Center for Gender & Refugee Studies

Director Karen Musalo's Remarks at CGRS Event:
The Refugee Convention at 75: Reflections on the Past, Present, and Future of Protection in the U.S. and Beyond
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Thank you all for being here to reflect on the past, present and future of the Refugee Convention.

As many of you know, the current global refugee protection system came into existence in the wake of World War II as a result of the failure of the international community to protect Jews and other persecuted groups fleeing the Holocaust.

You may be familiar with the story of the ocean liner, the *St. Louis*, which set off from Hamburg, Germany in May of 1939. Almost all of its 937 passengers were Jews, fleeing the rise of Adolf Hitler and the Nazi party.

They had been promised disembarkation in Cuba, but rising antisemitism and xenophobia led to huge public protests and resulted in the decision of the Cuban authorities to deny their entry. In desperation, a number of the passengers sent cables to President Franklin D. Roosevelt, imploring him to allow their landing.

The State Department sent a telegram, coldly responding that they should "await their turns on the waiting list" for visas to enter the US – a near impossibility at that time.

With no other recourse, the *St. Louis* returned to Europe, and its passengers were distributed among the four countries that had agreed to allow their entry – the United Kingdom, the Netherlands, Belgium and France. By the end of the war, almost a third of the *St. Louis's* passengers would be dead – deported to concentration camps where they were killed.

It was this failure of protection that led the international community to come together and to draft the 1951 Refugee Convention. The Convention defines a refugee as an individual with a well-founded fear of persecution on account of five protected grounds – race, religion, nationality, political opinion, and membership in a particular social group, and importantly, it prohibits the return of refugees to persecution – a principle known as the norm of *nonfoulement,* or non-return.

The drafters of the Convention intended it to address the plight of World War II refugees, and limited the treaty's applicability to events occurring before January 1951. It also

permitted the countries that ratified the Convention to limit their obligation geographically to refugees in Europe.

But as time went on, it became clear that refugees around the world would continue to require protection, so the 1967 Refugee Protocol came into being. The Protocol is identical to the 1951 Convention, except that it deletes the temporal and geographic limits of the Convention. The majority of nations in the world are parties to either the Convention or Protocol, or both.

The US became a party to the 1967 Protocol in 1968, but it did not immediately amend its laws to implement the obligations it undertook by ratifying it. It was not until 1980, towards the end of the Carter administration, that Congress passed the Refugee Act, which was intended to bring US law into compliance with its Protocol treaty obligations

The promise of the 1980 Refugee Act was immediately put to the test. In the early 1980s civil wars were raging in El Salvador and Guatemala. The military governments of both countries – with millions of dollars of funding from the United States -- responded with unfettered brutality against their citizens, committing massive human rights violations, including genocide against the indigenous population of Guatemala.

Salvadorans and Guatemalans reached the US border, and sought asylum under the newly passed Refugee Act. But Ronald Reagan was president, and granting asylum to those fleeing El Salvador and Guatemala would be to admit that the US was funding governments that violated the rights of their people – which was not something Reagan was about to do. Those fleeing the bullets and bombs paid for by the US were dubbed “economic migrants” and more than 97% were denied asylum.

As some of you may know, that policy of bias was challenged in court, in a case named, *American Baptist Churches v. Meese*. As a result of the litigation, the US government agreed to redecide the case of every Salvadoran and Guatemalan class member who had previously been denied.

But Central Americans were not the only group singled out for unequal and biased treatment. Haitians fleeing the brutal Duvalier dictatorship were effectively denied the promised protection of the Refugee Act. Shortly after Ronald Reagan assumed the presidency in 1981, he did all he could do to prevent Haitians from even reaching the US where they would have the right to seek asylum. Reagan entered into a written agreement with the Haitian dictator, Jean Claude Duvalier, which authorized the US Coast Guard to board Haitian vessels “on the high seas” and to “return its passengers to Haiti.

Reagan wanted to avoid being seen as openly violating the Refugee Act, so this agreement was accompanied by a declaration that no bona fide refugee was to be returned to Haiti. Interviews were supposed to be conducted shipboard to identify Haitians needing protection.

