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**THE SO-CALLED STATELESS:  
FIRM RESETTLEMENT, AFRICAN MIGRANTS, AND  
HUMAN RIGHTS VIOLATIONS IN MEXICO**

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## PROLOGUE

*Imagine suffering a violent, homophobic attack in your home country during which your partner was murdered. You flee to save your life. You cross through more than a dozen countries on your journey to safety. You are repeatedly robbed, assaulted, extorted, and forced to sleep in the streets of strange places. You are finally detained with other Black persons and are repeatedly given papers to sign in a language that you do not understand. No one will translate them for you. The jail you are kept in has no running water and very little food. Everyone is sick. After two weeks, you are handed a document that has your name on it, and a strange word, “apátrida,” or stateless. You do not understand. For the next five months, you remain sleeping on the streets outside of the jail, as you are not allowed to leave the city. You cannot legally work, and no one will rent you a place to stay because of the color of your skin. Stores close their doors to you, and the police shake you down for money at every opportunity. After months, you are given a document allowing you to travel, and you immediately continue to your journey to the United States. When you are detained after crossing the U.S./Mexico border, you learn that the document you received in Mexico because you were labeled as “stateless” was actually proof of Mexican permanent residency, which you never applied for, consented to, or even wanted. Your U.S. immigration lawyer later explains to you that because you received this status, your chances of obtaining protection through asylum in the United States might be limited, as you actually have legal permission to live and work in Mexico, a country where you were detained for months, endangered, and discriminated against as a Black migrant.*

## INTRODUCTION

For decades, Mexico has cooperated with, or been complicit in, U.S. demands to prevent asylum-seekers and migrants from reaching the U.S. border.<sup>1</sup> According to Todd Miller in his work entitled *Empire of Borders*, “Mexico had in a serious way been ‘hired’ by the United States to ‘protect’ the U.S. border from 1,000 miles away.”<sup>2</sup> Notwithstanding Mexico’s role in doing the “dirty work” of the United States, people continue to travel through Mexico.<sup>3</sup> Preliminary data and anecdotal interviews suggest an increasingly diverse group of migrants and asylum-seekers are transiting through Mexico en route to the United States.<sup>4</sup> The numbers of extracontinental migrants and asylum-seekers,

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<sup>1</sup> Jorge G. Castañeda, Opinion, *Mexico Should Not Consent to Do Washington’s Dirty Work*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/opinion/mexico-caravan-trump-dirty-work.html>.

<sup>2</sup> TODD MILLER, *EMPIRE OF BORDERS: THE EXPANSION OF THE U.S. BORDER AROUND THE WORLD* 28 (2019).

<sup>3</sup> See generally Castañeda, *supra* note 1.

<sup>4</sup> Caitlin Yates, *As More Migrants from Africa and Asia Arrive in Latin America, Governments Seek Orderly and Controlled Pathways*, MIGRATION POL’Y INST. (Oct. 22, 2019), <https://www.migrationpolicy.org/article/extracontinental-migrants-latin-america>;

particularly those from Africa, have risen sharply in the past five years.<sup>5</sup> In fact, the number of African nationals found by migration authorities in Mexico almost quadrupled to nearly 3,000 people between 2014 and 2018.<sup>6</sup> Subsequently, in 2019, Mexico detained 7,065 African nationals.<sup>7</sup> The same year, “more than 1,600 African nationals from thirty-six countries” were apprehended in a single U.S./Mexico border sector.<sup>8</sup>

Despite their small numbers when compared to Central Americans in migration, the increasing numbers of extracontinental migrants and asylum-seekers transiting through Mexico garnered more attention and scrutiny under the Trump Administration.<sup>9</sup> Previously, extracontinental migrants were able to obtain a transit or exit visa (an *oficio de salida* or a *salvoconducto*) allowing unrestricted passage through Mexico for a period of twenty days.<sup>10</sup> In May 2019, the United States threatened to impose tariffs on Mexico unless it curbed migration to the U.S./Mexico border; in response, Mexico enacted more barriers for asylum-seekers traveling through the country.<sup>11</sup> Mexico’s response included the deployment of the Mexican National Guard along Mexico’s northern and southern borders, as well as militarized checkpoints throughout the country.<sup>12</sup> In addition, the United States adopted systems of “metering” at ports of entry along its southern border with Mexico to restrict the numbers of individuals who could seek asylum on any given day, creating long wait times of many months

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Ramon Taylor, *At U.S.-Mexico Border, Africans Join Diversifying Migrant Community*, VOICE OF AM. (Aug. 31, 2019, 4:03 AM), <https://www.voanews.com/usa/us-mexico-border-africans-join-diversifying-migrant-community>.

<sup>5</sup> S. PRIYA MORLEY ET AL., BLACK ALL. FOR JUST IMMIGR., “THERE IS A TARGET ON US”—THE IMPACT OF ANTI-BLACK RACISM ON AFRICAN MIGRANTS AT MEXICO’S SOUTHERN BORDER 20 (2021), <http://baji.org/wp-content/uploads/2021/01/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf>. “Extracontinental” is a term used for people in migration in the Americas who are not from the Western Hemisphere. Yates, *supra* note 4.

<sup>6</sup> MORLEY ET AL., *supra* note 5, at 55.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> Taylor, *supra* note 4.

<sup>9</sup> See generally MORLEY ET AL., *supra* note 5, at 35.

<sup>10</sup> *Id.* at 33.

<sup>11</sup> Ana Swanson, *Trump’s Tariff Threat Sends Mexico, Lawmakers and Businesses Scrambling*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/business/mexico-tariffs-donald-trump.html>.

<sup>12</sup> Dave Graham, *Mexico Says It Has Deployed 15,000 Forces in the North to Halt U.S.-Bound Migration*, REUTERS (June 24, 2019), <https://www.reuters.com/article/us-usa-trade-mexico-immigration/mexico-says-it-has-deployed-15000-forces-in-the-north-to-halt-u-s-bound-migration-idUSKCN1TP2YN>; MORLEY ET AL., *supra* note 5, at 34; *Report: Mexico’s Immigration Enforcement Relies on Military*, ASSOC. PRESS (May 24, 2022), <https://apnews.com/article/politics-armed-forces-immigration-racial-profiling-a85ca4fda3589afa469e2afd0f6d2ced>.

in border cities.<sup>13</sup> The Migrant Protection Protocols (MPP), a program created under the Trump Administration in which asylum-seekers were returned to Mexico to wait for their immigration court hearings in the United States, significantly increased the number of asylum-seekers in Mexico.<sup>14</sup> The COVID-19 pandemic caused further chaos and uncertainty for those trapped in Mexico as the border between countries has been closed to asylum-seekers since March 2020.<sup>15</sup> As a result of actions by both the United States and Mexico, tens of thousands of asylum-seekers are now in Mexico, which has transitioned from a country of transit to now a country of perpetual waiting.<sup>16</sup> Interestingly, the number of migrants applying for asylum in Mexico is also increasing, with claims almost doubling between 2019 and 2021.<sup>17</sup> Over 130,000 persons applied for refugee and asylum protection in Mexico in 2021 alone, surpassing all previous records for applications.<sup>18</sup>

In recent years, Mexico began to label certain irregular African migrants and asylum-seekers as “stateless,” allowing them to have legal documentation to travel from the southern Mexican border to the U.S. border.<sup>19</sup> Under the operation of Mexico’s migration laws, these so-called stateless individuals are then awarded permanent residence status in Mexico—without ever applying for or consenting to it—which allows them to live and work in Mexico

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<sup>13</sup> Elizabeth Trovall, ‘Metering’ Policy at the Southern Border Faces Renewed Scrutiny, NPR (July 3, 2019), <https://www.npr.org/2019/07/03/738586876/metering-policy-at-the-southern-border-faces-renewed-scrutiny>.

<sup>14</sup> U.S. DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS (2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>. The program has been the subject of extensive litigation under the Biden administration, but as of October 2022, the administration has begun to wind down the program. See *Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWS. ASSOC. (Oct. 7, 2022), <https://www.aila.org/advocacy/media/issues/port-courts#:~:text=In%20short%2C%20MPP%20is%20over,least%20one%20government%20attorney%20reportedly>.

<sup>15</sup> See Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, 85 Fed. Reg. 16567, 16567 (Mar. 24, 2020) (codified at 42 C.F.R. pt. 71).

<sup>16</sup> See Jason Kao & Denise Lu, *How Trump’s Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html>.

<sup>17</sup> According to COMAR (Comisión Mexicana de Ayuda a Refugiados), the following numbers of persons applied for asylum between 2018 and 2021: 29,570 (2018); 70,320 (2019); 40,925 (2020); 129,907 (2021). *La COMAR en números*, GOBIERNO DE MÉXICO (Sept. 6, 2022), <https://www.gob.mx/comar/articulos/la-comar-en-numeros-313659>.

<sup>18</sup> *Mexico Saw Refugee, Asylum Claims Almost Double in 2021*, ASSOC. PRESS (Jan. 3, 2022), <https://apnews.com/article/immigration-coronavirus-pandemic-health-mexico-caribbean-6ccc422311704b478e2bb20b403b1317>.

<sup>19</sup> Reglamento de la Ley de Migración [RLM], art. 150, Diario Oficial de la Federación [DOF] 28-09-2012, últimas reformas DOF 23-05-2014 (Mex.); Interviews with migrants by phone and WhatsApp in New York, N.Y. (Aug. 2020, Feb. 2021) (on file with author).

indefinitely.<sup>20</sup> While at a glance, this might seem to be a benign attempt by the Mexican government to provide solutions for those caught in liminality, the award of permanent residency in a third country has severe repercussions for future asylum claims in the United States: namely, triggering the “firm resettlement” statutory bar to being granted asylum.<sup>21</sup> In short, an applicant may be denied asylum protection in the United States if they receive an offer of permanent resettlement in another country before they reach the United States.<sup>22</sup> U.S. regulations do not require that the applicant actually accept the offer in order for the firm resettlement bar to apply.<sup>23</sup>

This paper will explore Mexico’s reactionary migration policies, especially concerning the labeling of African migrants and asylum-seekers<sup>24</sup> as “stateless” and the subsequent unsolicited permanent residence status it offers, and address the numerous international and domestic legal violations contained within. Part I of this Article presents the lived experiences of African asylum-seekers traveling through Mexico in 2015 and 2019 to demonstrate the direct impact of Mexican migratory policy changes. Many Black migrants and asylum-seekers, as well as Afro-Mexicans, have raised awareness of anti-Blackness in Mexico and of how racism is pervasive.<sup>25</sup> Part II of this Article explains Trump-era changes to U.S. immigration policies, many of which continue under the Biden Administration. This Part first addresses those policies directly promulgated by the United States, and subsequently focuses on Mexican immigration policies

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<sup>20</sup> See generally *Documentación y condición de estancia en México, 2020*, GOBIERNO DE MÉXICO, <http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2020&Secc=2> (last visited Jan. 8, 2023) (Mexican government statistics on numbers of grants of permanent residence by year and by country of origin, including stateless individuals); Interviews with migrants by phone and WhatsApp in New York, N.Y. (Aug. 2020, Feb. 2021) (on file with author).

<sup>21</sup> An asylum applicant is ineligible for asylum in the United States if he or she was “firmly resettled in another country prior to arriving in the United States.” Immigration and Nationality Act (INA) § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi).

<sup>22</sup> See *id.*

<sup>23</sup> See 8 C.F.R. §§ 207.1(b), 208.15 (2021).

<sup>24</sup> Migrants and asylum-seekers are often overlapping terms, as people move for multiple complex reasons. See generally Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s ‘Migration Crisis,’* 44 J. ETHNIC MIGRATION STUD., 48, 48 (2018) (“The use of the categories ‘refugee’ and ‘migrant’ to differentiate between those on the move and the legitimacy, or otherwise, of their claims to international protection has featured strongly during Europe’s ‘migration crisis’ and has been used to justify policies of exclusion and containment.”). In addition, the terms “migrant” and “refugee” are political, and their usage by states creates hierarchies of deserving and undeserving. See Harsha Walia and Ayesha A. Siddiqi on the Real Migrant Crisis, HIGHSNOBIETY, <https://www.highsnobiety.com/p/harsha-walia-interview-ayesha-siddiqi-honors-week/> (last visited Jan. 8, 2023). As such, both the terms “migrant” and “asylum-seeker” will be used in this Article to describe people on the move.

