

A.R.: CASE NUMBER 302/2020
PRIMERA SALA DE LA SUPREMA CORTE DE LA NACAIÓN
MINISTRO PONENTE: ANA MARGARITA RÍOS FARJAT

AMICUS CURIAE BRIEF IN SUPPORT OF IMUMI

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INTRODUCTION

On June 7, 2019, Mexico and the United States issued a joint declaration (the “Joint Declaration”)¹ announcing the Migrant Protection Protocols (“MPP”), an unprecedented policy designed to curb the entry of asylum seekers into the United States—adults and children who have been persecuted or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.² Under MPP, migrants who left their home countries and traveled through Mexico to apply for asylum in the United States at the southern border are immediately expelled from the United States and sent to Mexico to await adjudication of their United States asylum claims.³ In the two years since MPP was put in place, asylum seekers have been forced to endure prolonged exposure to extreme violence, and in some instances death, in Mexico.⁴ Those who survive the squalid conditions and violence still face

¹ Office of the Spokesperson, “U.S.-Mexico Joint Declaration,” Washington, D.C., June 7, 2019 [hereinafter Joint Declaration].

² 8 U.S.C. §§ 1101(a)(42), 1158(b)(1).

³ See Adam Liptak, *Supreme Court Allows Revival of Trump-Era ‘Remain in Mexico’ Asylum Policy*, THE NEW YORK TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/us/politics/supreme-court-immigration-asylum-mexico.html>.

⁴ According to Human Rights First (“HRF”), there were at least 1,544 publicly documented cases of murder, rape, kidnapping, assault and other crimes committed against asylum seekers displaced by MPP through February 2021. *Delivered to Danger: Trump Administration sending asylum seekers and migrants to danger*, HUMAN RIGHTS FIRST <https://www.humanrightsfirst.org/campaign/remain-mexico> (last visited on Sept. 1, 2021).

nearly insurmountable obstacles to refugee protection, including an inability to access counsel⁵ and long-distance, unsafe travel to immigration hearings.⁶

While the beneficiary and main proponent of MPP is the United States, the Joint Declaration explicitly placed the responsibility to comply with international law on the government of Mexico (“Mexico”).⁷ In implementing MPP, Mexico has failed to meet its international obligations and is liable under two distinct legal theories.

First, Mexico violates its own international law obligations by, among other things, undermining migrants’ right to seek asylum, failing to guarantee due process protections, such as access to counsel, and facilitating the forcible removal of migrants, known as *refoulement*. Mexico has further failed to meet its international law obligations to ensure the safety and well-being of migrants and to uphold the principles of family unity. *Second*, Mexico is aiding and assisting the United States’ violations of international law by accepting returned United States asylum seekers without providing for their safety or security. The United States’ expulsion of asylum seekers, leaving them to fend for themselves in Mexico, contradicts international human rights law,

⁵ According to federal data, only 7.5% of individuals removed pursuant to MPP ever obtained counsel, though the true representation rate may be even lower as that number includes individuals who were initially placed into MPP but later removed from the program and allowed to enter the United States. Through the end of December 2020, only 5,285 people subject to MPP had secured counsel out of 70,467 placed in court proceedings. *See The ‘Migrant Protection Protocols,’* AMERICAN IMMIGRATION COUNCIL (Jan. 22, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf [hereinafter American Immigration Council MPP Report]; Transactional Records Access Clearinghouse, *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/mpp/> [hereinafter TRAC, *Details on MPP*]. Moreover, individuals at the El Paso port of entry were given just one hour after arriving at court to speak with their attorney. *See* American Immigration Council MPP Report, at 2.

⁶ Not only were many asylum seekers displaced by MPP removed to areas of Mexico far away from where they arrived and must report back to, but many must also reside or pass through Tamaulipas, which has been classified as having a level of danger similar to Syria, Afghanistan, and Yemen. *See* American Immigration Council MPP Report, at 2, 4-5.

⁷ The Joint Declaration makes no mention of the United States’ international law obligations but states “Mexico will authorize the entrance of all of those individuals for humanitarian reasons, *in compliance with its international obligations*, while they await the adjudication of their asylum claims. Mexico will also offer jobs, healthcare and education according to its principles.” (emphasis added).

including the core principles of refugee protection, such as the right to seek asylum, *non-refoulement*, and the right to due process. Without Mexico’s active collaboration, the United States simply could not implement MPP.

In the absence of action by this Court, Mexico’s continued violations of international human rights law is likely to be placed before the Inter-American Court on Human Rights (the “Inter-American Court”) and other international bodies. Indeed, human rights advocates have already filed a Precautionary Measure claim before the Inter-American Commission on Human Rights (the “Inter-American Commission”), requesting that the Commission enjoin the Mexican government from continuing to violate the American Convention on Human Rights (the “American Convention” or “ACHR”) by implementing MPP.⁸ *Amici* urge this Court to end these human rights abuses and ensure Mexico respects the rights of all migrants stranded under MPP. This requires affirmative steps by Mexico, which includes at a minimum: (1) formally terminating MPP, including by refusing to accept additional United States asylum seekers and expediting the processing of MPP migrants back into the United States; (2) ensuring the safety and well-being of MPP migrants within its borders, including a focus on family unity; and (3) providing safe travel to hearings in the United States while MPP is in place.

INTEREST OF *AMICI*

⁸ Request for Precautionary Measures with Respect to Mexico Under Article 25 of the Regulations of the Inter-American Commission on Human Rights, in the Name of J.L.A.M., D.D.L.S., L.F.O., E.C. [and] All Persons Seeking Asylum that Have Been Processed in the MPP Program and Accepted for Return in Mexico, Presented by Denise Gilman, Sarah Paoletti, Daniella Burgi-Palomino, & Helen Kerwin (June 16, 2020).

*Amici*⁹ are organizations that work in the area of refugee rights, and are dedicated to ensuring that refugees and other migrants enjoy the rights to which they are entitled. This includes the internationally guaranteed human rights outlined by conventions, treaties, and other instruments that Mexico has signed and committed itself to respect, as well as *jus cogens* norms of international law. *Amici* have an interest in this case because their support and advocacy for refugee populations relies upon Mexico to fulfill its international human rights obligations.

ARGUMENT

I. Mexico’s Human Rights Obligations Arise from International and Constitutional Guarantees, and Supersede Conflicting National Legislation or Presidential Decrees.

Mexico’s commitment to uphold human rights—including the rights of refugees—derives from a combination of constitutional guarantees and international law.¹⁰ This commitment is expansive and its place in the Constitution underscores its importance to the Mexican legal system. Article 1 states that “human rights shall be interpreted according to this constitution and the international treaties on the subject” and that Mexico is obligated to work “in favor of the broader protection of people at all times.”¹¹ This commitment further states that “[a]ll authorities” of the Mexican State “are obliged to promote, respect, protect and guarantee Human Rights, in

⁹ *Amici* include Asylum Seeker Advocacy Project (ASAP), Human Rights Initiative of North Texas, International Refugee Assistance Project (IRAP), Latin America Working Group (LAWG), Mississippi Center for Justice, Oasis Legal Services, Oxfam America, Oxfam México, Professor Denise Gilman - University of Texas Immigration Law Clinic, Professor Sarah Paoletti - University of Pennsylvania Transnational Legal Clinic, RefugePoint, Tahirih Justice Center, and Witness at the Border.

¹⁰ See generally, Christina M. Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, 20 AM. SOC’Y INT’L L. 4 (2016), https://www.asil.org/insights/volume/20/issue/4/status-human-rights-treaties-mexican-domestic-law#_edn1.

¹¹ Constitución Federal, Article 1.

accordance with the principles of universality, interdependence, indivisibility and progressiveness.”¹²

The elevation of international human rights protections to Article 1 underscores the central role such rights play in Mexican law. The Constitution itself outlines a number of core human rights that are universal in nature, including the rights to life and security of person,¹³ fair and due process,¹⁴ and family unity.¹⁵

Mexico recognizes that its human rights obligations stem not only from its Constitution, but also from the country’s international commitments. Mexico has ratified a number of significant human rights treaties on a range of subject matters. Mexico was an original signatory of the American Declaration on the Rights and Duties of Man (“American Declaration”) in 1948 and, less than a year later, voted in favor of the Universal Declaration of Human Rights (“UDHR”).¹⁶ Mexico has long been a signatory of the Convention Relating to Status of Refugees (“Refugee Convention”),¹⁷ which forms the basis of international refugee protections, such as the prohibition against *non-refoulement*, a *jus cogens* customary international law norm from which

¹² *Id.*

¹³ Constitución Federal, Article 4 (“Every person has a right to live in an adequate environment for her development and welfare.”).

¹⁴ Constitución Federal, Article 14 (“No one can be deprived of his freedom, properties or rights without a trial before previously established courts, complying with the essential formalities of the proceedings and according to those laws issued beforehand.”).

¹⁵ Constitución Federal, Article 4 (“Every family has a right to a dignified and decent household.”).

¹⁶ *International Bill of Human Rights: Universal Declaration of Human Rights – Voting Record*, UNITED NATIONS DIGITAL LIBRARY, <https://digitallibrary.un.org/record/670964?ln=en> (last visited on August 31, 2021); *What is the Universal Declaration of Human Rights and Why Was It Created?*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited on August 31, 2021).

¹⁷ Mariana Echandi, *UNHCR hails Mexico as new refugee law comes into force*, UNHCR (Jan. 28, 2011), <https://www.unhcr.org/en-us/news/latest/2011/1/4d42e6ad6/unhcr-hails-mexico-new-refugee-law-comes-force.html>; Mexico did not fully ratify the Refugee Convention or the 1967 Protocol until 2000. *Convention relating to the Status of Refugees*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (last visited on August 31, 2021).

no state can deviate.¹⁸ Mexico is also a signatory of the Cartagena Declaration, which expands the definition of “refugee” to encompass those who flee their home country due to “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”¹⁹ Mexico was an early adopter of the International Covenant on Civil and Political Rights (“ICCPR”), which protects a host of rights including life and security of person, due process, and family unity.²⁰ Mexico has further ratified a number of other treaties guaranteeing a wide range of protections that apply to refugees, such as the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“CAT”),²¹ the Convention on the Rights of the Child (“CRC”),²² and the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).²³

¹⁸ The principle of *non-reoulement* prohibits “any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened.” Exec. Comm. of the High Commissioner’s Programme, Note on International Protection, ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001); *see also* Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT’L J. REFUGEE L. 533, 557 (2001).

¹⁹ *See Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf.

²⁰ International Covenant on Civil and Political Rights Articles 6(1), 9(1), 13, 14, 17, 23(1), 26, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR]; *UN Treaty Body Database: Ratification Status for Mexico*, UNITED NATIONS HUMAN RIGHTS TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited August 31, 2021).

²¹ Mexico ratified CAT in 1986. *See UN Treaty Body Database: Ratification Status for Mexico*, UNITED NATIONS HUMAN RIGHTS TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited August 31, 2021).