As the numbers demonstrate – this screening process was simply a sham. Of the 23,000 Haitians intercepted by the Coast Guard from **September 1981 to September 1991** – a ten year period -- only 28 were identified as bona fide refugees who were permitted to seek asylum in the US. ***Twenty-eight out of 23,000 in a time of dictatorships, military rule, and violent coups in Haiti.***. It is just not credible that only 28 had viable claims for asylum.

But the situation for Haitians was to get far worse. In 1991, Jean Bertrand Aristide, became Haiti's first democratically elected president – winning with almost 70% of the popular vote. Aristide was a charismatic Catholic priest who allied himself with the interests of the poor. In September 1991 – before Aristide had even completed a full year of his five-year term, he was ousted in a military coup.

In the aftermath of the coup, his supporters were being hunted down and massacred, and many of them took to boats to save their lives. The initial response of the US was to recognize that these Haitians had valid asylum claims. But it still did not want to allow them onto US soil, where they would have the constitutional rights accorded to all persons within the US. So instead, they were sent to camps in Guantanamo, Cuba.

Some of you might associate Guantanamo Bay with the prison camp that has held those accused of complicity in the 9/11 attacks on the US – but years before that, it was a prison camp for Haitians.

As the exodus of fleeing Haitians continued, the available space on Guantanamo filled up, and President George H.W. Bush decided that rather than allow Haitians with valid claims of persecution to enter the US to make those claims, he would order that all Haitians intercepted at sea – whether they were refugees or not – be returned directly to Haiti.

This policy was immediately challenged and reached the US Supreme Court, in a case by the name of *Sale v. Haitian Centers Council*. Harold Koh, a Yale Law School professor, and former law clerk to Justice Harry Blackmun, represented the Haitians before the high court. Koh argued that the US policy of interdiction and immediate repatriation of Haitians violated the 1980 Refugee Act, as well as US obligations under the Refugee Protocol – both of which clearly prohibit sending those fleeing persecution back to their home countries.

And it bears mention that there was no dispute as to conditions in Haiti, and the widespread persecution of Aristide supporters in the aftermath of the coup. The Supreme

Court itself stated that it was an uncontested finding of fact that since the *coup "hundreds of Haitians have been killed, tortured, detained without a warrant, or subject to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding."*

Notwithstanding that reality, in a decision which numerous scholars have harshly criticized, eight out of the nine justices upheld the policy, ruling that neither the treaty nor US law apply in international waters, and therefore could not constrain the Coast Guard from stopping Haitians as they tried to escape, and returning them to persecution.

Ironically, the Court conceded that its reading went against what they characterized as the "spirit" of the Refugee Convention and Protocol – writing: *"The drafters of the Convention and the parties to the Protocol" as well as the congressmembers who drafted the Refugee Act "may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape"* -- but since in the Court's interpretation these obligations did not apply in international waters, the US could go ahead and do just that.

The *Sale* decision was not just devastating to the many Haitians who were returned to life-threatening peril. It was equally devastating in signaling to the rest of the international community that they too could avoid their obligations under the Convention and Protocol by simply preventing asylum seekers from ever reaching their territory – a practice that has now become all too common. Australia was one of the first countries to block boats carrying asylum seekers, and its Parliament referenced the US *Sale* decision in doing so.

Returning to the US, I mentioned former Presidents Reagan and George W.H. Bush in describing the US failures to live up to its international and domestic law commitments to refugees. But over the years, it has not only been Republican presidents that violated the letter and spirit of the Refugee Act.

Since the passage of the 1980 Refugee Act, Republican and Democratic presidents alike have been restrictive in their policies towards humanitarian protection. In the words of my colleague, Denise Gilman, who teaches at the Univ. of Texas at Austin, "[a]sylum [has been] seen as a 'scarce resource' to be carefully guarded and to be granted only in 'extraordinary cases.'" In a 2023 article Gilman wrote that since 1996, "the first year for which full data is available, grants of asylum have never risen above 50,000 per year," regardless of the number of applications filed, or the increased need in response to global events.