<sup>25</sup> See generally MORLEY ET AL., *supra* note 5, at 10.

affecting migrants in transit. Part III of this Article explores the concept of statelessness, including the internationally recognized legal definition, legal norms, and regional instruments. This Part discusses Mexico's interpretation of statelessness and how it disproportionately, if not entirely, impacts Black migrants. Part IV of this Article explains the harm to U.S. asylum claims caused by the offer of permanent residence in a third country such as Mexico, namely the firm resettlement bar. Part V addresses possible solutions moving forward, in both U.S. immigration law and in Mexican law, on domestic, regional, and international levels. Such proposed solutions aim to prevent more persons in migration from being issued a legal status which they did not understand, want, or consent to, and which has severe adverse impacts for their future migration goals.

I. EXTRACONTINENTAL MIGRATION THROUGH MEXICO: LIVED EXPERIENCES IN 2015 AND 2019

The migration stories of two men, Mamadou and Isaac, illustrate a similar journey from Ghana to the United States taken four years apart.<sup>26</sup> Both men left their home country of Ghana in their mid-thirties, after experiencing brutal violence for being perceived to be members of the LGBTQ community.<sup>27</sup> The disparate treatment they received during their time in Mexico enables us to understand the changes in Mexican immigration policies pertaining to African migrants.<sup>28</sup>

Mamadou is a thirty-eight-year-old Muslim man from Accra, Ghana.<sup>29</sup> He was married and lived with his wife and young son.<sup>30</sup> Mamadou owned a used bicycle store and made a good living for his family.<sup>31</sup> After he befriended a gay man, Mamadou began to have problems with the local imam and neighbors in his community.<sup>32</sup> After repeated threats, Mamadou and his friend were attacked by a homophobic mob.<sup>33</sup> Mamadou escaped, while his friend was killed.<sup>34</sup> Mamadou's brother helped him flee to the United States.<sup>35</sup> As Mamadou did not already have a U.S. visa, he flew to Brazil in May 2015, then to Ecuador,

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<sup>26</sup> "Mamadou" and "Isaac" are New York Law School Asylum Clinic clients whom the author represents. Pseudonyms are used to protect their privacy. Both have given permission for this summary of their stories to be shared. Interviews with Mamadou and Isaac, New York Law School Asylum Clinic clients in New York, N.Y. (Aug. 2018, Aug. 2021) (on file with author).

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

and then made his way through roughly a dozen countries to reach the United States.<sup>36</sup> He was robbed repeatedly, and his passport was stolen in Panama.<sup>37</sup> This journey took two months.<sup>38</sup> Mamadou did not experience any issues with Mexican immigration authorities and was never detained in Mexico.<sup>39</sup> He was issued a transit visa at the Mexico/Guatemala border, allowing him to travel through Mexico en route to the United States.<sup>40</sup> He presented himself at the San Ysidro Port of Entry in Tijuana, Mexico in July 2015, and stated that he was afraid to return to Ghana.<sup>41</sup> After being detained by U.S. Customs and Border Protection, Mamadou requested asylum protection in the United States, and after four years of hearings, appeals, and delays, he was finally granted asylum in 2019.<sup>42</sup>

Isaac is a thirty-seven-year-old Muslim man from Accra, Ghana.<sup>43</sup> He worked as a truck driver and transported goods from the Port of Accra throughout Ghana.<sup>44</sup> He enjoyed his work, which took him all over the country, often for a week at a time.<sup>45</sup> Isaac is a gay man and is friends with other members of the LGBTQ community in Accra.<sup>46</sup> In September 2019, Isaac, his partner, and their friends were having an outdoor barbeque when they were attacked by a homophobic mob.<sup>47</sup> The mob was specifically looking for Isaac.<sup>48</sup> Isaac was wounded with machete blows to his head and back, but he was able to escape.<sup>49</sup> Several of his friends lost limbs in the attack.<sup>50</sup> His partner was murdered by the mob.<sup>51</sup> Stories of the attack with Isaac's photo and name were published in multiple Ghanaian newspapers.<sup>52</sup> Isaac knew he could never be safe in Ghana.<sup>53</sup> He decided to travel to the only country where he thought he could be safe—the United States.<sup>54</sup> Without a U.S. visa, he flew to Brazil in October 2019, and then to Ecuador, and then began a journey of many months in order to reach

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*



Mexico.<sup>55</sup> He faced enormous violence en route, the most horrific of which occurred in the Darien Gap between Panama and Colombia, during which time his passport was stolen.<sup>56</sup> Isaac reached the southern border of Mexico in December 2019.<sup>57</sup> He was detained for two weeks at the Siglo XXI detention facility in Tapachula.<sup>58</sup> He spent the next five months effectively homeless, sometimes sleeping on the streets and other times trying to find a room at an inexpensive hotel when he had a bit of money.<sup>59</sup> He was not allowed to leave Tapachula, which he described as a “prison.”<sup>60</sup> He had to return to the detention facility every week to meet with Mexican immigration authorities, who refused to provide him with an interpreter.<sup>61</sup> He did not apply for asylum or refugee protection in Mexico because he did not feel safe.<sup>62</sup> He was unable to work in Mexico, as no one would hire him because he was Black, did not speak Spanish, and did not have work authorization.<sup>63</sup> He finally received what he thought was a transit visa in May 2020.<sup>64</sup> He was actually labeled as “stateless,” despite having his original Ghanaian birth certificate with him, and was given permanent residence in Mexico.<sup>65</sup> With this permanent residence card, he was finally allowed to leave the city of Tapachula.<sup>66</sup> He immediately flew from Tapachula to Mexicali, Mexico, and crossed into the United States, where he was apprehended by U.S. Customs and Border Protection.<sup>67</sup> He has requested asylum protection in the United States.<sup>68</sup>

Both Mamadou and Isaac fled Ghana due to anti-LGBTQ violence.<sup>69</sup> Their journeys to safety in the United States took them through a dozen countries over multiple months.<sup>70</sup> They suffered threats as Black persons traveling through South and Central America.<sup>71</sup> They were repeatedly robbed, assaulted, and mistreated on their journeys through the Americas.<sup>72</sup> They each spent about a

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

week crossing the odious Darien Gap, and their passports were stolen.<sup>73</sup> However, Isaac's experience in Mexico in 2019 and 2020 differs greatly from Mamadou's experience in 2015.<sup>74</sup> Mamadou passed through Mexico by bus in about a week.<sup>75</sup> He was never detained in Mexico, nor did he apply for any type of protection.<sup>76</sup> Isaac, on the other hand, was detained in a Mexican detention facility, and then effectively detained by being unable to leave the city of Tapachula for five months because of a lack of a transit or exit permit.<sup>77</sup> As Tapachula is a carceral city surrounded by checkpoints staffed by Mexican migration agents and the Mexican National Guard, it was impossible for him to escape.<sup>78</sup> His prolonged stay in Mexico caused him to have multiple interactions with Mexican immigration authorities, never with the use of an interpreter.<sup>79</sup> As such, he never understood anything that was happening concerning his immigration status in Mexico.<sup>80</sup> He was labeled as "stateless," which shocked him as he is a citizen and national of Ghana.<sup>81</sup> He had his Ghanaian identification documents and birth certificate at the time of his interaction with Mexican immigration authorities.<sup>82</sup> After five months of weekly check-ins, he was issued a Mexican permanent residence card based on his grant of being labeled as "stateless."<sup>83</sup>

Global mobility stalled in 2020 due to the COVID-19 pandemic.<sup>84</sup> Countries worldwide, including the United States and Mexico, used the pretext of the pandemic to shut their borders—sometimes to all, sometimes only to those deemed to be unworthy of entry.<sup>85</sup> Shortly before this Article went to press, the Supreme Court granted certiorari and ordered a temporary stay of a lower court decision which would have re-opened the U.S./Mexico land border after several years of barring asylum-seekers based on the antiquated Title 42 public health

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See id.*; Joe Penney, *Tapachula, Mexico, Is an Open-Air Immigration Prison for the U.S.*, NEW REPUBLIC (Oct. 26, 2021), <https://newrepublic.com/article/164131/tapachula-mexico-immigration-prison-us>.

<sup>79</sup> Interviews with Mamadou and Isaac, *supra* note 26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See* MEGHAN BENTON ET AL., *MIGRATION POL'Y INST., COVID-19 AND THE STATE OF GLOBAL MOBILITY IN 2020*, at 1 (2021) <https://publications.iom.int/system/files/pdf/covid-19-and-the-state-of-global.pdf>.

<sup>85</sup> *See id.*; CAITLYN YATES & JESSICA BOLTER, *MIGRATION POL'Y INST., AFRICAN MIGRATION THROUGH THE AMERICAS: DRIVERS, ROUTES, AND POLICY RESPONSES* 28 (2021), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-african-migration-americas-eng\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-african-migration-americas-eng_final.pdf).

regulation, which was implemented in March of 2020.<sup>86</sup> Official crossings on Mexico's southern border with Guatemala closed in different periods to "non-essential" travel.<sup>87</sup> Anecdotally, people in migration have been able to continuously cross the river between Mexico and Guatemala unofficially throughout the COVID-19 pandemic, except for two weeks in March and April 2020.<sup>88</sup> As international borders began to open by 2021, extracontinental migrants, as well as people from Haiti, Venezuela, Cuba, Nicaragua, and Honduras, continued to try to journey through Mexico to seek safety in the United States.<sup>89</sup>

## II. TRUMP ADMINISTRATION CHANGES IMPACTING EXTRACONTINENTAL ASYLUM-SEEKERS, CONTINUING UNDER THE BIDEN ADMINISTRATION

### A. *United States*

After calling asylum a "scam" and indicating that he wanted to end asylum protections altogether, former President Trump and his Administration went to great lengths to stop asylum-seekers from accessing the United States.<sup>90</sup> Advocates have noted some 472 administrative changes made to immigration policy and practice, many of which impact those seeking asylum protections.<sup>91</sup> Notable changes include the Trump Administration's use of the unofficial policy of "metering" to require those attempting to apply for asylum at the U.S. border with Mexico to put their name on an unofficial waiting list.<sup>92</sup> In Tijuana, this

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<sup>86</sup> See 42 U.S.C. § 265 (allowing the executive to suspend immigration into the United States by reason of the existence of communicable diseases in a foreign country); *Huisha-Huisha v. Mayorkas*, 2022 WL 16948610, at \*16 (D.D.C. Nov. 15, 2022) (permanently enjoining the COVID-19 border regulation, declaring it arbitrary and capricious), *cert. granted*, *Arizona v. Mayorkas*, 2022 WL 17957850 (U.S. Dec. 27, 2022) (temporarily staying the district court order pending oral argument).

<sup>87</sup> Dave Graham, *Mexico to Tighten Borders Against COVID-19 as U.S. Offers Vaccine Help*, REUTERS (Mar. 18, 2021, 12:02 PM), <https://www.reuters.com/article/us-usa-immigration-mexico-border/mexico-to-tighten-borders-against-covid-19-as-u-s-offers-vaccine-help-idUSKBN2BA23K>.

<sup>88</sup> Interview with Guatemalan boat worker, on Suchiate River at Mex./Guat. border (Mar. 2022) (on file with author).

<sup>89</sup> Penney, *supra* note 78.

<sup>90</sup> See *President Trump Mocks Asylum Seekers, Calls Program a "Scam,"* C-SPAN (Apr. 6, 2019), <https://www.c-span.org/video/?c4790668/president-trump-mocks-asylum-seekers-calls-program-scam>; see generally JESSICA BOLTER ET AL., *MIGRATION POL'Y INST., FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY 1-8* (2022), <https://www.migrationpolicy.org/research/four-years-change-immigration-trump>.

<sup>91</sup> BOLTER ET AL., *supra* note 90, at 1.

