border *were*, in fact, soldiers of an enemy power?

The treaty that governs these obligations is the *Geneva Convention Relative to the Treatment of Prisoners of War*, or Geneva III (1949c). This treaty lays out in quite precise detail how governments should treat enemy soldiers whom they have captured and are holding as prisoners of war. It is no secret that governments do not always uphold these laws, but the United States, among others, has indeed agreed to them. It is interesting to compare current treatment of asylum seekers with our legal obligations to prisoners of war who, days or even minutes prior to their capture, would have been shooting to kill at our own citizens.

We may note that Geneva III does not begin by discussing detention. Instead, it lays out a series of “General Protection[s]” and argues for humane treatment of prisoners of war under any circumstances (Geneva III, art. 13-16). This convention does, however, assume that prisoners of war will be put in detention and their movements and actions restricted, since prisoners of war have previously posed, and are likely to continue to pose, a threat to the security of the state that is holding them. Where Geneva IV understands internment or “assigned residence” in the case of civilians to be a last resort, Geneva III devotes its Parts III and IV – the bulk of its discussion – to “Captivity” and “Termination of Captivity.” The laws it lays out assume that prisoners are held in captivity, and the convention elucidates a state’s obligations for treatment of prisoners in that context.

And those obligations are quite numerous and are laid out in great detail. I will consider a few examples that seem to relate most closely to the issue of treatment of asylum seekers at the U.S. border. First, “Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention” (Geneva III, art. 13). We can take this together with, “The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health” (Geneva III, art. 15). It is no secret that Central American asylum seekers, including children, have suffered health problems and that some have even died while detained by the U.S.; the

arguments that play out in the media tend to focus on whether detention itself contributed significantly to those health problems, either because an asylum seeker fell ill due to conditions in detention or because medical care was not provided in a timely manner (Human Rights Watch et al.; Ingber; Seville, Rappleye, and Lehren). I will not take a strong position on that debate here. It is sufficient to point out, I think, that a government that takes prisoners of war into captivity – again, people who very recently were literally shooting at that government’s citizens – is legally obligated to provide even those prisoners with medical care free of charge, and cannot damage their health even by omission.

Prisoners of war are also to be treated in non-discriminatory fashion and are to be protected from violence. Article 13: “Prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” Article 16: “All prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.” Unless we choose simply to disbelieve the accounts given by multiple asylum-seeking individuals and families about abuse perpetrated in detention facilities and discussed above (Gumbel; Lawler; Washington), it appears that many asylum seekers who end up in detention suffer violent and intimidating treatment that would be prohibited even against a prisoner of war. In particular, Article 16 is violated when detainees are subject to racist remarks and taunting based on perceived sexual orientation or nationality.

Interestingly, rules are laid out in the convention even regarding the type and conditions of confinement for prisoners of war. Here again, the legal obligations of states toward captive enemy soldiers require, in most cases, better conditions than asylum seekers experience in practice. The convention states, “Prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.” Further: “Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.” Media reports on immigration detention at the border, including from nonprofits who seek to provide for asylum seekers’ basic needs as well as politicians like Merkley who have visited facilities, indicate that asylum seekers who have crossed the southern border of the U.S. in the last several years are often held in conditions that do not meet these criteria (McIntosh; Walsh; Weicher). Sarah Lopez, a scholar at the University of Texas at Austin, describes conditions in detention centers that include windowless rooms with long rows of bunk beds for up to 100 detainees; bathrooms and showers with partial, if any, privacy; outdoor recreation of only one hour per month; and at least one detainee held in solitary confinement for over a month for reasons he did not understand (Lopez: 37-38). Not all detainees in the facilities Lopez and her students examined were asylum seekers, but many were, and her descriptions comport with other depictions of detention centers that hold primarily asylum seekers. “Close confinement,” whether solitary or with large numbers of detainees in small spaces with almost no relief, appears to be the norm rather than the exception, and the detention centers, as described, do not afford many guarantees of hygiene or healthfulness. The centers may not technically be penitentiaries, but they resemble such in all but name.

There are other aspects of treatment of prisoners of war we could discuss, but I will take just one further point. Geneva III demonstrates a strong commitment to freedom of religious belief and expression for prisoners of war, as well as states' obligations to address prisoners' spiritual needs. It says that chaplains who have been captured and are "retained by the Detaining Power" for the purpose of ministering to prisoners may "continue to exercise their . . . spiritual functions for the benefit of prisoners of war"; they "shall be allowed to minister to them and to exercise freely their ministry amongst prisoners of war of the same religion." This is understood to include periodic visits to prisoners wherever they may be housed, and chaplains should be provided means of transport to reach prisoners (Geneva III, art. 33, 35). If a chaplain of the same religious tradition is not available for particular prisoners of war, the "Detaining Power" should appoint a clergyperson or, if necessary, a layperson of that tradition (presumably from the surrounding community of its own citizens) to minister to prisoners' spiritual needs (Geneva III, art. 35-37).