²² Mexico ratified the CRC the same year it was open for signature in 1990. *See UN Treaty Body Database: Ratification Status for Mexico*, UNITED NATIONS HUMAN RIGHTS TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited August 31, 2021).

²³ Mexico ratified ICESCR in 1981. *See (UN Treaty Body Database: Ratification Status for Mexico)*, UNITED NATIONS HUMAN RIGHTS TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=112&Lang=EN (last visited August 31, 2021).

Perhaps of greatest import here is Mexico’s ratification of the American Convention in 1981.²⁴ The ACHR is an expansive human rights treaty, with provisions covering the principle of *non-refoulement*²⁵ and the rights to seek asylum,²⁶ life,²⁷ fair and due process²⁸ and family unity.²⁹ The San Salvador Protocol of 1988—which Mexico ratified in 1996³⁰—expanded the ACHR’s protections to include the rights to health³¹ and education.³² The ACHR’s provisions form the core of the human rights system within the Americas and have been frequently interpreted by the Inter-American Commission and the Inter-American Court.³³ Mexico has been brought before the Inter-American Court at least 14 times since 1998 and has been the subject of 18 reports on the merits before the Commission since 1990.³⁴

Mexico’s human rights obligations—both those derived from the Constitution and from international law—are not interpreted in a hierarchy, but rather are read in tandem.³⁵ In 2013, the Supreme Court clarified that Mexico’s international human rights obligations are superior to all

²⁴ *American Convention on Human Rights “Pact of San Jose, Costa Rica”: Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited on August 31, 2021).

²⁵ *American Convention on Human Rights*, Article 22(8), 1144 U.N.T.S. 123 (1970) [hereinafter ACHR].

²⁶ ACHR, Article 22(7)

²⁷ ACHR, Articles 4(1), 4(5).

²⁸ ACHR, Articles 24, 25.

²⁹ ACHR, Articles 17(1), 19.

³⁰ *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador”: Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, <https://www.oas.org/juridico/english/sigs/a-52.html> (last visited on August 31, 2021).

³¹ ACHR San Salvador Protocol, Articles 10, 11, 16.

³² ACHR San Salvador Protocol, Article 13

³³ *What is the IACHR?*, OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited on August 31, 2021) (describing the Commission and the Inter-American Court as “institutions within the inter-American system for the protection of human rights” designed to “promote the observance and protection of human rights.”).

³⁴ *Judgments: Mexico*, INTER-AMERICAN COURT OF HUMAN RIGHTS, https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en (last visited on August 31 2021); *Merits Reports: Mexico*, OAS: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/iachr/decisions/merits.asp> (last visited on August 31, 2021).

³⁵ Constitución Federal, Article 133.

other forms of domestic legislation other than the Constitution itself.³⁶ As a result, Mexico's human rights obligations derive from a blend of international law and constitutional provisions.³⁷

MPP directly conflicts with a myriad of Mexico's human rights obligations, and therefore is superseded by Mexico's constitutional and treaty-based human rights commitments.³⁸ MPP reflects little more than a political agreement between two countries to restrict immigration and the June 7, 2019 Joint Declaration and corresponding supplementary agreement, in the words of Mexico's Foreign Ministry, do not represent a binding bilateral agreement.³⁹ Absent further legislation or ratification, MPP is merely a statement of policy. And even if MPP did have some legal effect vis-à-vis existing domestic law, it cannot extend so far as to violate the Constitution and consequently cannot supersede Mexico's human rights obligations under existing treaty law. As discussed below, MPP is wholly incompatible with Mexico's human rights obligations and stands in stark contrast to the language and application of the numerous human rights treaties to which Mexico is a party. We accordingly urge the Court to reject Mexico's implementation of MPP and ensure that the rights of all migrants subjected to MPP are respected.

³⁶ Suprema Corte de Justicia, Exp. 489/2010. As one scholar explains, "After Radilla case, rulings by Mexican federal courts were characterized by a delicate balance between enforcement of domestic legislation and Supreme Court precedents and compliance of international law *This reform basically positioned international human rights norms at the same level as the Mexican Constitution.*" Karina Ansolabehere, *One Norm, Two Models: Legal Enforcement of Human Rights in Mexico and the United States*, 8 MEXICAN L. REV. 93, 117 (2016) (emphasis added), available at <https://revistas.juridicas.unam.mx/index.php/mexican-law-review/article/view/10241/12260#ftn46>.

³⁷ Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, 20 ASIL 4, (Feb. 23, 2016), https://www.asil.org/insights/volume/20/issue/4/status-human-rights-treaties-mexican-domestic-law#_ednref3 ("The Supreme Court . . . jettisoned the concept of 'hierarchy,' and by a majority of ten votes, decided that human rights are recognized as a whole as a kind of amalgam, whether they derive from the Constitution or from international treaties to which Mexico is a party.")

³⁸ These violations are expanded upon in detail in Part II.

³⁹ *Mexico publishes Trump's 'secret deal' on migration*, AFP (June 15, 2019), <https://www.france24.com/en/20190615-mexico-publishes-trumps-secret-deal-migration> (published through France 24).

II. Mexico's Implementation of MPP Violates International Human Rights Law, Including the Core Principles of Refugee Protection.

a. Mexico's Implementation of MPP Violates Refugees' Right to Seek Asylum.

In parallel with Mexico's domestic legislation protecting the right of refugees to seek asylum,⁴⁰ the state has also, across a range of international and regional instruments, affirmed its commitment to upholding migrants' right to seek asylum. Article 14(1) of the UDHR guarantees the right of refugees to seek asylum,⁴¹ and the ACHR and the American Declaration further confirm Mexico's obligation to ensure refugees' "right to seek and be granted/receive asylum in a foreign territory."⁴² The universal recognition of these rights has transformed the right to seek asylum into a general principle of international law.⁴³ Further, Mexico—as a party to the Cartagena Declaration—has adopted a definition of refugee encompassing all persons who flee their countries due to violence, conflict, and other human rights abuses.⁴⁴

The Inter-American Commission has already analyzed programs similar to MPP and found that they violate migrants' right to seek asylum. In *John Doe*, Canada and the United States implemented a "direct-back policy" in which Canada automatically returned asylum seekers back

⁴⁰ In 2011, Mexico adopted its Immigration Law and Refugee law, amended in 2014 and now called the Law on Refugees, Complementary Protection, and Political Asylum. See *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children*, HUMAN RIGHTS WATCH (Mar. 31, 2016), <https://www.hrw.org/report/2016/03/31/closed-doors/mexicos-failure-protect-central-american-refugee-and-migrant#>.

⁴¹ Universal Declaration of Human Rights, Article 14(1) [hereinafter UDHR].

⁴² ACHR, Article 22(7); American Declaration on the Rights and Duties of Man, Article 27, 43 1 Annals of the O.A.S. 130 (1949) [hereinafter American Declaration].

⁴³ See, e.g., María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT'L J. REFUGEE L. 3 (2015), available at <https://doi.org/10.1093/ijrl/euu062>; Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, in *The Oxford Handbook of Refugee and Forced Migration Studies* (E. Fiddian-Qasmiyeh, G. Loescher, K. Long, & N. Sigona, eds.), available at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021>.

⁴⁴ See *supra* note 20 and accompanying text.

to the United States while they waited for their Canadian asylum claims to be processed.⁴⁵ Canada’s “failure to permit the [migrants] to remain in Canada until processing could be completed, [and failure] to gain assurances from U.S. officials that they would permit the [migrants] to return [to Canada] for their scheduled appointments” violated the migrants’ right to seek asylum, as guaranteed by Article 27 of the American Declaration.⁴⁶

Like the United States in *John Doe*, Mexico interferes with asylum seekers’ right to seek asylum by placing a geographical barrier between the migrants and the state in which they seek refuge, the United States, and then failing to ensure the migrants will be able to return to the United States for their court hearings. Asylum seekers returned to Mexico pursuant to MPP are often forced to travel long distances through highly dangerous areas to get to their court hearings because Mexico, in collaboration with the U.S. government, relocates migrants to areas that are far from their immigration court,⁴⁷ and that often have elevated rates of criminal activity.⁴⁸ These migrants face the threat of kidnapping, rape, and murder to attend their own court hearings.⁴⁹

⁴⁵ See *John Doe et al. v. Canada*, Case No. 12.586, Inter-Am. Comm’n H.R., Report No. 78/11 (merits), ¶ 2 (July 21, 2011), available at <https://www.refworld.org/cases,IACHR,502b61572.html> [hereinafter IACHR (Commission), *John Doe et al.*].

⁴⁶ See *Id.* at ¶ 97.

⁴⁷ See American Immigration Council MPP Report, at 2, 4-5. 6; see also *Migrant Protection Protocols (Archive) – How does the MPP process work*, DEPARTMENT OF HOMELAND SECURITY (April 14, 2020), <https://www.dhs.gov/archive/migrant-protection-protocols> (The migrants are “served with a notice to appear (NTA) with the time and location of their initial court hearing”).

⁴⁸ See *supra* note 4; see also *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger*, HUMAN RIGHTS FIRST (Dec. 2020),

<https://www.humanrightsfirst.org/sites/default/files/HumanitarianDisgrace.12.16.2020.pdf> (“[Mexico’s] homicide rate for 2020 is likely to be the highest in decades.”); Caitlin Dickerson, *Inside the Refugee Camp on America’s Doorstep*, THE NEW YORK TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html>.

⁴⁹ See Zachary Mueller, *Immigration 101: What is ‘Remain in Mexico,’ or the Migration Protection Protocols (MPP)?*, AMERICA’S VOICE (Feb. 28, 2019), <https://americasvoice.org/blog/remain-in-mexico-mpp/>; see also *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process*, HUMAN RIGHTS FIRST (Aug. 2019), <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>; *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUMAN RIGHTS WATCH (Jan. 29, 2020), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>; *Pandemic as Pretext:*

The data reveal how severely MPP has cut off access to asylum: as of January 2021 (when MPP was temporarily suspended by the Biden Administration), nearly 68% of migrants in Laredo, Texas⁵⁰ and over 60% in El Paso, Texas had been given an *in absentia* removal order because they were unable to attend their court hearings.⁵¹ Once an asylum seeker receives such an order, it becomes extremely difficult to receive protection in the United States. Although Mexico provides transportation for migrants to relocate further into the interior of the country, it has chosen not to provide transportation back to the border for attendance at hearings.⁵² It does, however, provide buses back to their countries of origin for migrants forced to abandon their asylum cases.⁵³

Once migrants are placed in MPP, their chances of securing legal representation dramatically decrease, diminishing their ability to meaningfully seek asylum.⁵⁴ Migrants in MPP with legal representation are 10 times more likely to receive asylum protection than those who are unrepresented⁵⁵ and migrants allowed to stay in the United States are 7 times more likely to obtain legal representation than those who are returned to Mexico.⁵⁶ Although Mexico stated that those

Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger, HUMAN RIGHTS FIRST (May 2020), <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf>.