<sup>92</sup> *'Metering' at the Border*, NPR (June 29, 2019, 8:03 AM), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border>. While the Obama administration used metering intermittently to respond to temporary backlogs, the Trump

list was maintained in a composition notebook by migrants themselves under the eye of both Mexican and U.S. immigration officials, while those same officials denied access to the actual entry door for asylum-seekers.<sup>93</sup> Cameroonians complained of corruption in that they were discriminated against and skipped over in line by the “list managers,” or the rotating cast of persons who controlled the list themselves.<sup>94</sup> Wait times ranged from four to nine months before those waiting on the list would be allowed inside the Port of Entry, detained, and then given a Credible Fear Interview with a U.S. government official—simply the first step in the process of applying for asylum.<sup>95</sup>

For those asylum-seekers from Central America and Brazil, the Trump Administration’s MPP, which started in January 2019, returned individuals and families to Mexican border towns to wait for their next appearances in U.S. immigration courts.<sup>96</sup> A study found that out of almost 50,000 asylum-seekers impacted by the MPP in their first year of operation, less than 10,000 had completed their cases as of September 2019, and only 0.1% of those were granted asylum.<sup>97</sup> In addition, hundreds of migrants were kidnapped in Northern Mexico while waiting for their U.S. immigration court hearings, while thousands of others have been robbed, raped, and assaulted.<sup>98</sup>

At the onset of the COVID-19 pandemic in the United States, the Trump Administration closed the U.S. southern border to asylum-seekers, ostensibly

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administration used metering much more consistently and over a longer period of time. *See id.*

<sup>93</sup> Sarah Stillman, *The Race to Dismantle Trump’s Immigration Policies*, NEW YORKER (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies>.

<sup>94</sup> Alexandra LaMarche & Alanna Fox, Opinion, *The U.S. Shouldn’t Make Cameroonians on the Border Wait in Vain*, HILL (Aug. 18, 2019, 6:00 PM), <https://thehill.com/opinion/international/457891-the-us-shouldnt-make-cameroonians-on-the-border-wait-in-vain/>; Max Rivlin-Nadler, *Migrants from Cameroon Protest Immigration Process in Tijuana*, KPBS (July 9, 2019, 10:34 AM), <https://www.kpbs.org/news/midday-edition/2019/07/09/migrants-cameroon-protest-immigration-process-tiju>.

<sup>95</sup> A Credible Fear Interview is the first step in the defensive asylum process for those who would be subject to expedited removal because they seek to enter the United States without a visa or other admission paperwork. *See* INA § 235, 8 U.S.C. § 1225.

<sup>96</sup> *See* U.S. DEP’T OF HOMELAND SEC., *supra* note 14; AM. IMMIGR. COUNCIL, THE “MIGRANT PROTECTION PROTOCOLS” 1–3 (Jan. 2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_migrant\\_protection\\_protocols\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf).

<sup>97</sup> Gustavo Solis, *Remain in Mexico Has a 0.1 Percent Asylum Grant Rate*, SAN DIEGO UNION-TRIBUNE (Dec. 15, 2019, 4:52 AM), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate>.

<sup>98</sup> HUMAN RIGHTS FIRST, CHAOS, CRUELTY, AND ILLEGALITY: THE TRUMP ADMINISTRATION’S RECORD ON ASYLUM 1 (Jan. 12, 2021), <https://humanrightsfirst.org/library/chaos-cruelty-illegality-the-trump-administrations-record-on-asylum/>.

for public health reasons under Title 42 of the U.S. Code.<sup>99</sup> U.S. Centers for Disease Control doctors have called the Title 42 border closure policy a “. . . misuse of public health authority.”<sup>100</sup> Nevertheless, while the United States has effectively moved on from the COVID-19 pandemic and discontinued COVID testing for international travelers arriving to the United States, Title 42 remains in effect as this article goes to press.<sup>101</sup> Under Title 42, those who enter without inspection and are apprehended are expelled under the guise of public health reasons.<sup>102</sup> The Department of Homeland Security (DHS) has carried out more than 1.8 million expulsions under Title 42, and many people have been expelled multiple times.<sup>103</sup> Advocates estimate that some 15,000 Black asylum-seekers, most of whom are African or Haitian, have been trapped in Mexican border cities due to these U.S. immigration policy restrictions, unable to access asylum protections in the United States.<sup>104</sup>

Due to the COVID-19 pandemic, the Trump Administration discontinued immigration court appearances for asylum-seekers waiting in Mexico under the

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<sup>99</sup> 42 U.S.C. § 265; Order Suspending Introduction of Persons from a Country Where a Communicable Disease Exists, *supra* note 15.

<sup>100</sup> Camilo Montoya-Galvez, *Top CDC Scientist Said COVID-Era Health Policy Used to Expel Migrants Unfairly Stigmatized Them*, CBS NEWS (Oct. 17, 2022, 1:28 PM), <https://www.cbsnews.com/news/top-cdc-scientist-said-covid-era-health-policy-used-to-expel-migrants-unfairly-stigmatized-them/>.

<sup>101</sup> See Rescinding Requirement for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery from COVID-19 for All Airline or Other Aircraft Passengers Arriving into the United States from Any Foreign Country, 87 Fed. Reg. 36129, 36129 (June 15, 2022); *Arizona v. Mayorkas*, 2022 WL 17957850 (U.S. Dec. 27, 2022). In November 2022, a federal judge struck down the immigration regulation as arbitrary and capricious, but the district judge order was stayed shortly thereafter, pending Supreme Court review of a narrow procedural question. See *Huisha-Huisha v. Mayorkas*, 2022 WL 16948610, at \*16 (D.D.C. Nov. 15, 2022), *cert. granted*, *Arizona v. Mayorkas*, 2022 WL 17957850 (U.S. Dec. 27, 2022).

<sup>102</sup> See 42 U.S.C. § 265; AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 4 (2022), [https://www.americanimmigrationcouncil.org/sites/default/files/research/title\\_42\\_expulsions\\_at\\_the\\_border\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf). Under the Biden administration, a policy change exempted unaccompanied minors from expulsion. See Public Health Reassessment and Immediate Termination of Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists with Respect to Unaccompanied Noncitizen Children, 87 Fed. Reg. 15243 (Mar. 11, 2022) (to be codified at 42 C.F.R. 71 pt. 40).

<sup>103</sup> See AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER, *supra* note 102, at 1.

<sup>104</sup> Mimi Dwyer, *As Biden Winds Down Mexico Program, Many Migrants on U.S. Border Left in Limbo*, REUTERS (Mar. 12, 2021, 6:07 AM), <https://www.reuters.com/article/us-usa-immigration-asylum/as-biden-winds-down-mexico-program-many-migrants-on-u-s-border-left-in-limbo-idUSKBN2B419F>.

MPP program indefinitely in March 2020.<sup>105</sup> During the first week of the Biden Administration, the DHS issued a statement suspending any new entrants into the MPP program, and instituted a policy in coordination with the United Nations High Commissioner for Refugees (UNHCR) to parole asylum-seekers with active MPP cases into the United States after passing COVID-19 screenings.<sup>106</sup> While the Biden Administration formally ended the MPP Program and paroled many impacted individuals into the United States, lawsuits filed by several states to re-instate MPP created uncertainty about the program's actual termination.<sup>107</sup> The Biden Administration not only reinstated MPP following a court order, but also increased eligibility for the program to include all persons from the Western Hemisphere.<sup>108</sup> Following a Supreme Court order in June 2022 finding that the Biden Administration did indeed have the legal authority to end MPP, the Administration is again taking steps to wind down the MPP program.<sup>109</sup>

### B. Mexico

Andrés Manuel López Obrador became president of Mexico in December 2018.<sup>110</sup> The first six months of his presidency reflected a relatively pro-human rights-based approach to migration through Mexico.<sup>111</sup> However, in response to the Trump Administration's May 2019 threats to impose tariffs if Mexico continued to allow U.S.-bound migrants to transit freely to the U.S. border, Mr. López Obrador's Administration quickly changed its immigration policies.<sup>112</sup>

#### 1. Mexican National Guard and Increased Detention

Mexico activated its *Guardia Nacional* (National Guard) and deployed members not only to the southern border with Guatemala, but throughout all of Mexico.<sup>113</sup> Described as "a security force in theory civilian, but in reality under

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<sup>105</sup> AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER, *supra* note 102, at 4.

<sup>106</sup> See Press Release, U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>; AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS," *supra* note 96, at 6–7.

<sup>107</sup> AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS," *supra* note 96, at 7.

<sup>108</sup> *Id.* at 7–8.

<sup>109</sup> See *Court Ordered Reimplementation of the Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Aug. 8, 2022), <https://www.dhs.gov/migrant-protection-protocols>.

<sup>110</sup> See MORLEY ET AL., *supra* note 5, at 34.

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*; see also Jorge Rocha, *Mexico Has Militarized Its Immigration Policy: Report*, LATIN AM. REPS. (May 28, 2022), <https://latinamericareports.com/mexico-has-militarized-its-immigration-policy-report/6567/>.

military control,” the Mexican National Guard is charged with detaining those suspected of being irregular migrants in Mexico.<sup>114</sup> Mexican human rights advocates assert that the identification of persons as irregular migrants is largely based on racial profiling.<sup>115</sup> Further, advocates have documented reports of African migrants and women being victims of extortion, discrimination, and sexual abuse at the hands of the Mexican National Guard.<sup>116</sup>

As a result of these changes, an increasing number of migrants are being detained in Mexico.<sup>117</sup> In 2019, Mexico detained over 182,000 persons for immigration reasons, an increase from previous years.<sup>118</sup> While 2020 is an anomaly for immigration statistics because of world-wide border closures due to the COVID-19 pandemic, Mexico detained over 250,000 persons in 2021.<sup>119</sup>

Many Mexican detention facilities, including Siglo XXI in Tapachula, the largest migrant detention facility in Latin America, are extremely overcrowded, with people sharing filthy mattresses, sleeping in hallways with rats and pigeon feces, lacking sufficient water and food, and going without access to medications or COVID-19 tests.<sup>120</sup> Siglo XXI has capacity for some 960 persons,<sup>121</sup> but in reality, there are at times more than 2,000 men, women, and children detained behind its walls.<sup>122</sup> Researchers from the IBERO University of Puebla studying detention facilities in the Mexican states of Tlaxcala and Puebla in 2020 and 2021 found that in all of the cases they studied, “detention occurs in a violent manner with little or no legal guidance.”<sup>123</sup> While Mexican law prohibits the

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<sup>114</sup> Report: Mexico’s Immigration Enforcement Relies on Military, *supra* note 12.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*; see also *Crece militarización de política migratoria mexicana: ONG, LA JORNADA SIN FRONTERAS* (May 24, 2022), <https://www.jornada.com.mx/sin-fronteras/2022/05/24/crece-militarizacion-de-politica-migratoria-mexicana-ong-792.html>.

<sup>117</sup> See Rafael Bernal, *Mexico Detained More Than 250,000 Migrants in 2021*, HILL (Dec. 28, 2021, 4:08 PM), <https://thehill.com/latino/587522-mexico-detained-more-than-250000-migrants-in-2021/>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See María Verza, *Detención migratoria en México: hacinamiento y abusos*, ASSOC. PRESS (June 17, 2019), <https://apnews.com/article/83221f781f7741ef953a31fefdeeb5a7>; MORLEY ET AL., *supra* note 5, at 40; Alejandro Gómez, *La Estación Migratoria Siglo XXI, una pesadilla*, DIARIO DEL SUR (Feb. 2, 2022), <https://www.diariodelsur.com.mx/local/la-estacion-migratoria-siglo-xxi-una-pesadilla-7811016.html>.

<sup>121</sup> *La Estación Siglo XXI, el centro migratorio que tiene a México en la mira*, EXPANSIÓN POLÍTICA (Feb. 3, 2020), <https://politica.expansion.mx/mexico/2020/02/03/la-estacion-siglo-xxi-el-centro-migratorio-que-tiene-a-mexico-en-la-mira>.

<sup>122</sup> See Verza, *supra* note 120; see also Gómez, *supra* note 120 (discussing Siglo XXI operating over capacity).