Again, we can see the difference between the legal obligations laid out here and the access (or non-access) asylum seekers in detention have to clergy or religious authorities. As with medical care, there are discrepancies in the descriptions provided by Immigration and Customs Enforcement officials on the one hand, and by nonprofits, advocacy groups, and detainees themselves on the other, regarding what sort of access asylum-seeking detainees have to clergy and religious services. In October 2018, Tom Verde wrote with regard to immigration detention generally (not just of asylum seekers, though they are included), "for many of the more than 39,000 undocumented immigrants locked up on any given day in ICE detention centers nationally – the highest number in history – visits from clergy, access to religious material, and opportunities to engage in religious worship can be infrequent, inconsistent and in some cases absent altogether" (Verde). According to Aleksandr Sverdlik writing for the American Civil Liberties Union, detainees' rights to religious expression are "routinely" violated while in detention, including confiscation of religious materials and denials of access to clergy, religious worship, religiously-mandated diet, and places to pray. Again, if even just some of the stories told by detainees and those who assist them are true, it appears that the U.S. government is failing to provide for asylum seekers the religious and spiritual resources that it would be obligated to provide *even for prisoners of war* who, until the moment of capture, would have posed a clear threat to the lives and well-being of U.S. soldiers and (in our hypothetical case of an invasion) civilians as well.

### **What Difference Does Good, or Bad, Treatment Make?**

It is a truism that the reason the Geneva Conventions exist in the first place is that prisoners of war, civilians in time of war, and others covered by the conventions are *not* always, or perhaps even commonly, dealt with in the relatively humane ways the conventions mandate. The same holds for the Refugee Convention and Protocol, the Universal Declaration of Human Rights, and other treaties and agreements that make up and clarify both international humanitarian law and international human rights law. Furthermore, we need only consider the U.S.-related examples of indefinite detention and torture of prisoners at Guantanamo Bay and the abuse of prisoners in Abu Ghraib prison in Iraq to recognize that the Geneva Conventions are by no means always followed. This is not even to mention targeting of civilians and abuse of prisoners of war by other states and in other places – to take just one example, the murder

and torture of both rebels and (especially and overwhelmingly) civilians of the Rohingya community in Myanmar. In this essay, however, we are discussing legal obligations, whether or not they are consistently followed. And we have shown above that the U.S. government's treatment of people legally seeking asylum at our southern border does not meet the legal standards that would apply even if the surge in Central American asylum seekers were, in fact, an "invasion" by an enemy force.

So far this discussion has been primarily theoretical, though rooted in on-the-ground experiences of asylum seekers. Now I want to turn to a practical question: does treating asylum seekers in ways that comport with international law and the U.S.'s own legal obligations increase the number of people who arrive at the border to seek asylum? Conversely, does poor treatment upon arrival discourage people from making the journey and/or requesting asylum in the U.S.?

The idea that there are "push" and "pull" factors to human migration is common in contemporary discussions of immigration. As a technical concept among sociologists studying immigration, the idea of "push" and "pull" was developed and defined in the 1960s. In essence, the concept says that people move from one location to another either because of some circumstance that "pushes" them out of the first location (poverty, violence), because of some circumstance that "pulls" them toward the second (opportunity, family ties, security), or often both (Riggs and Edgar: 619). Because migrants normally do respond to both push and pull factors, states that seek to encourage or discourage immigration should generally consider both kinds of factors in shaping their policies. For our purposes, the question is whether better or worse treatment of Central American asylum seekers at the U.S. border influences asylum seekers' behavior: that is, whether altering this "pull" factor has a meaningful impact on the number of asylum seekers who arrive, the demographics of those who do arrive, or some other feature of the issue. I will focus primarily on whether changes in treatment of asylum seekers increase or decrease the number of people arriving.

Some authorities and writers have argued that either short- or long-term "pull" factors encourage Central American families to migrate, or send their children, to the United States. The columnist Ruben Navarette, Jr. argued in 2014 that, although the Deferred Action for Childhood Arrivals program begun by the Obama administration in 2012 was not responsible for the surge of unaccompanied child migrants from Central America in 2013-14, "the real enticement for the refugees was a longstanding but unspoken Border Patrol policy to treat [un]accompanied minors differently than adults and not immediately return them to their home countries." As reported in an article by Sharon Harding in the same year, both Mexico's then-Deputy Government Secretary for Population, Migration and Religious Affairs and the United States's then-Secretary of the Department of Homeland Security argued that unaccompanied minors from Central America were arriving in 2013-14 at least in part because their parents thought they would be given special privileges or have their immigration status normalized, even temporarily. The officials were expressing a belief that a (fabricated) promise that children would be allowed to remain in the U.S. served as a "pull" factor for children who sought asylum or some other status.