⁵⁰ See TRAC, *Details on MPP* (hearing location set to Laredo Texas).

⁵¹ See *id.* (hearing location set to El Paso, Texas).

⁵² See Jay Root, *Asylum-seeking migrants pushed farther south into Mexico, left to fend for themselves*, THE TEXAS TRIBUNE (Aug. 9, 2021), <https://www.texastribune.org/2019/08/09/migrants-seeking-asylum-america-pushed-farther-south-mexico/>.

⁵³ See American Immigration Council MPP Report, at 5 (“Multiple reports have indicated that some individuals sent back under MPP have been coerced onto these buses and end up hundreds of miles from the border with no way to get back for their court dates”); Kevin Sieff, *Mexico has pushed hundreds of migrants expelled from the U.S. on to Guatemala, stranding them in a remote village far from their homes*, WASH. POST (Aug. 10, 2021), <https://www.washingtonpost.com/world/2021/08/10/mexico-deport-guatemala/>.

⁵⁴ See *supra* note 5; see also, American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 28, 2016) <https://www.americanimmigrationcouncil.org/research/acceounsel-immigration-court>.

⁵⁵ *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees*, HUMAN RIGHTS FIRST, at 8 (June 2020), <https://www.humanrightsfirst.org/sites/default/files/AdministrationDismantlingUSAsylumSystem.pdf>.

⁵⁶ See TRAC Immigration, *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases* (Dec. 19, 2019) <https://trac.syr.edu/immigration/reports/587/>.

“who have receive[d] a notice to appear before a U.S. immigration judge have access without interference to information and legal services,”⁵⁷ as of July 2021, less than 10% of migrants in MPP were able to obtain legal representation.⁵⁸

Mexico’s implementation of MPP has eviscerated migrants’ right to seek asylum because the geographical and practical barriers in place make meaningful access to the U.S. asylum process and access to counsel impossible for the vast majority of asylum seekers sequestered in Mexico.

b. Mexico’s Implementation of MPP Violates the *Jus Cogens* Principle of *Non-Refoulement*.

The Refugee Convention, which is the cornerstone of refugee rights, commits Mexico to *non-refoulement*, a fundamental principle of international law that prohibits states from forcibly expelling refugees to countries where they may face or fear threats to their lives or freedom.⁵⁹ This principle is also enshrined in Article 22(8) of the ACHR, which holds that “[i]n no case may an alien be deported or returned to a country. . . if in that country his right to life or personal freedom is in danger of being violated.”⁶⁰ Indeed, *non-refoulement* is so fundamental that it appears in a number of international instruments to which Mexico is a party, including the CAT and the CRC, as well as in customary international law.⁶¹ So imperative is the right not to be returned to a

⁵⁷ See Secretaria de Relaciones Exteriores, *Position of Mexico on the Decision of the U. S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018); *Policy Guidance for Implementation of the Migrant Protection Protocols*, DEP’T. OF HOMELAND SECURITY, at 2-3 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

⁵⁸ See TRAC, *Details on MPP*.

⁵⁹ Convention Relating to the Status of Refugees, Article 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁶⁰ ACHR, Article 22(8).

⁶¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, 23 I.L.M. 1027 (1984) [hereinafter CAT]; Committee on the Rights of the Child, General Comment No. 6 (2005), <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>, ¶¶ 26-28 (interpreting the Convention on the Rights of the Child as including *non-refoulement*); UNHCR, *The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal*

country where one will face persecution or death that it has achieved the status of *jus cogens*, an international norm of such importance that no state may violate it.⁶²

The principle of *non-refoulement* applies to migrants whose refugee status has not yet been determined.⁶³ The Inter-American Court has held that *non-refoulement* extends to any foreign person, not only asylum seekers and refugees.⁶⁴ *Non-refoulement* applies not only in the territory of a state, but also to foreign persons arriving at a state's border⁶⁵ or who are intercepted prior to their arrival at a state's border.⁶⁶ In an Advisory Opinion, the Inter-American Court confirmed that *non-refoulement* applies to “every person in the territory or **who is in any way subjected to its authority, responsibility, or control.**”⁶⁷ Asylum seekers reaching Mexico's border with the United States – or those who have not even yet reached the border, yet are impacted by decisions of United States authorities – merit these *non-refoulement* protections.

Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, (Jan. 31, 1994), <http://www.refworld.org/docid/437b6db64.html>.

⁶² Jean Allain, *The jus cogens nature of non-refoulement*, 13 INT'L J. REFUGEE L. 533 (2001).

⁶³ See *Report on Refugees and Migrants in the United States: Families and Unaccompanied Children*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ¶ 101 (July 24, 2015), available at <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

⁶⁴ See *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System*, Advisory Opinion OC-25/18, Inter-Am. Ct. H.R., ¶ 186 (May 30, 2018), available at <https://www.refworld.org/pdfid/5c87ec454.pdf> [hereinafter IACHR (Court), *Advisory Opinion on the Institution of Asylum*].

⁶⁵ See *id.* at ¶ 187 (2018), (citing to United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Implementation of the Extraterritorial Obligations of Non-refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 35).

⁶⁶ See *Hirsi Jamaa v. Italy*, App. No. 27765/09, Eur. Ct. H.R., ¶¶ 129, 134-38 (Feb. 23, 2021) (finding violation of principle of *non-refoulement* when Italy intercepted Somali and Eritrean migrants and returned them to Libya) [hereinafter ECHR, *Hirsi Jamaa*].

⁶⁷ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion, OC-21/14, Inter-Am. Ct. H.R., ¶ 235 (Aug. 19, 2014) [hereinafter IACHR (Court), *Rights and Guarantees of Children*].

States must not only abide by this fundamental principle, but must also adopt “positive measures” to ensure compliance.⁶⁸ *Refoulement* also includes “chain” or indirect *refoulement*, which refers to the return of asylum seekers to third countries that then deport the asylum seekers to another country where they face persecution and danger.⁶⁹ Bilateral agreements between States do not absolve States of their own respective *non-refoulement* obligations, even where the country to which the migrants are returned is deemed to be safe under the agreement.⁷⁰

By implementing MPP, Mexico affirmatively violates the principle of *non-refoulement* and continues its historic practice of *refouling* migrants to their countries of origin.⁷¹ Since implementing MPP, Mexico has taken steps to increase its deportation of migrants, including those subject to MPP. In 2019, the head of Mexico’s immigration services pledged to deport up to 2,500 migrants per day⁷² and Mexico’s foreign ministry has even “boast[ed]” about Mexico’s “robust detention and deportation figures.”⁷³ COVID-19 has made matters worse, with Mexico deporting

⁶⁸ See IACHR (Court), *Advisory Opinion on the Institution of Asylum*, ¶ 194 (citing to IACHR (Court), *Rights and Guarantees of Children and Case of Wong Ho Wing v. Peru*, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R., (ser. C) No. 297, ¶ 128 (June 30, 2015) [hereinafter IACHR (Court), *Wong Ho Wing*].).

⁶⁹ See *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims Trafficking*, IACHR, Principle 6 (Dec. 7, 2019), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-4-19-en.pdf>.

⁷⁰ IACHR (Commission), *John Doe et al.*, at ¶ 106-112; see also ECHR, *Hirsi Jamaa*, at ¶ 129.

⁷¹ Prior to the implementation of MPP, Mexico routinely *refouled* migrants to their countries of origin without informing them of their right to seek asylum, a practice that has become more prevalent under MPP. See *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central American Seeking Asylum*, AMNESTY INTERNATIONAL (Jan. 2018), <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

⁷² Beatrice Cuevaz, *Instala INM 12 Puntos en Frontera Sur, Prevé Deportar Dos Mil 500 al Día*, TRIBUNA DE LOS CABOS (June 18, 2019), <https://tribunadeloscabos.com.mx/noticias/nacional/instalainm-12-puntos-en-frontera-sur-prevé-deportar-dos-mil-500-aldia-30745>.

⁷³ David Agren, *Migrants Brave the “Beast” as Mexico Cracks Down Under US Pressure*, THE GUARDIAN (June 5, 2019), <https://www.theguardian.com/world/2019/jun/05/migrants-brave-the-beast-as-mexico-cracks-down-under-us-pressure>.

asylum seekers and migrants en masse by transporting them to Mexico's southern border and illegally forcing them across the border into Guatemala.⁷⁴

Beyond direct deportations, Mexico acts in other ways under MPP to force migrants back to their countries of origin. Mexico has militarized its southern border with Guatemala, blocking asylum seekers from entering Mexico and thereby preventing them from ever making their claims of asylum in the United States.⁷⁵ Mexico has also stepped up arrests of migrants—often a prelude to deportation—to record rates.⁷⁶ Mexico further fails to adequately protect asylum seekers from extortion and kidnapping, sometimes committed even by Mexican officials, placing immense pressure on migrants awaiting their hearings.⁷⁷ The squalid conditions present at migrant detention facilities,⁷⁸ the limited access to food, shelter, and protection,⁷⁹ the risk of arrest by Mexican police, and the often horrific abuse migrants face at the hands of cartels and Mexican officials⁸⁰ force

⁷⁴ *Pandemic as a Pretext: Trump Administration exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, HUMAN RIGHTS FIRST, at 16-17 (May 13, 2020), <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf>

⁷⁵ See James Fredrick, *How Mexico Beefs Up Immigration Enforcement To Meet Trump's Terms*, NPR (July 13, 2019) (“The National Guard is working...to prevent migrants from entering Mexico from Guatemala in the south, and to stop them from leaving to the U.S. in the north”), <https://www.npr.org/2019/07/13/740009105/how-mexico-beefs-up-immigration-enforcement-to-meet-trumps-terms>.

⁷⁶ See James Fredrick, *Mexico is Overwhelmed By Asylum Claims As It Ramps Up Immigration Enforcement*, NPR (June 14, 2019) <https://www.npr.org/2019/06/14/732485182/mexico-is-overwhelmed-by-asylum-claims-as-it-ramps-up-immigration-enforcement> (In 2019, “from January to May, Mexico detained 74,031 migrants, up 36% compared with the same period in 2018”); *Assessment of the Migrant Protection Protocols*, DEP'T OF HOMELAND SECURITY (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf; see also *infra* Part II.c.

⁷⁷ See HUMAN RIGHTS FIRST, *Delivered to Danger*, *supra* note 50, at 11 (“[A]sylum seekers in Mexicali reported that Mexican federal police forced them from a bus near Mazatlán threatening to beat them and turn them in to immigration for deportation if they refused to hand over whatever money they were carrying.”).

⁷⁸ One such detention facility in Tuxtla Gutiérrez, which has an official capacity of 80 people but houses more than 400 people at any given time, provides a stark example of how MPP violates the principle of *non-refoulement*. See Fredrick, *Overwhelmed*, *supra* note 76.

⁷⁹ See Rebecca Plevin, *The American Dream wasn't possible: Asylum-seekers deterred by border rules return home*, DESERT SUN (Jul. 18, 2019), <https://www.desertsun.com/story/news/politics/immigration/2019/07/18/asylum-seekers-mexico-forced-head-home-under-trump-border-policy/1740988001/>.