<sup>123</sup> GUILLERMO YRIZAR BARBOSA ET AL., *VIDAS EN CONTENCIÓN: PRIVACIÓN DE LA LIBERTAD Y VIOLACIONES A DERECHOS HUMANOS EN ESTACIONES MIGRATORIAS DE PUEBLA Y TLAXCALA, 2020–2021*, at 7 (2022), <https://repo.iberopuebla.mx/pdf/2022/informeIDHIE.pdf>.

detention of both accompanied and unaccompanied minors, the sad reality is that other vulnerable persons continue to be detained in Mexican detention facilities.<sup>124</sup> Though conditions are poor for all migrants, researchers assert that persons who do not speak Spanish receive much worse treatment from the *Instituto Nacional de Migración* (INM) officials running the detention facilities.<sup>125</sup>

## 2. Pre-June 2019 Immigration Practices

Before the significant changes in immigration enforcement in Mexico in 2019, African and other extracontinental migrants could transit legally through Mexico after receiving an *oficio de salida* from the INM, the Mexican governmental agency that controls migration, at the southern border of Mexico.<sup>126</sup> These exit permits allowed people in migration two options: to either regularize their status with INM, or to exit Mexico within twenty days.<sup>127</sup> They also provided persons with the requisite immigration documents to purchase bus or plane tickets to travel across Mexico to the United States border, a distance of some 2,000 or more kilometers.<sup>128</sup> At times, the INM would also issue African and other migrants a *tarjeta de visitante por razones humanitarias* (TVRH card, a type of humanitarian visa) which would allow them to transit through Mexico.<sup>129</sup> Researchers from the *Instituto para las Mujeres en la Migración* (IMUMI), a Mexico City-based non-profit organization, reported that African nationals were very rarely deported to their countries of origin from Mexico because of limited consular representation of many African countries in Mexico.<sup>130</sup> In addition, the heavy costs associated with deportations from Mexico to Africa, estimated to be 10,000 USD per person, made deportations of African migrants impracticable.<sup>131</sup>

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<sup>124</sup> Gustavo Guerra, *Mexico: Migration Law Amendment Requires Placing Undocumented Children in Shelters, Not Detention Centers*, LIBR. OF CONG. (Feb. 26, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-02-26/mexico-migration-law-amendment-requires-placing-undocumented-children-in-shelters-not-detention-centers/>; MORLEY, *supra* note 5, at 36, 38–39. See generally Verza, *supra* note 120; Gómez, *supra* note 120.

<sup>125</sup> YRIZAR BARBOSA ET AL., *supra* note 123, at 23.

<sup>126</sup> MORLEY ET AL., *supra* note 5, at 33.

<sup>127</sup> Alberto Pradilla, *El campamento de los “apátridas,”* MIGRANTES DE OTRO MUNDO, <https://migrantes-otro-mundo.elclip.org/pasos-prohibidos/el-campamento-de-los-apatridas.html> (last visited Jan. 8, 2023) [hereinafter Pradilla, *El campamento*].

<sup>128</sup> See *id.*; MORLEY ET AL., *supra* note 5, at 33.

<sup>129</sup> MORLEY ET AL., *supra* note 5, at 33.

<sup>130</sup> *Id.*

<sup>131</sup> Pradilla, *El campamento*, *supra* note 127; see also JAIME HORACIO CINTA CRUZ, MOVILIDADES EXTRACONTINENTALES: PERSONAS DE ORIGEN AFRICANO Y ASIÁTICO EN TRÁNSITO POR LA FRONTERA SUR DE MÉXICO 103 (2020).



### 3. Post-June 2019 Migration Policy Changes

Mexico's migration policy is a direct response to pressure from the United States. On June 7, 2019, Mexican Foreign Secretary Marcelo Ebrard signed an agreement in Washington, D.C, promising to reduce migration flows through Mexico and accept migrants in the MPP program back into Mexico, in exchange for U.S. agreement not to increase tariffs on Mexican goods.<sup>132</sup> Shortly thereafter, on July 10, 2019, Mexico changed its protocol for issuing exit permits with an official letter signed by Ana Laura Martínez de Lara, the then-Director General of Migration Control and Verification.<sup>133</sup> This letter, which was sent to all INM offices, instructed officials on how to issue and respond to the exit permits that had previously been in use.<sup>134</sup> No longer would persons in migration with an exit permit from INM be able to move freely throughout Mexico.<sup>135</sup> Instead, their choices would be to regularize their immigration status with INM, or to abandon Mexico from an official crossing on the border with Guatemala, where the migrant originally entered the country.<sup>136</sup> As such, people in migration crossing into southern Mexico were no longer able to quickly obtain documents allowing for travel through Mexico.<sup>137</sup>

### 4. "Tapachula"<sup>138</sup>: The Open-Air Prison City of Tapachula, Mexico

As a result of these changes, the city of Tapachula, in the state of Chiapas, about thirty minutes by road from the border with Guatemala, became an "open-air prison."<sup>139</sup> A city of some 350,000 persons in the poorest state in Mexico, Tapachula lauds itself as being a welcoming center for migrants.<sup>140</sup> The main exhibit at the one museum, the combined Museo Arqueológico del Soconusco and Museum of Tapachula, explains the city's role in receiving Japanese and Chinese immigrants in the early 1900s, European immigrants during much of the 1900s, and Guatemalan refugees during the 1980s and 1990s.<sup>141</sup>

Despite a one hundred-year history of welcoming immigrants, Tapachula's attitude towards those in migration, primarily Black migrants, has changed

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<sup>132</sup> Pradilla, *El campamento*, *supra* note 127.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> A play on words used by migrants to describe being trapped in Tapachula, or "Tapachula." Interview with Haitian migrant, in Tapachula, Mex. (Dec. 5, 2021) (on file with author).

<sup>139</sup> Penney, *supra* note 78.

<sup>140</sup> *See* Ángeles Mariscal & Silvana Salazar, *Tapachula migrante, la ciudad que somos*, PIE DE PÁGINA (Apr. 1, 2022), <https://piedepagina.mx/tapachula-migrante-la-ciudad-que-somos/>.

<sup>141</sup> Author visit to the Museo Arqueológico del Soconusco and Museum of Tapachula, in Tapachula, Mex. (Dec. 5, 2021) (on file with author).

significantly.<sup>142</sup> An increasing number of migrants became stuck in Tapachula, instead of simply passing through on their journeys north.<sup>143</sup> Increasingly, Tapachula was surrounded by checkpoints, preventing people in migration who did not have legal documents to be in Mexico from traveling to the United States.<sup>144</sup> For those who tried to circumvent checkpoints near Tapachula, it became increasingly likely that they would be apprehended elsewhere in Mexico, arrested, detained, and returned back to Siglo XXI in Tapachula to begin all over again.<sup>145</sup> Black immigrants in migration cannot hide nor blend in.<sup>146</sup> Anti-Black racism is present everywhere in Mexico, with Afro-Mexicans, or Mexicans of African ancestry, profiled by INM authorities and often deported to Haiti, solely based on the color of their skin.<sup>147</sup>

The majority of the African migrants apprehended by Mexican authorities were from Cameroon, the Democratic Republic of the Congo (DRC), Ghana, Somalia, and Eritrea, countries with which Mexico does not have diplomatic relations.<sup>148</sup> Mexico was unable to follow its procedures for verifying migrants' identities and declared them to be "stateless."<sup>149</sup> Due to the high costs of deportation flights to Africa and also the absence of diplomatic relations, it would have been difficult for Mexico to deport these same individuals.<sup>150</sup> As they were not permitted to leave Tapachula, not permitted to legally work, and required to check-in weekly with INM officials, African asylum seekers constructed a makeshift camp outside of the Siglo XXI detention facility.<sup>151</sup> They organized and created a collective, the Assembly of African Migrants, during the summer of 2019.<sup>152</sup> Representing over ten African nations, the Assembly members staged demonstrations both inside of Siglo XXI and in Tapachula to protest the human rights abuses they had suffered while detained in Mexico and to draw awareness to the fact they were being prevented from

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<sup>142</sup> See generally Penney, *supra* note 78 (discussing how anti-Blackness in U.S. immigration policy has led to shifting Mexican policies to deter Black asylum-seekers from reaching border).

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*; MILLER, *supra* note 2, at 19–24; Pradilla, *El campamento*, *supra* note 127.

<sup>145</sup> See MILLER, *supra* note 2, at 23.

<sup>146</sup> See Kovie Biakolo, *The Black Migrant Trail of Tragedies*, NATION (Feb. 8, 2022), <https://www.thenation.com/article/society/black-migration-racism/> (referencing thoughts of Guerline Jozef, Executive Director of the non-profit organization Haitian Bridge Alliance).

<sup>147</sup> TANYA DUARTE ET AL., "BECAUSE OF THE COLOR OF MY SKIN AND THE WAY I SPEAK SPANISH": THE INM'S DETENTION AND DEPORTATION OF INDIGENOUS AND AFRO-DESCENDANT MEXICANS 6, 11 (2020); see generally MORLEY ET AL., *supra* note 5.

<sup>148</sup> YATES & BOLTER, *supra* note 85, at 16, 30.

<sup>149</sup> *Id.* at 31.

<sup>150</sup> See *id.* at 29; Pradilla, *El campamento*, *supra* note 127.

<sup>151</sup> MORLEY ET AL., *supra* note 5, at 36; Author visit to Tapachula, Mex. (Dec. 2021) (on file with author); Interviews with migrants by phone and WhatsApp in New York, N.Y. (Aug. 2020) (on file with author).

<sup>152</sup> MORLEY ET AL., *supra* note 5, at 36–37.

continuing on their journeys north.<sup>153</sup> Some of the so-called stateless individuals who were actually Cameroonian undertook a journey in a small boat to try to escape from Tapachula and continue northward in October 2019.<sup>154</sup> They were unsuccessful, their boat sank, and at least two people drowned.<sup>155</sup> Others organized a caravan and, along with migrants from Haiti and Central America, attempted to walk out of Tapachula.<sup>156</sup> The 1,000 people comprising the caravan were turned back by Mexican migration officials and the Mexican National Guard and returned to Tapachula.<sup>157</sup>

In November and December of 2019, Mexican officials disbanded the camp and INM officials worked to grant legal status in Mexico for those they had labeled as “stateless.”<sup>158</sup> Many of the so-called stateless did not wish to apply for asylum in Mexico, as they did not feel safe or see any type of future for themselves or their families there due to the racism and mistreatment they had suffered.<sup>159</sup> While Mexican law puts those who have been declared “stateless” on a path to permanent residency, it took a lawsuit filed by a Mexican lawyer and activist, Luis García Villagrán, for INM to actually issue residency permits to the so-called stateless, some 979 individuals.<sup>160</sup> The Black Alliance for Just Immigration (BAJI) monitored the situation of Black migrants in southern Mexico throughout 2019 and described many issues in their report with IMUMI entitled “*There is a Target on Us*”—*The Impact of Anti-Black Racism on African Migrants at Mexico’s Southern Border*.<sup>161</sup> Tsion Gurmú and her colleagues at BAJI reported that many African persons signed Spanish-language immigration

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<sup>153</sup> *Id.*; Press Release, Asamblea de migrantes Africanos y Africanas en Tapachula, Voces Mesoamericanas (Aug. 29, 2019), <https://vocesmesoamericanas.org/comunicado-asamblea-de-migrantes-africanos-y-africanas-en-tapachula-29-de-agosto-2019/>.

<sup>154</sup> *African Migrants in Mexico Brave Odds to Reach the States*, AFRICANEWS (Oct. 13, 2019), <https://www.africanews.com/2019/10/13/african-migrants-in-mexico-brave-odds-to-reach-the-states/>.

<sup>155</sup> *Id.*

<sup>156</sup> Sandra Cuffe, *Mexican National Guard Blocks U.S.-Bound Migrant Caravan*, AL JAZEERA (Oct. 13, 2019), <https://www.aljazeera.com/news/2019/10/13/mexican-national-guard-blocks-us-bound-migrant-caravan>.