Karen Musalo and Eunice Lee make a compelling case, however, that "push" factors that drive families out of the "Northern Triangle" countries of Honduras, El Salvador, and

Guatemala are much stronger than any “pull” factors. They argue that the flow of Central American asylum seekers is highly unlikely to slow down or stop if conditions in the Northern Triangle countries do not change, regardless of the treatment asylum seekers receive once they arrive and regardless even of asylum seekers’ perceptions of whether their petitions for asylum will likely be granted. Musalo and Lee point out that after the “surge” of unaccompanied child migrants, and then of mothers with children, crossing the U.S. border in 2013-14, the Obama administration appropriated significant funding for border enforcement, directed State Department officials to counter supposed “misinformation” about the possibility of gaining legal status in the U.S., and “funded and encouraged the governments of Mexico, Guatemala, and Honduras to turn around Central American asylum seekers before they could ever reach [the] US border” (139). This did not, however, lower the numbers of migrants arriving and seeking asylum: after a brief drop in early 2015, the numbers climbed again in late 2015 – exceeding, in August and September 2015, the number of arrivals during those same months in 2014, and remaining high through 2016. Musalo and Lee’s report ends in 2016, but according to the U.S. Department of Homeland Security, the number of affirmative<sup>6</sup> asylum applications made by migrants from the Northern Triangle rose from 20,557 in 2015 to 25,862 in 2016 to 31,066 in 2017 (DHS Office of Immigration Statistics).

So it seems that the harsh “deterrent” policies pursued by the Obama administration – and the even harsher ones now pursued by the Trump administration – are failing to discourage asylum seekers from making the journey to the U.S. and requesting asylum. One further reason to view with skepticism the idea that “pull” factors are bringing migrants to the U.S., specifically, is that other countries in the region surrounding the Northern Triangle, namely Mexico, Belize, Costa Rica, Nicaragua, and Panama, have also seen a 13-fold increase in the number of asylum seekers from those three countries in recent years (Musalo and Lee: 152). As documented by many sources, rates of violence in Guatemala, El Salvador, and Honduras are sickeningly high and include domestic and other violence against girls and women as well as gang violence against children, teens, and families, all of which goes largely unchecked by police or state power. To take just a few representative statistics, the Council on Foreign Relations reports in its overview of the issue that El Salvador was, in 2015, the most violent country in the world that was not currently at war, with a homicide rate of 103 per 100,000. (The rate has, fortunately, fallen a bit since then, but remains high.) Also in 2015, the Honduran newspaper *La Presna* estimated that Salvadorans pay approximately \$390 million due to extortion per year, Hondurans \$200 million, and Guatemalans \$61 million (Labrador and Renwick). In 2017, the murder rates for El Salvador, Honduras, and Guatemala were, respectively, 62 per 100,000; 42 per 100,000; and 26 per 100,000 (World Bank). Compare to the United States, where, according to the FBI, the 2016 murder rate was 5.3 per 100,000. These factors seem much more decisive for asylum seekers’ patterns of migration than the fear of being locked up and ill-treated upon arrival in the U.S.

To sum up the argument as a whole, the U.S. government has legal obligations to asylum seekers, whether or not fulfilling those obligations encourages higher levels of migration. It

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<sup>6</sup> An affirmative asylum application is a request for asylum prior to any deportation proceedings being initiated against the applicant. A defensive asylum application is a request made after deportation proceedings have already been initiated.



has *actual* legal obligations laid out in the Refugee Convention and Protocol as well as in domestic U.S. law (Legal Information Institute n.d.), including the obligation to hear asylum claims in a fair court and to provide humane living conditions. In our thought experiment, of course, we are considering hypothetical obligations the U.S. would be bound by even if people arriving at the border were either civilians or soldiers of a country with which the U.S. was at war. But even if we ignored or wished to modify the state's legal obligations, poor treatment of Central American asylum seekers at the border has not made a dent in the number of people arriving and requesting asylum; indeed, the numbers have only gone up. So the current way the U.S. government is dealing with this "surge" of arrivals is not only morally troubling for many, as well as often illegal; it is ineffective.

### Responses to Objections

As I have suggested, it would certainly be possible to write a different article pointing out where the United States is failing to meet its (actual) legal obligations to asylum seekers under both U.S. and international law. I have found it more thought-provoking to ask, instead, what the U.S.'s legal obligations would be if the people arriving at the border were, in fact, part of an "invasion" during a war with a hostile power, since the language of "invasion" has been used frequently in the past five years and since we would presume that people who are legally seeking asylum after fleeing violence ought to be viewed with less suspicion and treated no more harshly than citizens, or soldiers, of a country with which the U.S. was at war. Since I have chosen to discuss treatment of asylum seekers by drawing on this analogy and by referring to the Geneva Conventions and the laws of war, I want to respond to a few possible objections and concerns that the analogy is not exact and is therefore not useful. It is *not* exact, of course, but I believe the comparison is appropriate as a thought experiment and that the objections below do not vitiate my endeavor.