⁸⁰ In 2021, Human Rights Watch published a 103-page report detailing the abominable conditions that migrants and their children must endure in while they wait for their claims to be heard. See “*Like I'm Drowning*” *Children and*

many migrants to “voluntarily” return to their country of origin prior to their asylum hearing in the United States, especially given the only free transportation provided by Mexico is back to their country of origin, not back to the border for their asylum hearing.⁸¹ Nor can Mexico point to the Joint Declaration creating MPP—a bilateral policy agreement with the United States—as a defense, as numerous courts have found such agreements cannot overcome a peremptory norm like the prohibition on *non-refoulement*.⁸²

c. Mexico’s Implementation of MPP Violates the Right to Life and Security of Person and the Right to Liberty.

Mexico’s implementation of MPP violates Article 1 of the American Declaration, which states that “[e]very human being has the right to life, liberty and the security of his person.”⁸³ Articles 4 and 5 of the American Convention, Article 6 and 9 of the ICCPR, and Article 3 of the UDHR also provide for the rights to life and the security of person.⁸⁴ The Inter-American Court has held that Article 4 of the American Convention “presupposes not only that no person may be deprived of his life arbitrarily” but requires states to adopt “appropriate measures to protect and preserve the right to life,” including affirmative measures to ensure access to basic life

Families Sent to Harm by the US ‘Remain in Mexico’ Program, HUMAN RIGHTS FIRST, at 66 (Jan. 6, 2021), https://www.hrw.org/sites/default/files/media_2021/04/mexico0121_web.pdf.

⁸¹ Patrick J. McDonnell, *Mexico sends asylum seekers south – with no easy way to return for U.S. court dates*, L.A. TIMES (Oct. 15, 2019), <https://www.latimes.com/world-nation/story/2019-10-15/buses-to-nowhere-mexico-transport-migrants-with-u-s-court-dates-to-its-far-south>.

⁸² See *supra* note 70 and accompanying text.

⁸³ American Declaration, Article 1.

⁸⁴ ACHR, Articles 4,5; ICCPR, Articles 6, 9; UDHR, Article 3.

necessities.⁸⁵ These rights are non-derogable and may not be suspended even in cases of war, public danger or other threats.⁸⁶

However, in enforcing MPP, Mexico suspends those rights by knowingly placing asylum seekers in dangerous and unfamiliar areas of the country without adequate protection and ignoring imminent risks that they will be threatened, attacked, or killed.⁸⁷ In turning a blind eye to the actions of criminal third parties, and even permitting its own officials to engage in criminal behavior, Mexico repeatedly violates the right to life and security of persons.⁸⁸

In addition to lack of protection from cartel and police violence, Mexico jeopardizes migrants' rights to life and human dignity by offering inadequate shelter, food, and other life necessities. Many migrants are left to fend for themselves in the streets, while others are placed into crowded shelters or tenements that are vulnerable to flooding and offer little protection from the elements.⁸⁹ Often, humanitarian groups are the only source of food, shelter, clothing, medical care, and other necessities.⁹⁰ These living conditions result in intense psychological distress for asylum seekers.⁹¹

⁸⁵ *Gonzalez et al (Cotton Field) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter. Am. Ct. H.R., ¶ 245 (Nov. 16, 2009) [hereinafter IACHR (Court), *Gonzalez*]; Article 4(1) (Prohibition of Arbitrary Deprivation of Life) of the ACHR reiterates the State's requirement to guarantee and preserve the right to life for the people within its jurisdiction.

⁸⁶ See IACHR (Court), *Gonzalez*, at ¶ 244.

⁸⁷ See *supra* notes 77-80 and accompanying text.

⁸⁸ See *supra* notes 77-80 and accompanying text.

⁸⁹ Caitlin Dickerson, *Inside the Refugee Camp on America's Doorstep*, THE NEW YORK TIMES (Oct. 23, 2020), <https://www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html>.

⁹⁰ HUMAN RIGHTS WATCH, *Like I'm Drowning*, *supra* note 80, at 49.

⁹¹ Helen Perry & Maura Sammon, *Medical Summary for Refugee Camp: Matamoros*, GLOBAL RESPONSE MANAGEMENT,

<https://www.humanrightsfirst.org/sites/default/files/GRM%20Report%20on%20Conditions%20in%20Matamoros.pdf> (last accessed on Sept. 2, 2021).

The American Convention—through Article 7(1)—also mandates that the State prevent public officials and private parties from violating the right to liberty for those inside its borders. When an individual’s liberty has been violated within its jurisdiction, the State must promptly investigate and punish those responsible for committing the violation.⁹² If such violations “are not investigated genuinely” then the private parties are “to some extent, assisted by the public authorities, which would entail the State’s international responsibility.”⁹³ In other words, the State cannot permit private persons to act with impunity in violation of rights guaranteed by the Convention.⁹⁴

Migrants in MPP routinely see their rights to liberty violated and Mexico does little to protect them or investigate and punish those responsible. It is well established that MPP has forced migrants into the hands of cartels.⁹⁵ After being placed into MPP, Mexico relocates asylum seekers to border towns with high rates of violence or transports them to towns in the interior, far from any immigration proceedings. Many of these towns are known hotbeds for organized crime and the dangers faced by asylum seekers in these areas are amplified by their status and unfamiliarity with the area.⁹⁶

⁹² See IACHR (Court), *Gonzalez*, at ¶ 236. (The most important factor in this analysis is determining “whether a violation [...] has occurred with the support or the acquiescence of the government or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.”) (quoting *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment, Inter-Am. Ct. H.R., (ser. C) No. 4, ¶ 173 (July 29, 1988)).

⁹³ *Id.* at ¶ 291.

⁹⁴ In *Gonzalez*, the Inter-American Court found that “[Mexico] was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed.” *Id.* at ¶ 283. The Court held that “in this context, an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days.” *Id.* In failing to act promptly follow reports of disappearances, Mexico did not act reasonably to end such women’s deprivation of liberty and thus violated the women’s right to liberty and the American Convention. *Id.* at ¶ 284.

⁹⁵ See, e.g., HUMAN RIGHTS FIRST, *Delivered to Danger*, *supra* note 49, at 3, 9 (“[A]sylum seekers returned under MPP have been kidnapped outside of migration offices in Mexico, virtually in sight of U.S. officials.”).

⁹⁶ U.S. DEP’T OF STATE, *Mexico Travel Advisory, Level 4 States*.

<https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>; *Mexican*

One particularly dangerous and common location is the state of Tamaulipas.⁹⁷ Asylum seekers there, awaiting entry into the United States, are frequently kidnapped for ransom, in some cases with the apparent assistance of authorities.⁹⁸ One member of the Juárez Cartel stated that MPP “keep[s] people stuck in our country,” and that kidnapping them is a direct response to MPP’s implementation.⁹⁹ He said that the cartel is “pull[ing] people off the streets and tak[ing] them to a safe house;” and when asylum seekers’ families fail to pay ransom, they “end up where they end up, maybe a mass grave.”¹⁰⁰

Other states and border regions to which individuals are sent under MPP are comparably dangerous,¹⁰¹ with over 50% of those migrants forced into MPP facing violence, including beatings, robbery, and extortion.¹⁰² In 2020 alone, Ciudad Juárez endured a total of 1,646 murders, averaging 4.2 murders per day.¹⁰³ To put the level of violence in perspective, HRF has documented

Police Helped Cartel Massacre 193 Migrants, Documents Show, NPR (Dec. 22, 2014),

<https://www.npr.org/2014/12/22/372579429/mexican-police-helped-cartel-massacre-193-migrants-documents-show>.

⁹⁷ See e.g., José de Córdoba, *Mexico Arrest 12 Police Officers Over Migrant Massacre*, WALL STREET J. (Feb. 3, 2021), <https://www.wsj.com/articles/mexico-arrests-12-police-officers-over-migrant-massacre-11612333197>.

⁹⁸ See Nicole Austin Hillary, *DHS OIG Formal Complaint Regarding 'Remain in Mexico'*, HUMAN RIGHTS WATCH (June 2, 2020),

<https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico>.

⁹⁹ Paola Ramos, *Warning From Wuhan & Cuban Hostage Crisis*, VICE NEWS (Apr. 19, 2020), <https://www.sho.com/vice/season/1/episode/4/warning-from-wuhan-and-cuban-hostage-crisis>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see also U.S. DEP’T OF STATE, OVERSEAS SECURITY ADVISORY COUNCIL, *Mexico 2020 Crime & Safety Report: Tijuana* (2020), <https://www.osac.gov/Content/Report/6da3d429-8e47-4cf5-b483-1949341e677f>; U.S. DEP’T OF STATE, OVERSEAS SECURITY ADVISORY COUNCIL, *Mexico 2020 Crime & Safety Report: Ciudad Juárez* (2020), <https://www.osac.gov/Content/Report/24a57125-75ad-473b-b1bc-190280d20573>.

¹⁰² A 2019 study of asylum seekers in MPP found that approximately one quarter of those interviewed had been threatened with or experienced physical violence while in Mexico. Tom K. Wong, *Seeking Asylum, Part 2*, U.S. IMM. POLICY CENTER 9 (Oct. 29, 2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

¹⁰³ Julian Resendiz, *Juarez sees new spike in violence against women*, BORDER REPORT (Jan. 4, 2021), <https://www.borderreport.com/hot-topics/border-crime/juarez-sees-new-spike-in-violence-against-women/#:~:text=According%20to%20authorities%20south%20of,year%2C%20with%20172%20female%20victims.>

6,356 instances of murder, rape, kidnappings, and other acts of physical violence against asylum seekers and other migrants returned to Mexico under MPP in 2021 alone.¹⁰⁴

Another study estimates that 18.7% of returned asylum seekers will be threatened with physical violence within ten days of returning to Mexico, while 32% will experience actual harm within ninety days.¹⁰⁵ Once their hearing dates arrive, asylum seekers often are required to arrive at the port of entry at 4:30 A.M.,¹⁰⁶ necessitating travel to and across the border in the middle of the night and exacerbating the risks of an already dangerous journey.¹⁰⁷

Finally, Mexico further violates the right to life and security of person by allowing its officials to commit acts of violence against migrants. In 2019, federal police kidnapped a Honduran asylum seeker in Ciudad Juárez, held her hostage for days, and repeatedly sexually assaulted her.¹⁰⁸ In January of this year, 19 people—including 13 migrants on their way to the United States—were allegedly massacred by Mexican police in Tamaulipas.¹⁰⁹ MPP has permitted Mexico to continue its ongoing violations of international law by its own officials.

d. Mexico's Implementation of MPP Violates Internationally Guaranteed Rights to Due Process.

¹⁰⁴ *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, HUMAN RIGHTS FIRST (Aug. 2021), https://www.humanrightsfirst.org/sites/default/files/HumanRightsTravesty_FINAL.pdf; Human Rights First has separately tracked 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants returned under MPP from 2019 to early 2021. *See* HUMAN RIGHTS FIRST, *Delivered from Danger*, *supra* note 49.