One of the most restrictive immigration laws – the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 – known as IIRIRA – was signed into law by Bill Clinton.

That law put in place the process of expedited removal, which requires asylum seekers to pass a screening test in order to be permitted to seek asylum. The law also expanded statutory bars to protection, and greatly limited judicial review.

But of course, none of what has come before in terms of restrictionism could compare with the Trump administration's unrelenting attempt to end protection for refugees, and to completely dismantle the asylum system. We saw this in his first term, but without a doubt, what we are seeing in his second term is completely without restraint. And Congress has enabled these policies by its allocation of billions of dollars to the Department of Homeland Security.

Trump's assault on asylum and asylum seekers has included:

• Declaring an invasion to justify closing the border, and barring asylum claims for those who arrive

• Detaining all asylum seekers in inhumane conditions, resulting in the deaths of more than 60 individuals in custody, the highest number of deaths in detention in decades

• Attempting to prevent asylum seekers from having their day in court, by issuing policies stating that judges can refuse to hear claims – in technical terms – that those claims can be pretermitted – if the person fails to establish a prima facie claim in the judge's opinion, or if the person could be sent to a safe third country. I'll return to the safe third country policy in a moment.

• And for those individuals whose cases are not pretermitted, and who are permitted to go before an immigration judge, they face a totally biased court system. The Trump administration has fired or forced out immigration judges, with the objective being to eliminate those judges who often ruled in favor of asylum seekers. To date at least 279 judges have been fired or resigned. The administration has rapidly hired new judges – either in a temporary or permanent capacity. The government's hiring notice was not for immigration judges, but for "deportation judges" and advertising for the positions boasted the opportunity for these judges to "deliver justice to criminal illegal aliens" and to "save [their] country."

As a result of the remaking of the immigration courts, the asylum denial rate stands at 94% -- an all-time high.

• The Trump administration also purged the administrative appeals body – the Board of Immigration Appeals (BIA), removing Biden appointees and replacing them with its own hires. The BIA and the Attorney General, who have historically issued a relatively small

number of decisions a year, have issued over 170 decisions to date, and as a colleague, Jason Cade, has written – what these decisions have in common is "the immigrant always loses."

These decisions set precedent which has swept away decades of caselaw, in an attempt to make it near impossible for individuals to meet the new legal standards for asylum, withholding, and Convention against Torture protection.

• And probably one of the cruelest policies is that of sending asylum seekers to so-called safe third countries, where they purportedly could apply for asylum. These are countries with which the asylum seeker has had no prior contact, and which often have egregious human rights conditions, such as the Central African Republic and the Democratic Republic of Congo. It has been documented in many cases that these third countries directly return the individuals to their country of feared persecution – in a clear violation of the norm of non-refoulement. To date, the US has entered into agreements with approximately thirty-five countries.

In addition to these policies affecting asylum, there have been many other measures taken by the administration which have been devastating to humanitarian protections. The termination of Temporary Protected Status is in this category. As you may know, TPS is a status created by 1990 immigration legislation which provides for temporary status and work authorization for persons who cannot return home because of ongoing armed conflict, environmental disasters, or other extraordinary and temporary conditions that would prevent individuals from returning in safety.

The Trump administration has ended TPS for 13 of the 17 nationalities who had been given this status, even though conditions in their home countries have not sufficiently changed to justify this termination. One of the most appalling instances is the ending of TPS for Haitians -- a termination upheld by the US Supreme Court, in *Mullin v. Doe*. The level of violence in Haiti is beyond dispute, so much so that the US State Department has issued a Category 4 advisory, warning its citizens to not travel there for any reason, and advising Americans who are there to make a will, and establish a proof of life protocol with their loved ones – but yet we are returning Haitians to face these life-threatening dangers.