<sup>157</sup> *Id.*

<sup>158</sup> MORLEY ET AL., *supra* note 5, at 37.

<sup>159</sup> *See id.* at 36, 41–42. *But see* Alberto Pradilla, *979 migrantes africanos que el gobierno considera “apátridas” piden ser regularizados*, ANIMAL POLITICO (Sept. 19, 2019), <https://www.animalpolitico.com/2019/09/migrantes-africanos-gobierno-apatridas/> [hereinafter Pradilla, *979 migrantes*] (discussing group of stateless African migrants asking for grant of permanent residence in Mexico).

<sup>160</sup> María de Jesús Peters, *Inicia INM visado de africanos*, EL UNIVERSAL (Oct. 7, 2019, 2:08 AM) <https://www.eluniversal.com.mx/estados/inicia-inm-visado-de-africanos>; *see* Edgar Hernández, *Buscan africanos, ahora, ayuda de SRE*, REFORMA (Sept. 20, 2019, 1:59 PM), <https://www.reforma.com/buscan-africanos-ahora-ayuda-de-sre/ar1773681>; Pradilla, *979 migrantes*, *supra* note 159.

<sup>161</sup> *See* MORLEY ET AL., *supra* note 5, at 12–14.

documents during their interactions with Mexican immigration officials without understanding what these documents said.<sup>162</sup> Advocates like Gurmu assert that these persons were likely under duress and misled by Mexican immigration officials.<sup>163</sup> There were also serious language access issues as the documents were in Spanish with no translation or interpretation provided.<sup>164</sup> The BAJI report also indicated that because of the Third Country Transit Ban, which would have prevented the migrants from obtaining asylum in the United States unless they applied for asylum in a country they passed through en route to the United States, some felt compelled to seek protection in Mexico, despite experiencing persecution on account of their race in the country.<sup>165</sup>

### III. STATELESSNESS

#### A. Overview

Defined as “a person who is not considered a national by any State under the operation of its law,” a stateless person is one who is deprived of their right to a nationality.<sup>166</sup> Traditionally, statelessness was considered a consequence of state succession, such as the collapse of the former Soviet Union or Yugoslavia, or a relic of colonialism.<sup>167</sup> While these concepts remain true, statelessness at present is most often a result of discrimination based on gender, ethnicity, race, disability, or socio-economic status.<sup>168</sup> Persons who are stateless are vulnerable and often denied access to basic services, such as documentation of their identity, education, employment, healthcare, political engagement, and the right to travel.<sup>169</sup>

#### B. International Legal Norms

There are two international conventions concerning statelessness. The 1954 Convention Relating to the Status of Stateless Persons (1954 Convention), aims at defining statelessness and setting out rights to which stateless persons should be entitled.<sup>170</sup> The core principle of this convention is that states parties will treat stateless individuals at least as favorably as they treat foreigners who do

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<sup>162</sup> *See id.*, at 36, 41–42.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 35–36, 41–42.

<sup>166</sup> Convention Relating to the Status of Stateless Persons, ch. I, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117, 136; *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948).

<sup>167</sup> *What Is Statelessness*, INST. ON STATELESSNESS & INCLUSION, <https://www.institutesi.org/what-is-statelessness> (last visited Jan. 8, 2023).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Convention Relating to the Status of Stateless Persons, *supra* note 166.

possess a nationality.<sup>171</sup> The 1961 Convention on the Reduction of Statelessness (1961 Convention) aims to prevent statelessness through establishing an international right to a nationality.<sup>172</sup> It calls on states parties to implement safeguards in their national laws to prevent statelessness in childhood as well as later in life.<sup>173</sup> The United Nations General Assembly also granted UNHCR a formal mandate to work in support of stateless persons through identification, reduction, and prevention of statelessness, and protection of stateless persons so that they can enjoy their full rights.<sup>174</sup>

In addition to UNHCR and the 1954 and 1961 Conventions, various international human rights law mechanisms recognize and seek to combat statelessness, including: the International Covenant on Civil and Political Rights,<sup>175</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>176</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>177</sup> the Convention on the Rights of the Child,<sup>178</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>179</sup> and the Convention on the Rights of Persons with Disabilities.<sup>180</sup>

### C. *Regional Instruments on Statelessness: Mexico and the Americas*

In the Americas, the Inter-American Court of Human Rights has recognized the right to nationality as an essential right.<sup>181</sup> This right imposes certain limits on the discretion that States have in statutes and regulations concerning nationality.<sup>182</sup> Further, the Inter-American Court has held that “States have the obligation not to adopt practices or laws concerning the granting of nationality”

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<sup>171</sup> See, e.g., *id.* at arts. 16, 19, 21, 26.

<sup>172</sup> See Convention on the Reduction of Statelessness, art. 1, Aug. 30, 1961, 989 U.N.T.S. 175, 176.

<sup>173</sup> See *id.* at arts. 1, 4–11.

<sup>174</sup> *How UNHCR Helps Stateless People*, UNHCR, <https://www.unhcr.org/en-us/how-unhcr-helps-stateless-people> (last visited Jan. 8, 2023).

<sup>175</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 24(3) (Dec. 16, 1966).

<sup>176</sup> G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 9 (Dec. 18, 1979).

<sup>177</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(iii) (Dec. 21, 1965).

<sup>178</sup> G.A. Res. 44/25, Convention on the Rights of the Child, arts. 7–8 (Nov. 20, 1989).

<sup>179</sup> G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 29 (Dec. 18, 1990).

<sup>180</sup> G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 18 (Dec. 13, 2006).

<sup>181</sup> Organization of American States, American Convention on Human Rights, preamble, art. 20, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 144.

<sup>182</sup> *Id.* at 150.

which would increase the number of stateless persons.<sup>183</sup> Mexico has ratified the American Convention on Human Rights and has recognized the adjudicatory jurisdiction of the Inter-American Court as binding.<sup>184</sup>

Further, the Declaration and Action Plan of Brazil (Action Plan), adopted in 2014 on the thirtieth anniversary of the Cartagena Declaration on Refugees, calls for the revision and harmonization of nationality laws with international standards concerning the prevention of statelessness.<sup>185</sup> Mexico is among the twenty-eight Latin American countries committed to protecting refugees and stateless persons through this enhanced Action Plan.<sup>186</sup> Additionally, the Action Plan establishes effective procedures for identifying statelessness, as well as adopting regulatory frameworks that guarantee human rights for stateless persons.<sup>187</sup>

#### D. *Statelessness in Mexico*

The regulatory framework surrounding statelessness in Mexico is found in the Mexican Constitution, the *Ley de Migración* (Migration Law), *Ley de Nacionalidad* (Nationality Law), and the regulations supporting the Migration and Nationality Laws.<sup>188</sup> Mexico adopted a definition of “statelessness” that is in harmony with the 1954 Convention, which it ratified in 2000.<sup>189</sup> Through Mexican constitutional reforms in 2011, international and regional human rights

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<sup>183</sup> *Yean v. Dominican Republic*, Preliminary Objectives, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12,189, ¶ 142 (Sept. 8, 2005).

<sup>184</sup> *See American Convention on Human Rights*, INTER-AM. COMM’N ON HUM. RIGHTS, ORG. OF AM. STATES (2022), <https://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> (noting Mexico’s ratification on March 2, 1981).

<sup>185</sup> U.N. High Comm’r for Refugees, *Brazil Declaration: “A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean”* 5, 17 (Dec. 3, 2014) [hereinafter *Brazil Declaration*].

<sup>186</sup> *Brazil Declaration and Plan of Action*, UNHCR, <https://cartagena30.acnur.org/en/brazil-declaration-and-plan-of-action/> (last visited Jan. 8, 2023) (listing the signatories).

<sup>187</sup> *Brazil Declaration*, *supra* note 185, at 17.

<sup>188</sup> Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021 (Mex.); Ley de Migración [LM], Diario Oficial de la Federación [DOF] 25-05-2011, últimas reformas DOF 29-04-2022 (Mex.); Ley de Nacionalidad [LN], Diario Oficial de la Federación [DOF] 23-01-1998, últimas reformas DOF 23-04-2012 (Mex.).

<sup>189</sup> *See Convention Relating to the Status of Stateless Persons*, *supra* note 166, at art. 1; Ley De Migración [LM] art. 3(IV), Diario Oficial de la Federación [DOF] 25-5-2011, últimas reformas DOF 30-10-2014 (Mex.). Notably, Mexico is not a state party to the 1961 Convention on the Reduction of Statelessness. *See generally* Convention on the Reduction of Statelessness, *supra* note 172.

treaties are recognized as on the same level as the Mexican Constitution.<sup>190</sup> Also in 2011, Mexico enacted its *Ley sobre Refugiados, Protección Complementaria y Asilo Político* (Refugee and Asylum Law), as well as its Migration Law.<sup>191</sup> These laws guarantee full respect for the human rights of migrants, as well as other positive safeguards, and are in-line with international standards for humanitarian protection.<sup>192</sup>

A stateless person, or *apátrida*, is defined in the Migration Law as “[a]ny person who is not considered a national by any State, in accordance with its legislation.”<sup>193</sup> The Migration Law then expands on this definition of statelessness to add that “[t]he law will grant equal treatment to people who have a nationality but it is not effective.”<sup>194</sup> The regulations to the Migration Law further explain that “a foreign person does not have an effective nationality, when the consular representation manifests the impossibility of authorizing the entry of said person to its territory.”<sup>195</sup>

Article 150 of the regulations of the Migration Law outlines a procedure for an actual determination of statelessness.<sup>196</sup> First, INM receives a request and asks for an opinion from the Mexican Commission for Refugee Assistance (COMAR).<sup>197</sup> INM also issues a proof that a statelessness determination procedure is taking place, called a *trámite*.<sup>198</sup> COMAR then conducts an interview with the person thought to be stateless, and issues an opinion on whether this person is indeed stateless under Mexican law.<sup>199</sup> INM makes a

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<sup>190</sup> Victor Manuel Colli Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 HUM. RIGHTS BRIEF 7, 11–12 (2012).

<sup>191</sup> U.N. Hum. Rights Council, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution: Mexico, U.N. DOC. A/HRC/WG.6/17/MEX/1, at 15–16 (2013).

<sup>192</sup> *See id.* Subsequently, in 2014, Mexico withdrew reservations that it had previously made to Article 32 of the 1951 Convention relating to the Status of Refugees and Article 31 of the 1954 Convention relating to the Status of Stateless Persons. *See Mexico Withdraws Reservations to Refugee and Statelessness Conventions*, UNHCR (Feb. 11, 2014), <https://www.unhcr.org/en-us/news/briefing/2014/2/52fa05e79/mexico-withdraws-reservations-refugee-statelessness-conventions.html>. These reservations to the treaties had allowed Mexico to deport asylum-seekers, stateless individuals, and other vulnerable persons to a third country without adhering to due process provisions. *Id.*

<sup>193</sup> Ley De Migración [LM] art. 3, IV, Diario Oficial de la Federación [DOF] 25-5-2011, últimas reformas DOF 30-10-2014 (Mex.) (translation by author).

<sup>194</sup> *Id.* (translation by author).

<sup>195</sup> Reglamento de la Ley de Migración [RLM], art. 149, Diario Oficial de la Federación [DOF] 28-09-2012, últimas reformas DOF 23-05-2014 (Mex.) (translation by author).