¹⁰⁵ *See* Wong, *Seeking Asylum*, *supra* note 102, at 9.

¹⁰⁶ *See Fully End the Migrant Protection Protocols: Ensure Safety for All Subjected to Horrific Policy*, HUMAN RIGHTS FIRST, at 2 (Apr. 2021), <https://www.humanrightsfirst.org/sites/default/files/FactsheetFullyEndMPP.pdf>.

¹⁰⁷ *See id.*; *See Examining the Human Rights and Legal Implications of DHS' "Remain in Mexico" Policy*: Hearing Before Subcommittee on Border Security, Facilitation & Operations, House Comm. on Homeland Security, 116th Cong. 105, 131, 139, 142 (2019), available at <https://www.congress.gov/116/chr/CHRG-116hhr/40466/CHRG-116hhr/40466.pdf>.

¹⁰⁸ HUMAN RIGHTS FIRST, *Delivered to Danger*, *supra* note 49, at 4.

¹⁰⁹ Kevin Sieff & Gabriela Martinez, *Mexican police charged in massacre of Guatemalan migrants near U.S. border*, WASH. POST (Feb. 3, 2021), https://www.washingtonpost.com/world/the_americas/mexico-tamaulipas-police-migrant-killing/2021/02/03/32c22274-65c7-11eb-8468-21bc48f07fe5_story.html.

By denying asylum seekers access to courts, full and fair hearings, and case reviews prior to expulsion, Mexico also is in violation of its due process obligations. Mexico is an original signatory to the UDHR,¹¹⁰ which recognizes a variety of due process and fair trial rights for all individuals, including equal protection and non-discrimination before the law, freedom from arbitrary arrest or detention, and the right to a fair and public hearing by an impartial tribunal to determine an individual's rights.¹¹¹ Mexico is also bound by the ICCPR, which guarantees the right to fair hearings, as well as equal protection and nondiscrimination before the law, regardless of national origin.¹¹²

The American Convention similarly binds Mexico to the legal principles of equality and nondiscrimination,¹¹³ holding that all individuals have the right to effective recourse before a competent tribunal prior to any state action depriving that person of their rights.¹¹⁴ The Inter-American Court has interpreted this provision as obliging states to institute a process that will enable undocumented migrants to defend their rights when State action threatens to infringe upon them.¹¹⁵ Proceedings must guarantee access to necessary facilities, a competent interpreter, legal assistance and representation, review by a competent authority, a personal interview, and the ability to appeal application denials.¹¹⁶

¹¹⁰ International Bill of Human Rights, Universal Declaration of Human Rights: Resolution/Adoption by the General Assembly, UNITED NATIONS: DIGITAL LIBRARY

<https://digitallibrary.un.org/record/670964?ln=en&p=Resolution+217%28III%29+A>

¹¹¹ UDHR, Articles 7, 9, 10.

¹¹² ICCPR, Articles 14, 26.

¹¹³ ACHR, Article 24.

¹¹⁴ ACHR, Article 25.

¹¹⁵ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., ¶ 123 (Sept. 17, 2003) [hereinafter IACHR (Court), *Rights of Undocumented Migrants*] (citing Inter-Am. Ct. H.R., *Baena-Ricardo et al. v. Panamá*, Judgment, Inter-AM. Ct. H.R. (ser. C.) No. 72, ¶ 124 (Feb. 2, 2001)).

¹¹⁶ *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., ¶ 133 (Nov. 25, 2013) [hereinafter IACHR (Court), *Pacheco Tineo Family*].

Mexico has upheld few of these protections in its implementation of MPP. As already described, immigration proceedings are largely inaccessible to MPP migrants due to geographic barriers and the threat of violence.¹¹⁷ In addition, Mexican officials affirmatively take steps that make attending immigration court hearings virtually impossible, such as by busing asylum seekers as far south as Chiapas, providing no transportation back north to the United States border,¹¹⁸ threatening migrants with deportation unless they pay a bribe,¹¹⁹ and in many instances actually deporting MPP migrants back to their home countries despite their pending asylum hearings in the United States.¹²⁰

For those able to overcome these enormous logistical obstacles, MPP applicants still have woeful access to legal representation, largely due to Mexico's failure to provide safety and security to MPP migrants residing in violent border states.¹²¹ MPP migrants with legal representation are ten times more likely to obtain asylum,¹²² yet less than 10% ever obtain a lawyer.¹²³ By contrast, in non-MPP proceedings, 90% of non-detained and 53% of detained asylum seekers in 2018 had legal representation.¹²⁴ This pervasive lack of legal representation is a direct result of Mexico's implementation of MPP: attorneys report that they are fearful of the dangers posed by MPP cases,

¹¹⁷ See *supra* notes 47-53 and Part II.c.

¹¹⁸ See *supra* note 52-53, 78.

¹¹⁹ See HUMAN RIGHTS FIRST, *Delivered to Danger*, *supra* note 49, at 2.

¹²⁰ Gilman and Paoletti, *Request for Thematic Hearing During 175th Period of Sessions of the Inter-American Commission on Human Rights Addressing Persistent Violations of International Law Resulting from the Implementation of the Migrant Protection Protocols (known as "Remain in Mexico") (United States and Mexico)*, at 7-8 <https://law.utexas.edu/wp-content/uploads/sites/11/2020/02/2020-02-IC-IACHR-Hearing-Request-MPP.pdf>.

¹²¹ See *supra* Part II.c.

¹²² See HUMAN RIGHTS FIRST, *Grant Rates Plummet*, *supra* note 55, at 4.

¹²³ TRAC, *Details on MPP* (64,469 out of 71,038) (last visited Aug. 31, 2021).

¹²⁴ TRAC, *Asylum Decisions*, <https://trac.syr.edu/phptools/immigration/asylum/> (last visited Sept. 2, 2021)

often receiving kidnapping and assault threats from cartel members for their involvement.¹²⁵ MPP hearings are also held exclusively along the border, overwhelming the limited number of available lawyers in those regions.¹²⁶

Lack of personal interviews and consideration before a tribunal prior to expulsion also violates international law. The UNHCR explains that due process safeguards during refugee status determinations include the requirement that asylum seekers receive a “personal interview by a fully qualified official.”¹²⁷ The Inter-American Court has adopted this norm, finding that due process requires that “the [asylum] application be examined objectively . . . by a competent and clearly identified authority, and requires a personal interview.”¹²⁸ In addition, the Refugee Convention requires that rejected asylum applications be reviewed prior to forcible removal.¹²⁹ The UNCHR further stipulates that applicants should be provided with guidance and duly informed about the asylum procedure, legal advice, and any necessary interpretation services.¹³⁰

¹²⁵ See *Immigrant Defs. L. Ctr. v. Chad Wolf*, Case No. 2:20-cv-09893-JGB-SHK (C.D. Cal. Nov. 9, 2020), Declaration of Kizuka, at ¶ 15 (available at <https://innovationlawlab.org/media/0048-11-09-2020-Declaration-of-Kennji-Kizuka.pdf>).

¹²⁶ *We Can't Help You Here*, HUMAN RIGHTS WATCH, at 33-34 (Jul. 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>; *MPP: Implementation and Consequences for Asylum-seekers in Mexico*, STRAUSS CENTER, at 31 (May 2020) https://www.strausscenter.org/wp-content/uploads/PRP-218_Migrant-Protection-Protocols.pdf.

¹²⁷ U.N. High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, ¶ e(i), 20 Oct. 1983, No. 30 (XXXIV), in U.N.G.A. Doc. No. 12A (A/38/12/Add.1) (defining the minimum procedural requirements for determining refugee status, including the right of an applicant to be provided with the necessary facilities for submitting his or her case to the authorities, and the right to remain in the country pending a decision on his or her asylum application) [hereinafter UNHCR, *Applications for Refugee Status*].

¹²⁸ IACHR (Court), *Pacheco Tineo Family Case*, at ¶ 159.

¹²⁹ Refugee Convention, Article 33; see also UNHC, *Applications for Refugee Status*, *supra* note 127, at ¶ e(iii); Article 13 of the ICCPR (requiring a formal hearing in which evidence can be submitted, the migrant can be represented, and a formal decision is handed down prior to expulsion).

¹³⁰ UNHCR, Conclusion No. 8 (XXVIII) Determination of Refugee Status, ExCom, 28th Session, 1977, para. (e)(ii); UNHCR Handbook, *op. cit.*, fn. 66, para. 192(ii) (available at <https://www.unhcr.org/en-us/excom/exconc/3ae68c6e4/determination-refugee-status.html>).

MPP severely undermines the ability of migrants to receive personal interviews and consideration before a tribunal prior to their asylum claim being decided. As of July 2021, nearly 40% of asylum seekers in MPP received *in absentia* deportation orders because they were unable to attend their hearings in the United States, meaning they effectively had no opportunity to be heard.¹³¹ This lack of attendance is largely due to the geographic barriers, specter of violence, and lack of legal representation already discussed, all of which are a direct result of Mexico's implementation of MPP.¹³²

e. Mexico's Implementation of MPP Violates the Right to Family Unity

¹³¹ TRAC, *Details on MPP* (27,780 out of 71,038) (last visited Aug. 30, 2021).

¹³² *See supra*, notes 47-58 and Part II.c.

Mexico’s Constitution¹³³ the UDHR,¹³⁴ ACHR,¹³⁵ ICCPR,¹³⁶ ICESCR,¹³⁷ CRC,¹³⁸ and the Refugee Convention¹³⁹ all guarantee the right to family unity. The Inter-American Court has said that pursuant to the Article 17 of the American Convention, Article VI of the American Declaration, and Article 9 of the CRC, States must “promot[e], as broadly as possible, the development and strengthening of the family unit” and have an “obligation to prevent family separation and to preserve family unit.”¹⁴⁰

Despite the overwhelming number of commitments Mexico has made to this right in domestic and international law and the clear language of the inter-American Court, Mexico has allowed the forced separation of migrant families pursuant to MPP.¹⁴¹ In only a three-month period

¹³³ Constitución Federal, Article 4 (“Every family has a right to a dignified and decent household.”).

¹³⁴ UDHR, Article 16(3) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”).

¹³⁵ ACHR, Article 17(1) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”); Article 19 (“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”); ACHR San Salvador Protocol, Article 16 (“Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother.”).

¹³⁶ ICCPR, Article 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”); Article 23(1) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

¹³⁷ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, Article 10(1) (1966) (“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”).

¹³⁸ Convention on the Rights of the Child, 1577 U.N.T.S. 3, § B (1989) (Unanimous Recommendations) (“The unity of the family, the natural and fundamental group unit of society, is an essential right to the refugee.”) [hereinafter CRC].

¹³⁹ Refugee Convention, at § B (Unanimous Recommendations) (recognizing “the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened” and recommends “ensuring the unity of the refugee’s family is maintained”).