Sadly, the US is not content to dismantle refugee protection in the US and is pushing other countries to restrict protection. Last year the US hosted a side meeting at the UN General Assembly in New York. The US representative, Christopher Landau, called the asylum system "a huge loophole in our migration laws" and said that "revisiting" the 1951 Convention "should be a top international priority." The following month, a US *charge d'affaires* attended the UNHCR Executive Committee meeting and repeated the false claim

that “asylum abuse had reached epidemic proportions.” The US representatives made similar statements just last week at another UNHCR Executive Committee meeting.

And, as I mentioned earlier, unfortunately, countries of the EU, and a number of other high income peer countries, have, in fact, moved towards restrictive policies. The recently adopted *European Pact on Migration and Asylum* – which sets standards throughout the European Union – is an example of this. Even Canada, which has historically been welcoming to asylum seekers, has expanded the situations in which it can refuse to consider the claims of arriving asylum seekers.

As disheartening as all of this is, there are also many reasons to be hopeful. **First**, the resistance to these unjust policies has been strong and consistent. Whether it is the citizens of Minneapolis who showed the world what solidarity looks like, or the lawyers who – day in and day out – challenge unjust and unlawful policies, or the migrants themselves who refused to be silenced – there has been a strong, visible and courageous movement in defense of the dignity and rights of every human being. In the panel that follows, you will get to hear from three speakers who are models of the movement’s courage and creativity.

Second, we have begun to see revulsion at the cruelty of the Trump administration’s immigration policies, which are now a liability rather than an asset for the Republicans. Recent polling has shown global support for providing refuge to those fleeing persecution – even in the United States, where 72% of individuals support refugee protection. This provides a real opportunity to reverse the damage Trump has done, and to begin to rebuild our asylum system. It will take work and commitment, but I have confidence that it can be done.

And part of our work in doing this has to be educating the public about the endless stream of lies about migrants – the narrative that they are criminals, or that they adversely impact our economy -- when the exact opposite is true. I probably don’t need to tell all of you this, but immigrants commit crimes at a far lower rate than citizens, and this program of mass deportation has done nothing but damage our economy, not help it. This positive narrative about migrants is one that we need to work harder to get out.

But turning back to why I feel hopeful at this point in time -- what has really lifted my spirits are the many people who remind us that welcoming refugees is not just a question of legal obligation, but a profound moral question, a question of conscience. I have been particularly grateful to Pope Leo for his unapologetic and uncompromising statements on the issue.

This past June, Pope Leo went to the Canary Islands. The islands, which are located 60 miles off the northwest coast of Africa, are a part of Spain. Tens of thousands of migrants take to boats in an attempt to reach the Canary Islands, where they hope to access EU refugee protection. The voyage of the migrants is perilous, and thousands have drowned at sea.

Pope Leo went to the small port in a fishing village in the southwest of Gran Canaria. Standing at the port, surrounded by a crowd which included migrants, he began by casting a wreath into the waters in memory of the thousands who lost their lives attempting to reach safety.

He then spoke directly to the migrants present, and said to them*: "I want to bow before your dignity. You are not just numbers or files. You are people who have left behind families and homes. You have dreams that no one has the right to despise."*

Leo continued:

Human dignity demands legal and safe pathways, rescue and assistance, real cooperation against traffickers, effective protection for victims, serious processes of reception and integration, and policies that allow every person to live with dignity in their own land.

While there is a right to seek refuge when life is threatened, there is also the right not to have to migrate: the right to remain in one's own home without hunger, war, persecution, violence, the land becoming uninhabitable, corruption stealing the bread from the poor or weapons destroying the future of children.

We cannot grow accustomed to counting the dead. Human dignity has no passport and does not lose its value when crossing a border.

May history not accuse us of turning the pain of those who suffer into a common sight along our shores. Today, here by the sea, every individual that arrives asks us what remains of our humanity. Sooner or later, it will be known whether we protected life or whether we yielded to indifference.

I thank Pope Leo for his call for justice and solidarity, and I thank you all for being here, and for being among those who have not yielded to indifference, but who deeply believe – in Pope Leo's words – that human dignity has no passport.

I'd like to end with a musical contribution – a piece called "A Safe Place to Land," by Sara Bareilles and John Legend.