<sup>196</sup> *Id.* at art. 150.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

determination and issues an immigration document.<sup>200</sup> In case of a negative determination, the person is able to attempt to regularize their migration status under other sections of the Migration Law.<sup>201</sup>

Article 151 of the Regulations states that if there is a well-founded presumption that the foreign state or states of which the migrant claims to be a national will not recognize the migrant, or if evidence exists that consular authorities of the state refused the migrant entry into their country of origin (such that their nationality is “not effective”), then the individual will be found to be stateless and will be granted permanent residency.<sup>202</sup>

Mexican advocates, including researchers at the Universidad Iberoamericana Ciudad de Mexico, have critiqued the Migration Law and corresponding regulations on various grounds.<sup>203</sup> First, advocates stress that there is no international legal definition of what “no effective nationality” means, nor are there specific internal regulations on how to conduct these consultations on statelessness for Mexican migration officials.<sup>204</sup> In addition, advocates have critiqued the regulations of Article 150, in that there is no exhaustive monitoring of the procedure—no procedural guarantees, guiding principles, rights to legal assistance, or protections for minors and persons with disabilities.<sup>205</sup> Further, while the intervention of COMAR is obligatory, COMAR’s opinion is non-binding.<sup>206</sup> Finally, the law lacks a procedure for the study of statelessness, let alone an accounting of how many stateless people there are in Mexico, their needs, the services they have received or failed to receive.<sup>207</sup>

In practice, the researchers determined that Articles 149, 150, and 151 of the Migration Law and corresponding regulations use ambiguous terms that are not defined, and that the lack of clarity has caused confusion between INM and COMAR regarding these procedures.<sup>208</sup> The researchers studied Mexican migration statistics and focused on persons from the DRC and Senegal who migrated through Mexico between 2016 and 2018.<sup>209</sup> Following INM procedures, when individuals from the DRC came into contact with INM, INM officials should have proceeded to confirm the identity of the individuals with

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at art. 151.

<sup>203</sup> See FELIPE SÁNCHEZ NÁJERA ET AL., UNIVERSIDAD IBEROAMERICANA CIUDAD DE MÉXICO, APATRIDIA EN MÉXICO. EL USO DE LA PROTECCIÓN INTERNACIONAL COMO INSTRUMENTO DE LA POLÍTICA MIGRATORIA (2018), [https://ibero.mx/files/2019/3-pdh2018\\_apatridia.pdf](https://ibero.mx/files/2019/3-pdh2018_apatridia.pdf).

<sup>204</sup> *Id.* at 21, 29–30.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 10, 20–21.

<sup>207</sup> *Id.* at 10.

<sup>208</sup> *Id.* at 21–23.

<sup>209</sup> *Id.* at 17–18.



DRC.<sup>210</sup> If the government of the DRC<sup>211</sup> did not respond to INM's request within twenty calendar days, INM considered the individuals to be "stateless."<sup>212</sup> Based on the information analyzed, the researchers attest that it is possible that the real problem of stateless persons in Mexico is not actually a matter of statelessness as in the international legal definition, but assert instead that this label has been applied inappropriately to deal with different migrant groups.<sup>213</sup> In short, their theory is that "statelessness" is used in Mexico to solve politically charged migration issues.<sup>214</sup> It seems very likely that this label was also used in 2019 and 2020, predominately with African migrants and asylum-seekers.

Mexican immigration statistics support the premise that an increasing number of individuals are either actually stateless in Mexico or are being labeled as such, but that this number appears to ebb and flow. Under Mexican law, individuals who are stateless are granted permanent residence.<sup>215</sup> According to the Mexican Government's migration statistics, the following numbers of individuals were granted permanent residence in Mexico based on a finding of "statelessness," compared with the total number of individuals granted permanent residence in Mexico during each calendar year:

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<sup>210</sup> *See id.* at 18, 23.

<sup>211</sup> There does not appear to be consular representation of the DRC in Mexico. Senado de la República, Informe de Comisiones Unidas de Relaciones Exteriores y de Relaciones Exteriores, África 19-4-2016 (Mex.).

<sup>212</sup> *See* NÁJERA ET AL., *supra* note 203, at 23.

<sup>213</sup> *Id.* at 18, 30.

<sup>214</sup> *See id.* at 18, 30.

<sup>215</sup> Reglamento de la Ley de Migración [RLM], art. 151, Diario Oficial de la Federación [DOF] 28-09-2012, últimas reformas DOF 23-05-2014 (Mex.).

**Table 1.** Persons granted permanent residence and stateless status in Mexico over time<sup>216</sup>

Year	Total Number Granted Permanent Residence	Number Granted Permanent Residence as a “Stateless” Person
2014	43,481	11
2015	34,406	9
2016	35,906	10
2017	32,778	141
2018	38,675	24
2019	40,543	1,065
2020	58,430	2,008
2021	68,523	28
2022 (Jan.–Sept.)	56,166	24

When addressing statelessness in Mexico, UNHCR and the international community focus on groups of indigenous Guatemalans who sought refuge in Mexico in the 1980s and 1990s, during the Guatemalan Civil War.<sup>217</sup> These families settled primarily in southern Mexico.<sup>218</sup> While the Mexican Constitution affords all persons born in the Mexican territory Mexican citizenship by birth (*jus soli*), due to racism, language barriers, transportation hurdles, and lack of funds, the birth registrations for many of the descendants of these indigenous Guatemalan refugees were never completed.<sup>219</sup> As a result, the international community considers these persons to be stateless, and they are counted as part of Mexico’s stateless population.<sup>220</sup> However, UNHCR and the Institute on Statelessness and Inclusion estimate a very small number of stateless persons remain in Mexico, some thirteen as of 2014.<sup>221</sup>

<sup>216</sup> *Boletín Estadísticas*, GOBIERNO DE MÉXICO, [http://portales.segob.gob.mx/es/PoliticaMigratoria/Boletines\\_Estadisticos](http://portales.segob.gob.mx/es/PoliticaMigratoria/Boletines_Estadisticos) (last visited Jan. 8, 2023) Under “*Boletín estadístico anual*,” select each year’s statistical bulletin by clicking the corresponding link; then click “*Versión completa para pdf*.” *Id.* Statelessness data is contained in table 2.4.2 and new permanent residence grants are included in table 2.4.3 of each document. *Id.*

<sup>217</sup> See Oscar Gil, *From Stateless to Citizen: Indigenous Guatemalan Refugees in Mexico*, HEMISPHERIC INST., <https://hemisphericinstitute.org/en/emisferica-14-1-expulsion/14-1-dossier/from-stateless-to-citizen-indigenous-guatemalan-refugees-in-mexico.html> (last visited Jan. 8, 2023).

<sup>218</sup> See *id.*

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> *Stateless Persons in the Americas*, INST. ON STATELESSNESS & INCLUSION, <http://www.worldstateless.org/continents/americas/stateless-persons-in-the-americas> (last visited Jan. 8, 2023).

The years of 2019 and 2020 clearly demonstrate a sizable difference in the number of stateless individuals who were granted permanent residence in Mexico.<sup>222</sup> During this same period, there is no indication that there was another stateless population recognized in Mexico.<sup>223</sup> There are no reports of additional registrations of significant numbers of indigenous Guatemalan refugees from the 1980s and 1990s.<sup>224</sup> Therefore, one can assume that this increase in stateless persons in Mexico in 2019 and 2020 was attributable primarily to the African migrants labeled as the so-called stateless and granted permanent residency.<sup>225</sup>

#### IV. IMPACT ON U.S. ASYLUM CLAIMS

As a result of being labeled as “stateless” and therefore issued permanent residence in Mexico, African and other impacted migrants and asylum-seekers face challenges presenting asylum cases in the United States. U.S. asylum law mandates a bar to asylum for persons who have “firmly resettled” in a third country before arriving in the United States.<sup>226</sup>

##### A. *A Brief History of Refugee & Asylum Law and Firm Resettlement*

The modern international legal framework for Refugee and Asylum Law includes the 1951 Convention relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees.<sup>227</sup> The latter, to which both the United States and Mexico are parties, removed the geographical and temporal limits to recognizing refugees and required all ratifying countries to abide by the terms of the Refugee Convention.<sup>228</sup> As international treaties are not self-executing under U.S. law, the United States incorporated its international treaty commitments from the Refugee Protocol into domestic law in 1980.<sup>229</sup> Mexico signed and ratified the Refugee Convention and the 1967 Protocol in 2000.<sup>230</sup> In 2011, Mexico created a specific

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<sup>222</sup> See *supra* Table 1; see also YATES & BOLTER, *supra* note 85, at 32.

<sup>223</sup> See generally YATES & BOLTER, *supra* note 85, at 32.

<sup>224</sup> See generally *id.*

<sup>225</sup> See *id.* at 31–32 (indicating a “match” between people considered stateless in Mexico and the number of people receiving permanent residence based on statelessness).

<sup>226</sup> See INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi).

<sup>227</sup> Convention Relating to the Status of Refugees, July 28, 1951, 181 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

<sup>228</sup> See Refugee Protocol, *supra* note 227, at art. 1; U.N. HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (Apr. 2015), <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> [hereinafter STATES PARTIES TO REFUGEE CONVENTIONS].

<sup>229</sup> See U.S. CONST. art. II, § 2, cl. 2; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

<sup>230</sup> See STATES PARTIES TO REFUGEE CONVENTIONS, *supra* note 228; see also Mariana Echandi, *UNHCR Hails Mexico as New Refugee Law Comes into Force*, UNHCR (Jan. 28,

framework incorporating humanitarian protection that complied with these international standards.<sup>231</sup>

The definition of a refugee, as found in Article I of the Refugee Convention, excludes two categories of persons.<sup>232</sup> First, any “person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”;<sup>233</sup> and second, any person who, though once a refugee, “has acquired a new nationality, and enjoys the protection of the country of his new nationality.”<sup>234</sup> These exclusions from refugee protection appear to fit with the object and purposes of the Refugee Convention, namely to define refugees and those in need of international protection and to create legal obligations for states parties.<sup>235</sup> Those who have acquired another nationality and are no longer vulnerable are therefore not in need of international protection, and thus states parties are not obligated to extend protection to them.<sup>236</sup>

In his article entitled “An Offer of Firm Resettlement,” Robert D. Sloane examines a series of cases involving Chinese asylum-seekers in the 1960s and 1970s, prior to the United States’ incorporation of the Refugee Convention into domestic law.<sup>237</sup> He asserts that in these cases, U.S. courts held that while consideration of whether an applicant had firmly resettled prior to their arrival in the United States was relevant, an immigration judge or asylum officer needed to consider the totality of the circumstances in order to determine whether the applicant had been, in fact, firmly resettled.<sup>238</sup> Sloane suggests that for the courts, “No one factor should be viewed as dispositive. Above all, the inquiry in every case must be whether, in view of the applicant’s legal status and circumstances, the refugee remains ‘in flight,’ unable to avail himself of the effective protection of some third state.”<sup>239</sup>

In 1980, the United States Congress passed the Refugee Act, which incorporated international legal definitions concerning humanitarian protection for those fleeing persecution into U.S. domestic law.<sup>240</sup> As such, to be granted asylum in the United States, a person must: (1) meet the definition of a

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2011), <https://www.unhcr.org/news/latest/2011/1/4d42e6ad6/unhcr-hails-mexico-new-refugee-law-comes-force.html>.

<sup>231</sup> Echandi, *supra* note 230.

<sup>232</sup> See Refugee Convention, *supra* note 227, at art. I.

<sup>233</sup> *Id.* at art. I(E).

<sup>234</sup> *Id.* at art. I(C)(3).

<sup>235</sup> See *id.* at arts. I(C)(3), I(E).

<sup>236</sup> See *id.*

<sup>237</sup> See Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L L. REV. 47 (2004).

<sup>238</sup> *Id.* at 53.

<sup>239</sup> *Id.*

<sup>240</sup> See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

refugee;<sup>241</sup> (2) not be barred from asylum protection;<sup>242</sup> and (3) merit a grant of asylum in the adjudicator's discretion.<sup>243</sup>

In 1990, the U.S. promulgated new federal regulations which placed firm resettlement as a statutory bar to denial of asylum as opposed to a discretionary factor for the adjudicator to consider.<sup>244</sup> Firm resettlement is now defined in the U.S. federal regulations as follows: "A[] [noncitizen] is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."<sup>245</sup> There are two exceptions to the firm resettlement statutory bar. If the applicant meets either of these exceptions, then the applicant is not barred from asylum protection.<sup>246</sup> These two exceptions are "restrictive conditions" and "no significant ties."<sup>247</sup>

To meet the "restrictive conditions" exception to the firm resettlement bar, an applicant for asylum must establish "that the conditions of his or her residence in the third country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled."<sup>248</sup> The regulations list factors to be considered, including the housing available to the person, the type of employment available to the person, and the conditions under which others in the country reside.<sup>249</sup> Further, the regulations clarify that the

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<sup>241</sup> INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). Under the statute:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

*Id.* at § 101(a)(42)(a).