¹⁴⁰ IACHR (Court), *Rights and Guarantees of Children*, at ¶ 264, 273.

¹⁴¹ See, e.g., Kristina Cooke, *When the US puts a border between migrant kids and their caretakers*, REUTERS (July 11, 2019) (detailing numerous instances of children being separated from their parents and other family members under MPP, with the children sent to U.S.-based children’s shelters and the parents returned to Mexico, and noting that there are no systems in place for tracking such parents and children separated under MPP); KIDS IN NEED OF DEFENSE, *Forced Apart: How the ‘Remain in Mexico’ Policy Places Children in Danger and Separates Families* (Feb. 24, 2020) (describing various instances of migrant families separated under MPP), <https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf> (hereinafter KIND Report).

of MPP, the United States Department of Health and Human Services received referrals of over 350 unaccompanied children remaining in the United States without their families, where the families were returned to Mexico.¹⁴² If it were not for Mexico's implementation of the MPP, many of these children would not have been separated from their families, who would have been able to remain in the United States pending their asylum hearings.

Moreover, this figure does not account for families forced to separate in Mexico due to the unlivable conditions and threats of violence. Reports from human rights groups detail various instances of children returned to Mexico under MPP who were forced to flee back to the United States without their families due to extortion by cartels or their parents' disappearance in Mexico.¹⁴³ For example, one child interviewed by KIND was forced to leave his mother, in Mexico and present himself at a U.S. port of entry due to credible threats from a local drug cartel against the child.¹⁴⁴ Other children have returned to U.S. ports of entry alone after their mothers went missing in Mexico while waiting for their asylum court date.¹⁴⁵ In sum, Mexico's implementation of MPP has violated the right to family unity by forcing accompanied children traveling under the protection of their parents to return to the U.S. as unaccompanied minors because of the untenable environment in Mexico.

III. Mexico Violates the Laws of State Responsibility by Aiding and Assisting the United States' Violations of International Law.

Mexico, by entering into the Joint Declaration and implementing MPP, has also violated international law by aiding and assisting the United States in its own primary violations of

¹⁴² Priscilla Alvarez, *At least 350 children of migrant families forced to remain in Mexico have crossed over alone to US*, CNN (Jan. 24, 2020); <https://www.cnn.com/2020/01/24/politics/migrant-children-remain-in-mexico/index.html>.

¹⁴³ See KIND Report, *supra* note 141.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

international law. The implementation of MPP hinges on Mexico's decision to accept asylum seekers expelled from the United States while they await hearings to determine their legal status in the United States. Without Mexico's collaboration, the United States government would be unable to carry out MPP and therefore would be unable to commit the internationally wrongful acts that MPP facilitates. Indeed, prior to the conclusion of the June 2019 Joint Declaration, the Secretary of Exterior Relations Julian Escutia Rodriguez sent a letter to the U.S. embassy in December 2018, confirming that Mexico would accept forcibly returned asylum seekers back into their territory,¹⁴⁶ a clear violation of the principle of *non-refoulement*. Such a guarantee underscores not only Mexico's complicity as the critical partner that enabled the U.S. to carry out these violations, but as a key actor whose early acquiescence ensured the U.S. that they could carry out such abuses at all. Mexico's cooperation with the United States constitutes "aid or assistance" as outlined in Article 16 of the International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility").¹⁴⁷ As a result, Mexico has incurred international responsibility for assisting the United States in its violations of the *jus cogens* principle of *non-refoulement* and the rights to seek asylum and to due process.

- a. Mexico is Subject to Article 16 of the ILC's Articles on State Responsibility for Internationally Wrongful Acts.

¹⁴⁶ Letter from Julian Escutia Rodriguez, Coordinator of Advisors of the Subsecretary of North America, Secretary of Exterior Relations, to John Creamer, Charge d'Affairs, U.S. Embassy, (Dec. 20, 2020), *available at* <https://imumi.org/wp-content/uploads/2020/02/Qu%C3%A9date-en-M%C3%A9xico-2020-1.pdf> (p. 22-23).

¹⁴⁷ International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts*, November 2001, Supplement 10 (A/56/10) Article 16, available at <https://www.refworld.org/docid/3ddb8f804.html> [hereinafter ILC's Articles on State Responsibility].

Article 16 of the of the ILC’s Articles on State Responsibility articulates that a State incurs international responsibility for aiding or assisting another State’s breach of international law.¹⁴⁸ In other words, the act of assisting another State in its violation of international law is itself a violation of international law.¹⁴⁹ This core principle of international law—along with a number of other principles found within the Articles on State Responsibility—forms a part of the Laws of State Responsibility, a set of fundamental rules of customary international law that govern when an international obligation has been breached, who is responsible for that breach, and the consequences of that breach.¹⁵⁰ The International Court of Justice (“ICJ”) and other international courts have cited provisions of the Articles on State Responsibility as reflecting principles of customary international law binding on all states.¹⁵¹ The Articles on State Responsibility are broadly applicable to any situation in which a State breaches its international obligations,¹⁵² but

¹⁴⁸ ILC’s Articles on State Responsibility, Article 16.

¹⁴⁹ The full text of Article 16 is as follows: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.” *Id.*

¹⁵⁰ See Lori F. Damrosch & Sean D. Murphy, *International Law Cases and Materials*, at 485-87 (6th ed. 2014). Though the Articles on State Responsibility are not a formal treaty, they are nonetheless viewed as reflecting customary international law. The commentary to the ILC’s Articles on State Responsibility states that the Articles “seek to formulate, by way of codification . . . the basic rule of international law concerning the responsibility of States for their internationally wrongful acts.” ILC’s Articles on State Responsibility, General Commentary, at ¶ 1.

¹⁵¹ See e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) 2007 I.C.J. 191, ¶¶ 385, 398, 420, 431, 460 [hereinafter ICJ, Crime of Genocide]; Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment) (1997) I.C.J. 7, ¶¶ 47-52; *Prosecutor v. Blaškić*, I.C.T.Y. Case No. IT-95-14-AR108, ¶ 26 n.34 (1997); ECHR, *Hirsi Jamaa*, at ¶ 77 n. 57 (Concurring Opinion) (recognizing that the Rules of State Responsibility “constitute customary international law”). In particular, the ICJ explicitly cited Article 16 as “reflecting a customary rule” of international law, reinforcing that all states, including Mexico, incur international responsibility for assisting other states in their commission of breaches of international law. See Application of the Convention (*Bosnia and Herzegovina v. Serbia and Montenegro*), at ¶ 420.

¹⁵² The ILC’s General Commentary to the Articles on State Responsibility outlines a number of factual scenarios where the principles underlying the Articles have been and can be applied. ILC’s Articles on State Responsibility, Commentary on Article 1, ¶ 1 (discussing the principle of incurring state responsibility for acts related to armed conflict, freedom of navigation, and even the construction of a dam project on river forming an international boundary).

there has been particular focus on Article 16's application in the realm of human rights.¹⁵³ The ILC commentary on Article 16 explains that the "obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State *is not limited to the prohibition on the use of force,*" but rather extends to "material aid to a State that *uses the aid to commit human rights violations.*"¹⁵⁴ Consequently, a number of international courts have applied Article 16 and the underlying customary international law principles to the human rights context. For example, in 2007 the ICJ in its judgment concerning the acts of genocide committed in Bosnia and Herzegovina made explicit reference to Article 16's "aid or assistance" standard when analyzing the phrase "complicity" as it is used in Article III(e) of the Genocide Convention.¹⁵⁵ The ICJ concluded that in order to determine whether Serbia was responsible for "complicity in genocide," the court had to analyze whether Serbia had "furnished 'aid or assistance' in the commission of the genocide in Srebrenica."¹⁵⁶ Applying principles underlying Article 16, the European Court of Human Rights ("ECHR") in *El-Masri v. Macedonia* imputed to the State of Macedonia responsibility for various human rights violations based on its facilitation of and assistance in furthering acts of torture and arbitrary detention committed by the United States.¹⁵⁷

¹⁵³ There is substantial legal analysis from the academic community analyzing Article 16 within the context of human rights violations. See generally Annie Bird, *Third State Responsibility for Human Rights Violations*, 21 EURO. J. OF INTL. L. 883 (2011); Anja Seibert-Foh, *From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?*, 60 German Yearbook of Intl. L. 667 (2017); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (2016).

¹⁵⁴ ILC's Articles on States Responsibility, Commentary on Article 16, ¶ 9 (emphasis added).

¹⁵⁵ ICJ, Crime of Genocide, at ¶ 420.

¹⁵⁶ *Id.*

¹⁵⁷ *El-Masri v. The Former Yugoslav Republic of Macedonia*, Ap.. No. 39630/09, Judgment, Eur. Ct. H.R., ¶¶ 206, 215-223, 234-43, 248-50, 258-62 (Dec. 13, 2012) (finding Macedonia in violation of Articles 3, 5, 8, and 13 of the European Convention on Human Rights). The European Court of Human Rights referred to Article 16 as a relevant rule of International Law, but ultimately based its decision under provisions of the European Convention on Human Rights. *Id.* at ¶ 97; see also *Al Nashiri v. Poland*, Appl. No. 28761/11, Judgment, Eur. Ct. H.R., ¶¶ 487-99, 517-19, 530-532, 538-40, 550-51, 565-69, 578-79 (July 24, 2014) (finding Poland in violation of Articles 2, 3, 5, 6 § 1, 8, 13 and Protocol No. 6 of the European Convention on Human Rights for its complicity in the United States' High Value

International law is clear that the Laws of State Responsibility and Article 16 of the Articles on State Responsibility apply to States providing assistance in the commission of human rights violations.¹⁵⁸

Article 16 demands three prerequisites: first, the State providing aid or assistance “must be aware of the circumstances making the conduct of the assisted State internationally wrongful.”¹⁵⁹ Second, the State must provide the aid or assistance with the intent of “facilitating the commission of that act, and must actually do so.”¹⁶⁰ Third, the act itself must have been wrongful if it had “been committed by the assisting State itself.”¹⁶¹

Mexico, by implementing MPP, has incurred international responsibility as defined under Article 16 of the Articles on State Responsibility by aiding and assisting the United States in its violations of the *jus cogens* principle of *non-refoulement* and the rights to seek asylum and to due process.¹⁶² The three aforementioned prerequisites have been met:

- (1) Mexico has provided aid and assistance to the United States in agreeing to accept and house asylum seekers expelled from the border of the United States, and is aware that this leaves migrants vulnerable, subject to *refoulement*, and infringes on their right to asylum and due process;

Detainees program); *Abu Zubaydah v. Lithuania*, Appl. No. 46454/11, Judgment, Eur. Ct. H.R., ¶¶622, 641-44, 656-58, 665-66, 674-77 (May 31, 2018) (finding Lithuania in violation of Articles 3, 5, 8, and 13 of the European Convention on Human Rights for its complicity in the United States’ High Value Detainees program).