First objection: civilians may be one thing, but if people trying to cross the border were in fact enemy *soldiers*, we would be trying to keep them out; it would be perfectly reasonable to fortify the border and turn people away. My answer to this objection is first to agree that the analogy to enemy soldiers does not hold regarding the question of whether people are allowed into the country at all. In this thought experiment, however, I am focusing on what legal obligations the United States would have in a case in which enemy soldiers *did* make it across the border (or were captured and brought to the U.S.). The question is what kind of treatment prisoners of war should receive once they *are* in the country and under its power, however they came to be so. And then, of course, to consider treatment of asylum seekers in light of the discussion of prisoners of war.

Second objection: wars (usually) end, which means that the status of being either a citizen or national of a hostile power, or an enemy soldier, is a temporary one. Asylum seekers, on the other hand, are requesting a status that will allow them to remain in the country indefinitely and likely permanently; they will remain in the country and become part of the political community. This too is true, but it is not clear that it makes a difference for my discussion. If anything, it seems that a government ought to be motivated to treat people who are potential future citizens more generously than it would treat people who are and will remain citizens or nationals of another country, especially a hostile one. I cannot think of a reason to do otherwise – except, perhaps, if the government is more interested in deterring asylum-seeking

than it is in deterring enemy soldiers from threatening its people. And we have already established that poor treatment of asylum seekers does not serve as a deterrent, at least in the case of Central American asylum seekers coming to the U.S. Furthermore, even if the main problem *is* that people are seeking to remain in the U.S. permanently – that is, if the government is inclined to view asylum seekers with less favor even than prisoners of war, because asylum seekers wish to remain in the country – then the proper response would be to deny the asylum claims and deport people, rather than treating them poorly while they are in custody. That raises a whole different set of concerns about the state’s legal obligations to allow asylum seekers to remain when their claims are strong enough, but for our purposes, the point is that there seems to be no justification for poor treatment *simply* based on the fact that asylum seekers are requesting to remain in the U.S. and are petitioning to gain a permanent legal status.

### Conclusion: The Ironies of Rightlessness

To sum up briefly: although the language of “invasion” in reference to the arrival of Central American asylum seekers at the southern border of the United States is generally used by politicians and pundits who wish to deny asylum and turn people away, it is instructive to consider what it would mean for the U.S. government’s legal obligations if, in fact, there *were* some sort of “invasion” going on. As I have tried to show here, the government would have to abide by strict rules regarding how to treat the so-called “invaders.” While the U.S. government has by no means always upheld its obligations to civilians in wartime or to prisoners of war, our military does emphasize and usually enforces norms around aligning its conduct with the laws of war as laid out in the Geneva Conventions. Which means that, ironically, if asylum seekers from Central America were literal invaders, if they were soldiers in an invading army, it is more than possible that they would be subject to better treatment at the hands of the U.S. government than they are now. Hannah Arendt wrote in 1951:

The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one maybe sure he has been deprived of human rights. . . . As a criminal even a stateless person will not be treated worse than another criminal, that is, he will be treated like everybody else. . . . As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals (286).

Her analogy is a different one than mine – stateless/criminal vs. asylum seeker/enemy soldier – but many of the ironies are the same. Asylum seekers do technically have rights under international and U.S. domestic law, yet they are often viewed and treated as if they were “outside the pale of law.” There seems to be a sense in which governments at least know what to *do* with enemy soldiers, yet they become strangely baffled and overwhelmed when confronted with (in the U.S. case) a few tens of thousands of asylum seekers arriving in a country of over 300 million people.

In the short term, the U.S. among other countries is, in multiple aspects, failing to abide by both domestic and international law in its treatment of asylum seekers. This would be the case even if the U.S. were suffering from a literal “invasion” of enemy soldiers. In the long

run, the fact that we in the U.S. (and many in other countries as well) treat asylum seekers so badly, and conduct so much hand-wringing over 30,000 people at our border, points to a wider problem of international governance. The development of the *Global Compact for Safe, Orderly, and Regular Migration*, signed by 152 countries worldwide in December 2018 (the United States was one of 5 “no” votes), shows an increasing awareness on the part of world leaders and governments that countries must cooperate more fully in order to promote both orderly migration and the protection of human rights as people migrate. Considering what rights are owed to people even under the hostile, stressful, and unpredictable circumstances of war may help spur both scholars and policymakers toward creative and humane ways of addressing migration, especially of asylum seekers, as the movement of human beings who cross borders to flee violence is likely only to increase in the foreseeable future.

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