<sup>242</sup> *See id.* at § 208(a)(2).

<sup>243</sup> *See id.* at § 208(b)(1)(A).

<sup>244</sup> Sloane, *supra* note 237, at 56. *See Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674, 30,678 (July 27, 1990) (codified at 8 C.F.R. § 208.14 (1991)); *see also* 8 C.F.R. § 208.15 (1991) (defining firm resettlement).

<sup>245</sup> 8 C.F.R. § 208.15 (2021). Note that the Trump administration issued a final rule which further expanded the definition of firm resettlement and eliminated the exceptions discussed below. *See* 85 Fed. Reg. 80274, 80388 (codified at 8 C.F.R. § 208.15 (2021)). Those regulations were scheduled to go into effect on January 11, 2021. *See id.* The changes were enjoined before going into effect and remain inoperable. *See Pangea Legal Services v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021).

<sup>246</sup> 8 C.F.R. § 208.15.

<sup>247</sup> *Id.*

<sup>248</sup> *See* 8 C.F.R. § 208.15(b).

<sup>249</sup> *Id.*

extent to which the third country withheld travel documentation from the asylum applicant might be considered to be a restrictive condition.<sup>250</sup>

To establish that an asylum seeker has “no significant ties” to a third country, so as to avoid the firm resettlement bar, an applicant must show that (1) their entry into the third country was a “necessary consequence of [their] flight from persecution,” (2) they remained in the third country no longer than was required to arrange further travel, and (3) they did not establish any “significant ties” to the third country.<sup>251</sup>

Scholars, including Sloane, have critiqued the changes to U.S. immigration law in the 1990s which recategorized firm resettlement from a discretionary factor in asylum eligibility to a mandatory bar.<sup>252</sup> In doing so, the United States proffers an “offer-based” inquiry that de-emphasizes whether the person seeking asylum was still in flight from persecution when they are alleged to have firmly resettled.<sup>253</sup> Now, the only importance is on the offer, regardless of the totality of the circumstances.<sup>254</sup> Sloane argues that, similar to other wealthy Western nations, this change in law is “perhaps motivated by a desire to curtail what may be deemed by some to be an undesirable flow of asylum-seekers, [and] obscures rather than cures the perceived problem.”<sup>255</sup>

#### B. *Firm Resettlement in U.S. Asylum: Recent Cases*

Case law from the Board of Immigration Appeals (BIA) has recently evolved on this issue. In May 2011, the decision *Matter of A-G-G-* explained that the purpose of the firm resettlement bar “is to limit refugee protection to those with nowhere else to turn.”<sup>256</sup> In this case, the BIA provided a four-step framework for the adjudicator to decide if an asylum applicant should be subjected to the firm resettlement bar.<sup>257</sup> First, the adjudicator “bears the burden of presenting prima facie evidence of an offer of firm resettlement,” relying on direct or, if direct is not available, indirect evidence.<sup>258</sup> Second, if DHS provides sufficient prima facie evidence, the applicant must be given the opportunity to rebut such evidence.<sup>259</sup> Third, the adjudicator must weigh the totality of the evidence and make a determination whether the evidence of an offer of firm resettlement has been rebutted.<sup>260</sup> Finally, if the adjudicator finds the applicant was firmly

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<sup>250</sup> *See id.*

<sup>251</sup> 8 C.F.R. § 208.15(a).

<sup>252</sup> *See* Sloane, *supra* note 237, at 47–48.

<sup>253</sup> *Id.* at 57.

<sup>254</sup> *Id.* at 69.

<sup>255</sup> *Id.*

<sup>256</sup> *Matter of A-G-G-*, 25 I&N Dec. 486, 503 (B.I.A. 2011).

<sup>257</sup> *See id.* at 501.

<sup>258</sup> *See id.* at 501–03.

<sup>259</sup> *See id.* at 503.

<sup>260</sup> *See id.*

resettled, the burden shifts to the applicant to establish that an exception applies.<sup>261</sup>

In the unpublished 2017 BIA decision *Matter of L-K-U-*, concerning a mother from Rwanda who had lived in South Africa, the BIA concluded that “[t]he intent of the firm resettlement bar is to disqualify asylum applicants who have previously found another country of *refuge*, not another country in which he or she faces a danger of persecution.”<sup>262</sup> In reaching this conclusion, the BIA cites to *Matter of A-G-G-*, and a 1971 Supreme Court case, explaining that the “Supreme Court had ‘concluded that Congress did not intend to provide refugee protection to aliens who had already found *shelter* and begun new lives in other countries.”<sup>263</sup>

More recently, however, in 2020, the BIA held that, concerning whether a noncitizen would be subject to the firm resettlement bar, “a viable and available offer to apply for permanent residence in a country of refuge is not negated by the alien’s unwillingness or reluctance to satisfy the terms for acceptance.”<sup>264</sup> The BIA found that the respondent, a native and citizen of Haiti, had been firmly resettled in Brazil prior to arriving in the United States, and therefore was ineligible for U.S. asylum protection.<sup>265</sup>

Therefore, the firm resettlement bar could be an issue for asylum-seekers in the United States, if they were to enter a third country and receive an offer of permanent residence status in that third country prior to arriving in the United States.<sup>266</sup> If an asylum-seeker is found to have been firmly resettled in a third country following the four-step procedure put forth in *Matter of A-G-G-*, then they are barred from asylum protection in the United States, unless they meet one of the two exceptions: “restrictive conditions” or “no significant ties.”<sup>267</sup>

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<sup>261</sup> *Id.*; see generally U.S. CITIZENSHIP & IMMIGR. SERVICES, RAI0 COMBINED TRAINING PROGRAM: FIRM RESETTLEMENT TRAINING MODULE (2019).

<sup>262</sup> *Matter of L-K-U-*, AXX-XXX-003, at 1–2 (B.I.A. June 16, 2017) (emphasis in original).

<sup>263</sup> *Id.* at 2 (quoting *Matter of A-G-G-*, 25 I&N Dec. at 492 (quoting *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971))) (emphasis in original).

<sup>264</sup> *Matter of K-S-E-*, 27 I&N Dec. 818, 821 (B.I.A. 2020). The BIA cited to a 2006 case in which the Ninth Circuit stated: “[A]n alien may have an ‘offer’ if the alien is *entitled* to permanent resettlement and all that remains in the process is for the alien to complete some ministerial act.” *Id.* at 819 (quoting *Maharaj v. Gonzales*, 450 F.3d 961, 977 (9th Cir. 2006) (emphasis in original). Referencing *Matter of A-G-G-*, the board reiterated that “to hold otherwise would be contrary to the purpose of the firm resettlement bar . . .” *Id.* at 821 (quoting *Matter of A-G-G-*, 25 I&N Dec. at 503).

<sup>265</sup> *Id.* at 818.

<sup>266</sup> See *id.*; 8 C.F.R. § 208.15.

<sup>267</sup> See *Matter of A-G-G-*, 25 I&N Dec. at 501–03; 8 C.F.R. § 208.15.

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C. *Firm Resettlement and Isaac*

Returning to Isaac's situation, discussed in Part I, if the adjudicator finds that he has been firmly resettled in Mexico, thereby preliminarily barring him from asylum protection in the United States, the question remains as to whether he meets either of the exceptions to the firm resettlement bar.<sup>268</sup>

1. No Significant Ties

The "no significant ties" exception to the firm resettlement bar states that an applicant for asylum is not firmly resettled if: (1) their entry into the third country "was a necessary consequence of [their] flight from persecution"; (2) they remained in the third country only for the time needed to arrange further travel; and (3) they did not establish any significant ties to the third country.<sup>269</sup> In Isaac's case, all three elements are likely true. He was forced to pass through Mexico en route to the United States as a simple consequence of geography.<sup>270</sup> While he did stay in Mexico for more than five months, he was detained either in the Siglo XXI detention facility or in the carceral city of Tapachula, which he was unable to leave.<sup>271</sup> His time in Mexico was only that which was necessary for Mexican immigration officials to produce the immigration document enabling him to legally travel through Mexico to continue his journey northward.<sup>272</sup> Finally, Isaac has no ties to Mexico.<sup>273</sup> He does not speak Spanish.<sup>274</sup> He has never worked in Mexico, nor does he own property there.<sup>275</sup> He has no friends or family residing in Mexico.<sup>276</sup> He has not returned to Mexico since he entered the United States.<sup>277</sup> Thus, Isaac likely qualifies for the "no significant ties" exception to the firm resettlement bar.<sup>278</sup>

2. Restrictive Conditions

The "restrictive conditions" exception to the firm resettlement bar considers an applicant to not be resettled if "the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge."<sup>279</sup> The regulations clarify factors constituting "restrictive conditions," including: "the type of housing, whether permanent or temporary,

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<sup>268</sup> See 8 C.F.R. § 208.15; Interview with Isaac, *supra* note 26.

<sup>269</sup> 8 C.F.R. § 208.15(a).

<sup>270</sup> See Interview with Isaac, *supra* note 26.

<sup>271</sup> See *id.*

<sup>272</sup> See *id.*

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> See *id.*

<sup>277</sup> See *id.*

<sup>278</sup> See *id.*; 8 C.F.R. § 208.15(a).

<sup>279</sup> 8 C.F.R. § 208.15(b).



made available to the refugee; the types and extent of employment available,” and the person’s ability to access various rights granted to other residents in the nation.<sup>280</sup> Such rights and privileges include “permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization . . . .”<sup>281</sup>

In order to better understand the mistreatment Isaac suffered in Mexico and to address his eligibility for the “restrictive conditions” exception to the firm resettlement bar, one must first consider the profound impact of racism and xenophobia in Mexico on the lives and migratory situations of Black persons in transit. Racism and xenophobia are intertwined in Mexico, and this union is particularly problematic for Black migrants like Isaac.<sup>282</sup> To be clear, racism is a form of power based on the idea of inferior and superior “races,” which manifests itself both in ideology and in practice, both institutionally and in everyday life.<sup>283</sup> It is a way of organizing power and privilege, where some groups are considered better than others.<sup>284</sup> More specifically, “Racism is a way of thinking and acting that has become a useful system for organizing power and privilege from the local to the global.”<sup>285</sup>

Mexican historians and scholars further develop the concept of the entanglement of racism and xenophobia. They describe xenophobia as rejection, fear, and dread of foreigners.<sup>286</sup> Xenophobia can manifest itself in prejudice, exclusion, discrimination, denial of rights, as well as violence and extermination.<sup>287</sup> Daniela Gleizer, also a Mexican historian, describes the complicated relationship between xenophobia and Mexican national identity.<sup>288</sup> According to Gleizer, xenophobia has a role in supporting the historical notion of *mestizaje* as the Mexican single national identity.<sup>289</sup> Xenophobia also intersects with racism in the way people of African descent are treated in Mexico. Scholar Marycarmen Lara Villanueva asserts that “anti-Black racism

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> See generally MORLEY ET AL., *supra* note 5.

<sup>283</sup> Olivia Gall et al., *Integra. Red temática de investigación interdisciplinarian sobre identidades, racism y xenofobia*, CIENCIA Y DESARROLLO, <https://www.cyd.conacyt.gob.mx/?p=articulo&id=417> (last visited Jan. 8, 2023).

<sup>284</sup> See *id.*

<sup>285</sup> *Id.* (translation by author).

<sup>286</sup> Jimena Rodríguez et al., *¿Qué es y cómo se manifiesta la xenophobia?*, 3 REFLEXIONES DIDÁCTICAS EN TORNO A RACISM Y A LA XENOPHOBIA EN MÉX. 1, 7 (2020), [https://www.conapred.org.mx/documentos\\_cedoc/Que\\_es\\_como\\_la\\_Xenofobia\\_03\\_web.Ax.pdf](https://www.conapred.org.mx/documentos_cedoc/Que_es_como_la_Xenofobia_03_web.Ax.pdf).

<sup>287</sup> See generally Peter Wade, *Raza, ciencia, sociedad*, 2 INTERDISCIPLINA 35 (2014).