¹⁵⁸ The Inter-American Court has also ruled on issues of aiding and abetting human rights violations. In *Mapiripán Massacre*, the Inter-American Court held Colombia responsible for a massacre committed by a paramilitary group because “the massacre could not have been prepared and carried out without the collaboration, acquiescence, and tolerance” of the Colombian state. See *Case of the “Mapiripán Massacre” v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 120 (Sept. 15, 2005).

¹⁵⁹ ILC’s Commentary to Article 16 of the Articles on State Responsibility, at ¶(3).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Sections III.b-d. outline in detail the United States’ primary violation of its international obligations and how Mexico has itself violated international law by aiding and assisting the United States’ in its violations.

(2) Mexico fully intended to facilitate this expulsion—and corresponding breaches of international law—through its agreement to and implementation of MPP, and;

(3) It is clear that such expulsions would be wrongful if they had been committed by Mexico itself.¹⁶³

b. Mexico is Assisting the United States in Violating Refugees’ Right to Seek Asylum.

The United States, like Mexico, bound itself to protect human rights as outlined by several key international law treaties, such as the American Declaration, the American Convention, the UDHR, and the Refugee Convention, each of which underscores that “every person has the right . . . to seek and receive asylum in a foreign territory.”¹⁶⁴ Through MPP, the United States violates migrants’ right to seek asylum by forcibly returning asylum seekers to Mexico where they are often relocated hundreds of miles from the location of their immigration court hearing, subjected to destitute conditions and violent criminal acts, and extremely unlikely to obtain legal representation.¹⁶⁵ As a result of these circumstances, migrants in MPP are not given the opportunity to present their asylum claims.

¹⁶³ As outlined *supra* in Section II, Mexico’s implementation of MPP constitutes primary violations of the *jus cogens* principle of *non-refoulement* and the asylum seekers’ right to asylum, right to life and security of person, right to due process, and right to family unity.

¹⁶⁴ See American Declaration, Article 27; see also ACHR, Article 22(7); UDHR, Article 14(1) (“[E]veryone has the right to seek and to enjoy in other countries asylum from persecution.”); Refugee Convention, Article 1 (outlining that asylum may be sought by those fleeing persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion).

¹⁶⁵ See *supra* Part II.d.

The Inter-American Commission has previously found that the United States' violated the right to seek asylum in the *Haitian Interdiction* case.¹⁶⁶ The United States set up a program whereby it would intercept Haitian refugees at sea prior to their arrival in the United States, depriving the Haitians of a fair opportunity to articulate and substantiate their political asylum claims.¹⁶⁷ Less than 0.005% of interdicted Haitians were found to possess a legitimate asylum claim.¹⁶⁸ Similarly, in the aforementioned decision in *John Doe*, the Inter-American Commission held that programs like MPP, which automatically return asylum seekers to a third country where they await processing of their claims, inherently violate migrants' right to seek asylum.¹⁶⁹

The similarities between MPP and the programs in *Haitian Interdiction* and *John Doe* are striking. Like in both cases, migrants placed in the MPP program are turned away from the United States prior to having their asylum claims heard. As a result, migrants have less than a 1% chance of obtaining asylum protection in the United States.¹⁷⁰ And like Canada in *John Doe*, the United States fails to permit migrants to remain in the United States while their claims are processed and fails to ensure that migrants are able to return to the United States for their court hearings.¹⁷¹ Although the United States provides transportation from the border to the courts, the United States has made it clear that migrants are "responsible for their own transportation to reach the port of entry to attend their removal hearings."¹⁷² Many migrants are sent to regions of Mexico hundreds

¹⁶⁶ See *Haitian Interdiction Case (United States)*, Case 10.675, Inter-Am. Comm'n H.R., Report No 51/96, ¶ 188 (March 13, 1997) [hereinafter IACHR (Commission), *Haitian Interdiction*].

¹⁶⁷ *Id.* at ¶¶ 3, 31.

¹⁶⁸ *Id.* at ¶ 6.

¹⁶⁹ See *supra* notes 45-46 and accompanying text.

¹⁷⁰ See HUMAN RIGHTS Watch, *Q&A: Trump*, *supra* note 49.

¹⁷¹ See *supra* notes 47-49, 52-53, 81 and accompanying text.

¹⁷² See DEP'T OF HOMELAND SECURITY, *Migrant Protection Protocols*, *supra* note 47.

of miles from their respective immigration courts¹⁷³ and are often unable to attend their court hearings because they are experiencing kidnapping, rape, and other forms of violence.¹⁷⁴ If asylum seekers do make it to their hearing, they are given only minutes to present their case, usually without counsel present, in tents with the immigration judges appearing remotely.¹⁷⁵ The reality is that the United States, through its implementation of MPP, has made it nearly insurmountable for migrants to have their asylum claims heard—let alone approved—making a farce of these migrants’ fundamental right “to seek and receive asylum” in the United States.¹⁷⁶

Mexico aids and assists the United States’ violations of MPP migrants’ right to seek asylum and therefore is responsible for violating Article 16 of the Articles on State Responsibility. At the outset, if it were not for Mexico’s agreement to accept and house asylum seekers expelled from the United States, MPP would simply not function. And Mexico goes further in its assistance by relocating migrants to remote areas of Mexico, making it even less likely that these migrants will have an opportunity to have their asylum claims heard.

c. Mexico is Assisting the United States in Violation of the *Jus Cogens* Principle of *Non-Refoulement*.

The United States violates the *jus cogens* principle of *non-refoulement* through two different avenues. First, it has expelled migrants to Mexico where, as already discussed, they are often subjected to extreme violence, including rape and death.¹⁷⁷ Second, it has facilitated chain

¹⁷³ See *supra* notes 47-49, 52-53, 81, and accompanying text.

¹⁷⁴ See *supra* Part II.c.

¹⁷⁵ See Mueller, *Immigration 101*, *supra* note 49.

¹⁷⁶ American Declaration, Article 27.

¹⁷⁷ See *supra* Part II.c.

refoulement by expelling migrants to Mexico, who are then expelled by Mexico to other countries where they face persecution.¹⁷⁸

As relevant here, states violate their duty not to *refouler* when they conduct generalized, rather than individualized, assessments of risk in determining whether to deport or remove migrants from their borders.¹⁷⁹ In *John Doe* the Inter-American Commission found that Canada had violated the principle of *non-refoulement* by failing to conduct an individualized risk assessment before returning asylum seekers to the United States, where they faced the risk of subsequent deportation back to their countries of origin.¹⁸⁰ Individualized risk assessments are still required even where the relevant third country is deemed a “safe third country.”¹⁸¹

The United States, like Canada in *John Doe*, has violated its *non-refoulement* and chain *non-refoulement* obligations by returning asylum seekers back to Mexico after making only generalized assessments, without performing adequate individualized assessments of potential danger to their life, liberty, and personal freedom.¹⁸² The United States did provide “*non-refoulement*” fear-assessment interviews,¹⁸³ but these interviews were only available to the migrants who affirmatively requested them and most migrants who made the request were never actually interviewed.¹⁸⁴ These interviews focused on the migrant’s fear of returning to Mexico,

¹⁷⁸ See *supra* Part II.b.

¹⁷⁹ See, IACHR (Commission), *John Doe et al.*, at ¶ 107.

¹⁸⁰ *Id.* at ¶ 112.

¹⁸¹ *Id.* at ¶¶ 106-107.

¹⁸² See *Examining the Human Rights*, *supra* note 107; see also, DEP’T OF HOMELAND SECURITY, *Policy Guidance*, *supra* note 57 (“The United States further recognizes that Mexico is implementing its own, sovereign, migrant protection protocols providing humanitarian support for and humanitarian visas to migrants.”).

¹⁸³ See U.S. CUSTOMS AND BORDER PROTECTION (“CBP”), *Re: Guidance on Migrant Protection Protocols* (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20OFO%20Memo%201-28-19.pdf>.

¹⁸⁴ Gus Bova, *Attacked in Mexico, Returned to Mexico: Trump Policy Ignores Danger to Asylum-Seekers*, TEXAS OBSERVER (Sep. 30, 2019), <https://www.texasobserver.org/attacked-in-mexico-returned-to-mexico-trump-policy-ignores-danger-to-asylum-seekers/>.

not the migrant’s home country, even though deportation to Mexico often leads to deportation to the migrant’s home country.¹⁸⁵ When migrants were able to receive a *non-refoulement* interview, they were given a negative determination 86% of the time.¹⁸⁶ As already discussed at length, migrants expelled to Mexico under MPP face danger and possible death—undercutting the notion that the United States’ conducts adequate *non-refoulement* interviews.¹⁸⁷ Indeed, it is common for migrants who have already experienced horrifying violence in Mexico to be denied a *non-refoulement* screening interview when they reach the United States, even if they have visible injuries from their past traumas.¹⁸⁸ Because the United States refused to provide individualized assessments for each migrant, many were forced to abandon their asylum claims and return to their home countries from which they had fled persecution—precisely the outcome the principle of *non-refoulement* was designed to avoid.¹⁸⁹

In implementing MPP, Mexico knowingly facilitates the United States’ unlawful acts of *refoulement* and *chain-refoulement* and thereby incurs international responsibility under Article 16 of the Articles on State Responsibility. The United States’ *refoulement* of migrants reaching its southern border is possible only with Mexico’s acquiescence in accepting and housing these migrants. Mexico houses many of these migrants in regions where they are subjected to

¹⁸⁵ *Id.*

¹⁸⁶ See DEPT’ OF HOMELAND SECURITY, *Assessment of the Migrant Protection Protocols*, *supra* note 76; see also CBP Blocking “Migrant Protection Protocols” Fear Screening, HUMAN RIGHTS FIRST (June 20, 2020), <https://www.humanrightsfirst.org/resource/cbp-blocking-migrant-protection-protocols-fear-screenings> (In early 2020, the CBP simply stopped providing *non-refoulement* fear-assessment interviews under the guise of enforcing a CDC pandemic-related order).

¹⁸⁷ See *supra* Part II.c.

¹⁸⁸ See HUMAN RIGHTS FIRST, *Humanitarian Disgrace*, *supra* note 48 at 14; Gus Bova, *Attacked in Mexico*, *supra* note 180.

¹⁸⁹ See HUMAN RIGHTS FIRST, *Humanitarian Disgrace*, *supra* note 48, at 9.

extraordinary violence¹⁹⁰ and where their “life or personal freedom is in danger of being violated.”¹⁹¹ Mexico plays the chief role in the United States’ unlawful acts of chain-*refoulement* by busing MPP migrants down to the Guatemalan border, thereafter withholding their immigration papers, and then subsequently deporting them back to their countries of origin.¹⁹² Even those MPP migrants who are not forcibly deported are heavily encouraged to leave, as exhibited by Mexico’s free provision of transportation back to their countries of origin but not corresponding transportation back to the United States border.¹⁹³

d. Mexico is Assisting the United States in Violation of Internationally Guaranteed Rights to Due Process.

The United States is in violation of its due process obligations under UDHR, the American Declaration, American Convention, and the ICCPR, which guarantee all persons access to a fair trial and due process of law.¹⁹⁴ Asylum seekers should have access to legal representation, interpretation or translation, a review before a competent authority, a personal interview, and an appeal process regarding their denied asylum status.¹⁹⁵ However, the United States has chronically failed to satisfy any of these obligations. Even before MPP, in over 50% of expedited removal proceedings for asylum seekers, immigration officers failed to inform the individual of his or her right to seek asylum on the basis of violence or persecution at home; in 50% of the cases, asylum-seekers signed written statements in the presence of an immigration officer without review or

¹⁹⁰ See *supra* Part II.b-c.

¹⁹¹ ACHR, Article 22(8); see also *supra* Section Part II.b-c.

¹⁹² See *supra* notes 52-53, 81, 117-120.

¹⁹³ See Camilo Montoya-Galvez & Angel Canales, *Mexico offers to send asylum seekers turned away by U.S. back to home countries*, NBC NEWS (July 2, 2019), <https://www.cbsnews.com/news/mexico-offers-to-send-asylum-seekers-turned-away-by-u-s-back-to-home-countries/>; Root, *Asylum-seeking migrants pushed farther*, *supra* note 52.

¹⁹⁴ See *supra* notes 110-116 and accompanying text.

¹⁹⁵ See IACHR (Court), *Pacheco Tineo Family*, at ¶ 133; see also *supra*, notes 113-116 and accompanying text.

interpretive services; and in 15% of the cases asylum seekers were not given a fear interview even though the individual claimed to be in fear of persecution.¹⁹⁶ In most cases, asylum seekers must affirmatively request a fear interview and those that do must remain detained while awaiting the interview and its results.¹⁹⁷ Throughout this process, asylum seekers remain subject to expedited removal and mandatory detention, without any possibility of release.¹⁹⁸ If an individual fails to request an interview, DHS will deport that individual to Mexico and use this failure to request as a shield from liability.¹⁹⁹

In Mexico, asylum seekers are routinely placed in dangerous and unfamiliar border towns where the wait to obtain a hearing is indefinite. As of July 2021, nearly 8,000 people in MPP were still waiting for their first hearing, and nearly 40% of those in MPP had their cases dismissed simply because they were unable to traverse the border.²⁰⁰ Many such individuals missed their hearings because they were kidnapped or failed to receive adequate notice, both of which occur with startling frequency. For instance, it is routine practice for the U.S. Government to send

¹⁹⁶ See Sara Campos & Guillermo Cantor, *Deportations in the Dark*, AMERICAN IMMIGRATION COUNCIL (Sept. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/deportations_in_the_dark.pdf; *Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguard to Protect Refugees*, HUMAN RIGHTS FIRST (Apr. 2019), https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf; *Report on Asylum Seekers in Expedited Removal: Volume I: Findings and Recommendations*, USCIRF, 54, 57 (Feb. 8, 2005), available at https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf; see also *Report on Asylum Seekers in Expedited Removal: Expedited Removal Study Report Card: 2 Years Later*, USCIRF (February 2007), available at: http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf.

¹⁹⁷ INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 CFR §§ 235.3(b)(4)(ii), 1235.3(b)(4)(ii); U.S. CUSTOMS AND BORDER PROTECTION, *Re: Guidance on Migrant Protection Protocols* (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20OFO%20Memo%201-28-19.pdf>.

¹⁹⁸ *Report on Immigration in the United States: Detention and Due Process*, Inter-Am. Comm'n. H.R. Report No. 78/10, OEA/Ser.L./V/II, ¶ 113 (Dec. 10, 2010) [hereinafter IACHR (Commission), *Report on Immigration*].

¹⁹⁹ INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 CFR §§ 235.3(b)(4)(ii), 1235.3(b)(4)(ii).

²⁰⁰ TRAC, *Details on MPP* (last visited August 31, 2021).

“Notices to Appear” to locations or homes that bear no relationship to where the individuals actually live.²⁰¹

As discussed more fully in Section II.d., once an individual finally obtains and reaches his or her hearing, the record regarding legal representation is abysmal, with fewer than 10% of individuals in MPP able to obtain counsel.²⁰² Migrants who lack legal representation have shockingly low chances of prevailing, with those represented ten times more likely to obtain asylum.²⁰³ MPP directly results in this inexcusable disparity in legal representation by overloading local legal resources and placing migrants in regions where lawyers cannot realistically reach them.²⁰⁴ Even when migrants are lucky enough to obtain legal representation, the United States routinely acts to stifle such representation. For example, most migrants meet with their attorney only once, usually on the same day as their immigration hearing.²⁰⁵ These meetings may last only for one hour, with many only a few minutes in length.²⁰⁶

The United States’ MPP facilities, and the procedures and personnel it employs at those facilities, are also grossly inadequate. Access to certain facilities is tightly restricted and attorneys may not enter unless they have a pre-existing agreement with a client; in the absence of such an

²⁰¹ Adolfo Flores, *Border Patrol Agents are Writing “Facebook” as a Street Address for Asylum-Seekers Forced to Wait in Mexico*, BUZZFEED NEWS (Sept. 27, 2019), <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

²⁰² TRAC, *Details on MPP* (64,469 out of 71,038) (last visited August 31, 2021).

²⁰³ See *supra*, notes 55-56 and accompanying text.

²⁰⁴ See *supra*, note 125 and accompanying text.

²⁰⁵ *US Move Puts More Asylum Seekers at Risk: Expanded ‘Remain in Mexico’ Program Undermines Due Process*, HUMAN RIGHTS WATCH (Sep. 25, 2019) <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk> (“Armed guards now prevent attorneys in the US from interacting with MPP participants unless the attorneys have already filed official notices that they are representing specific participants.”); see also *Examining the Human Rights*, *supra* note 107 (“other than for 1 hour preceding their scheduled hearings,” asylum seekers are not permitted to consult with their attorneys).

²⁰⁶ HUMAN RIGHTS WATCH, *US Move Puts More Asylum Seekers at Risk*, *supra* note 205.

agreement, asylum seekers are without recourse.²⁰⁷ Further, the United States prohibits asylum seekers from meeting with non-profit organizations, which could inform them of their basic rights, including the right to legal representation.²⁰⁸

MPP proceedings are generally conducted by video conference.²⁰⁹ The Inter-American Commission has stated that “the increasing reliance on video conferencing for immigration proceedings . . . diminishes the quality of a detainee’s legal representation.”²¹⁰ The report noted that these virtual proceedings “may inhibit immigrant detainees from presenting effective testimony and prevent the immigration judge from making accurate credibility evaluations.”²¹¹ Further, the quality of a detainee’s legal representation deteriorates, as attorneys must decide whether to stay with the client at the detention facility or move to the courtroom with the immigration judge and DHS attorney.²¹² Another report found that asylum seekers who had their hearing over video were half as likely to be granted relief.²¹³ The Inter-American Commission also noted that video conferencing makes translation more difficult, undermining a “detainee’s ability to understand and participate effectively in the proceedings.”²¹⁴

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ The use of virtual “tent courts” to conduct MPP migrants’ asylum hearings preceded the onset of the COVID-19 pandemic and began as early as September of 2019. See *Policy Brief: Questions Remain After AILA Joins Laredo Tent Court Tour*, AMERICAN IMMIGRATION COUNCIL (Jan. 30, 2020), <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-questions-remain-after-aila-joins> (“[M]assive temporary tent facilitates . . . function as virtual immigration courtrooms During the hearings, asylum seekers are held in tents at ports of entry while judges appear remotely via video teleconference.”).

²¹⁰ See IACHR (Commission), *Report on Immigration*, at ¶¶ 403-406.

²¹¹ *Id.* at ¶ 406.

²¹² *Id.*

²¹³ Frank M. Walsh and Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEORGETOWN IMMIGRATION LAW JOURNAL 259, 271 (2008).

²¹⁴ IACHR (Commission), *Report on Immigration*, at ¶ 406.

The inadequacies of these interpretative services go beyond the video conferences. Many asylum seekers speak indigenous languages and there are not enough translators and interpreters to serve these individuals.²¹⁵ Thus, they can neither express themselves in their own language, nor receive adequate explanation of the administrative and judicial documents and proceedings. This deprives them of the ability to interact with counsel or explain themselves and their circumstances to officials who understand their sociocultural background.

Article 16 of the Articles on State Responsibility requires Mexico to uphold the very due process obligations that the United States violates through MPP. By knowingly assisting the United States' violations of such obligations, Mexico has violated its own obligations. Without Mexico's collaboration, the United States would be unable to carry out MPP and commit the internationally wrongful act of preventing asylum seekers from exercising their due process rights. Not only does Mexico readily accept expelled migrants, thereby assisting the United States in denying such individuals their lawful rights to due process, but also it places such individuals in territories so violent that they cannot obtain legal representation.²¹⁶ Mexico knows full well that, as a result of MPP, countless migrants are effectively stuck within its borders, unable to obtain legal representation, attend their immigration hearings, or obtain asylum in the United States. If Mexico refused to participate in this unlawful conduct, which deprives asylum seekers of their due process rights, then MPP could not exist.

²¹⁵ OAS Press Release, *IACHR conducted a visit to the United States' Southern Border* (Sep. 16, 2019) ("IACHR . . . document[ed] that there were not enough translators and interpreters" for asylum seekers who spoke indigenous languages and could not communicate in Spanish). https://www.oas.org/en/iachr/media_center/PReleases/2019/228.asp.

²¹⁶ As discussed previously, lawyers avoid such violent areas because they fear retaliation by cartels and others. *See supra* note 125-126 and accompanying text.

CONCLUSION

MPP represents an egregious violation of international law that must be rectified. In agreeing to and implementing MPP, Mexico has violated its own international legal obligations to uphold the principle of *non-refoulement* and respect asylum seekers' rights to seek asylum, to life and security of person, to due process, and to family unity. Mexico has also aided and assisted the United States' violations of international law of many of the same core principles of refugee protections, thereby incurring international responsibility under Article 16 of the Articles on State Responsibility.

This Court should put an end to these violations and ensure that Mexico respects its commitments to uphold the human rights of asylum seekers. Amici request that this Court order Mexico to take affirmative steps to: (1) formally terminate MPP, including by refusing to accept additional United States asylum seekers and expediting the processing of MPP migrants back into the United States; (2) ensure the safety and well-being of MPP migrants within its borders, including a focus on family unity; and (3) provide safe travel to hearings in the United States while MPP is in place.

Respectfully submitted,

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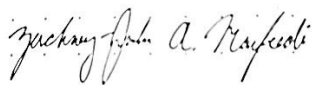
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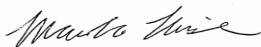
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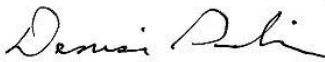
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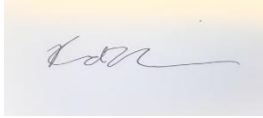
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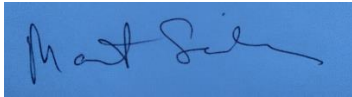
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