<sup>288</sup> Daniela Gleizer, *Dos exilios, una memoria y un olvido*, LETRAS LIBRES 28, 29–30 (July 2019), <https://letraslibres.com/wp-content/uploads/2019/06/dosier-glaizer-mex.pdf>.

<sup>289</sup> *Id.* at 29–30.

in Mexico . . . is not only widespread, but a pillar of Mexicanness.”<sup>290</sup> In short, Afro-Mexicans are not considered to be Mexican because they are of African descent.<sup>291</sup> Afro-Mexicans were not able to self-identify on the Mexican national census as having a unique identity until 2020.<sup>292</sup> Their population is estimated to be more than 2.5 million persons, two-thirds of whom also self-identify as Indigenous.<sup>293</sup>

In the migratory context, racism and xenophobia are pervasive. Researchers Ester Serra Mingot and Carlos Alberto González Zepeda found that while in theory, the issuance of formal legal status in Mexico would allow individuals to access social services, this is not the actual experience of people in migration.<sup>294</sup> What’s more, because the discrimination they face from Central American and other migrants in shelters is so pervasive and problematic, African migrants prefer to live on their own, away from established so-called solidarity networks aiding those in migration.<sup>295</sup> Serra Mingot and González Zepeda write:

[I]n practice, there is wide-ranging direct and structural racism in detention centers, police violence, employment discrimination, and a lack of access to Mexico’s education system. Another challenge is the lack of translation services for non-Spanish speakers, which makes it difficult to find jobs, access education for children, receive health care, and find housing.<sup>296</sup>

Moreover, researchers Caitlyn Yates and Jessica Bolter of the Migration Policy Institute found that Black migrants in Mexico faced challenges based on language, racial discrimination, and religious discrimination, which was especially pronounced for Black Muslims.<sup>297</sup> Isaac faced numerous challenges, experiencing discrimination and violence as a Black migrant in Mexico.<sup>298</sup> While detained with other Black persons, he was treated worse and had less access to food, water, or basic hygiene items than other detained persons who were not Black.<sup>299</sup> Once released, he was not legally allowed to work in Mexico, and was legally detained in the open-air prison that is the city of Tapachula,

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<sup>290</sup> Marycarmen Lara Villanueva, *In Mexico, How Erasing Black History Fuels Anti-Black Racism*, CONVERSATION (Feb. 24, 2022, 4:14 PM), <https://theconversation.com/in-mexico-how-erasing-black-history-fuels-anti-black-racism-175315>.

<sup>291</sup> *See id.*

<sup>292</sup> David Agren, *‘We Exist. We’re Here’: Afro-Mexicans Make the Census After Long Struggle for Recognition*, GUARDIAN (Mar. 19, 2020, 5:00 AM), <https://www.theguardian.com/world/2020/mar/19/afro-mexicans-census-history-identity>.

<sup>293</sup> Lara Villanueva, *supra* note 290.

<sup>294</sup> Ester Serra Mingot & Carlos Alberto González Zepeda, *Transnational Social Protection Infrastructures: African Migrants in Mexico*, INT’L MIGRATION 1, 5 (2022).

<sup>295</sup> *Id.* at 7.

<sup>296</sup> *Id.* at 5.

<sup>297</sup> *See* YATES & BOLTER, *supra* note 85, at 2, 6, 30.

<sup>298</sup> *See* Interview with Isaac, *supra* note 26.

<sup>299</sup> *See id.*

surrounded by checkpoints.<sup>300</sup> While other people in migration, namely Central Americans and Cubans, were also prevented from legally working due to lack of immigration status in Mexico, they were able to find jobs in the informal economy in Tapachula.<sup>301</sup> Isaac and other similarly situated Black migrants were not.<sup>302</sup> Further, it was difficult for him to find a place to live.<sup>303</sup> He struggled to find anyone who would rent a room to a Black man, and his lack of Spanish proficiency made even finding hotel rooms more difficult.<sup>304</sup> Proprietors charged higher rates for hotel rooms to Black migrants.<sup>305</sup> Stores raised their prices and allowed less negotiation for goods.<sup>306</sup> African and Black migrants like Isaac reported racial discrimination in all aspects of life in Mexico.<sup>307</sup> In addition, while Isaac was designated as “stateless,” it took an additional five months for the Mexican government to produce a document allowing him to travel throughout Mexico.<sup>308</sup> Other migrants, including Haitians in Tapachula, report difficulties accessing healthcare due to discrimination based on race, nationality, and language.<sup>309</sup> Such consistently poor conditions are clearly restrictive.<sup>310</sup> Finally, refusal of travel documents could allow Isaac to show that he was not firmly resettled in Mexico.<sup>311</sup>

Black migrants like Isaac experience racism in Mexico that is both direct and indirect, structural and interpersonal. From their treatment by governmental officials in detention facilities, to the inability of Black migrants to secure employment or adequate housing, to their entrapment in the southern Mexican city of Tapachula, it is not surprising that Black migrants attempt to leave southern Mexico and travel to the United States as soon as they obtain a regular immigration status and are able to do so. Their time in Mexico continues their “flight,” and they are “unable . . . to avail [themselves] of the protection of” Mexico.<sup>312</sup> The only logical conclusion that can be drawn from the lived experiences of the so-called stateless in Mexico who choose to pursue asylum

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<sup>300</sup> *See id.*

<sup>301</sup> *See id.*

<sup>302</sup> *See id.*

<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> *See id.*; MORLEY ET AL., *supra* note 5, at 43.

<sup>306</sup> *See* Interview with Isaac, *supra* note 26.

<sup>307</sup> *See id.*; MORLEY ET AL., *supra* note 5, at 16.

<sup>308</sup> *See* Interview with Isaac, *supra* note 26.

<sup>309</sup> *See Not Safe Anywhere, Haitians on the Move Need Urgent International Protection*, AMNESTY INT’L (Oct. 2021), <https://www.amnestyusa.org/wp-content/uploads/2021/10/Not-Safe-Anywhere-Haitians-need-urgent-international-protection-READY-FOR-PUBLISHING1.pdf>.

<sup>310</sup> *See* 8 C.F.R. § 208.15.

<sup>311</sup> *See id.*; Interview with Isaac, *supra* note 26.

<sup>312</sup> *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

protection in the United States is that one or both exceptions to the firm resettlement bar must apply.<sup>313</sup>

## V. MOVING FORWARD

Despite Isaac and other similarly situated individuals meeting exceptions in U.S. immigration law to the firm resettlement bar to their asylum cases, issues still remain. As asylum is a discretionary form of relief from deportation, much is dependent on the particular immigration judge hearing Isaac's case.<sup>314</sup> As there is no counsel appointed at government expense in immigration removal proceedings, it is likely that other African asylum-seekers who were labeled "stateless" in Mexico and granted permanent residence have since entered the United States and will be forced to move forward without an attorney.<sup>315</sup> Some may be arguing their own cases pro se while detained in the United States.<sup>316</sup>

As such, the following Section addresses additional arguments under U.S. immigration law and calls for reforms to both U.S. and Mexican domestic legislation in order for both countries to be in line with their international legal commitments.

### A. *United States*

#### 1. Additional Asylum Claims

In a situation in which the adjudicator, namely an immigration judge, were to find that the firm resettlement bar applies to asylum-seekers such as Isaac, and that they do not meet either exception to the firm resettlement bar, African migrants could pursue an asylum claim against persecution in Mexico. Numerous reports from both U.S. and Mexican non-governmental organizations, as well as news organizations, reiterate the extreme prejudice Black migrants face in Mexico.<sup>317</sup> Moreover, much of the violence and mistreatment Black migrants suffer is directly promulgated by Mexican officials, either in detention facilities, in appointments with governmental officials such as the INM, or by police officers or members of the Mexican

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<sup>313</sup> See 8 C.F.R. § 208.15.

<sup>314</sup> See INA § 208(b)(1)(A); see also *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRAC IMMIGRATION (2007), <https://trac.syr.edu/immigration/reports/183/index.html> (“[t]he unusual persistence of these disparities—no matter how the asylum cases are examined—indicates that the identity of the judge who handles a particular matter often is more important than the underlying facts”).

<sup>315</sup> INA § 292.

<sup>316</sup> See *id.* at §§ 236, 292 (allowing for detention of noncitizens).

<sup>317</sup> See, e.g., MORLEY ET AL., *supra* note 5, at 16–17; Témoris Grecko, *Afromexicanos: La discriminación visible*, REVISTA PROCESO (Apr. 1, 2017), <https://www.proceso.com.mx/reportajes/2017/4/1/afromexicanos-la-discriminacion-visible-181471.html>; Pradilla, *El campamento*, *supra* note 127.

National Guard.<sup>318</sup> The racist interactions Black migrants have with multiple Mexican government officials cannot be dismissed as “a few bad apples” or an aberration in a government office, but is instead a systemic practice of structural racism which pervades every aspect of Mexican society.<sup>319</sup>

Anti-Black racism in Mexico intertwines with xenophobia and is perhaps most pronounced in the treatment of Afro-Mexicans.<sup>320</sup> Despite having been born with Mexican citizenship and nationality, Afro-Mexicans are treated as foreigners in their own country, harassed, prevented from securing employment or housing, and at times, threatened with deportation to other countries.<sup>321</sup>

Therefore, the idea that a Black migrant might have experienced past persecution in Mexico on account of a protected ground, namely race, or that they might have a well-founded fear of returning to Mexico because of their race, is not far-fetched, but a logical conclusion from systemic policies of anti-Blackness in Mexico.<sup>322</sup> As a result, these so-called stateless individuals with permanent residency in Mexico might additionally request asylum in the United States based on persecution in Mexico.<sup>323</sup>

## 2. Withholding of Removal and Protection Under the United Nations Convention Against Torture

Notably, despite potentially being impacted by the firm resettlement bar to asylum based on being labeled as so-called stateless, migrants may still be eligible for protection from deportation through Withholding of Removal and/or the U.N. Convention Against Torture (CAT), assuming they meet requirements for each form of immigration relief.<sup>324</sup> Under U.S. law, Withholding of Removal allows a person to seek protection if their “life or freedom would be threatened” on account of their race, religion, nationality, membership in a particular group or political opinion, if forced to return to a certain country.<sup>325</sup> Withholding of Removal represents the international obligation of “non-refoulement” that forms a basis of the Refugee Convention, in that states parties are forbidden from returning asylum-seekers to a country in which they would be irreparably harmed.<sup>326</sup> It is important to note that Withholding of Removal protects only

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<sup>318</sup> See Grecko, *supra* note 317; MORLEY ET AL., *supra* note 5, at 19, 34, 40–43.

<sup>319</sup> See Grecko, *supra* note 317.

<sup>320</sup> See discussion *supra* Section IV.C.2.

<sup>321</sup> See Grecko, *supra* note 317.

<sup>322</sup> See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining refugee); MORLEY ET AL., *supra* note 5, at 19, 23, 40–43.

<sup>323</sup> See INA §§ 101(a)(42), 258(b)(1).

<sup>324</sup> See *generally id.* at § 241(b)(3)(A) (Withholding of Removal); 8 C.F.R. § 208.16 (2021) (relief under the Convention Against Torture).

<sup>325</sup> See INA § 241(b)(3)(A).

<sup>326</sup> U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigra>

the applicant, and does not allow for protection to also be granted to spouses and minor children.<sup>327</sup> Withholding of Removal presents other restrictions as well, including a prohibition on international travel and the inability for the recipient to adjust their status to that of lawful permanent residency.<sup>328</sup>

Protection under the U.N. Convention Against Torture presents another option for persons barred from seeking asylum in the United States. The United States signed CAT in 1988, Congress ratified it in 1994, and finally, in 1999, the former Immigration and Naturalization Service issued regulations detailing the requirements and procedures for seeking protection.<sup>329</sup> In summary, a person who has been granted protection under CAT cannot be removed to a country where it is more likely than not that they will be tortured.<sup>330</sup> There are two forms of protection under CAT: Withholding of Removal under CAT, and Deferral of Removal under CAT.<sup>331</sup> Like those granted protection under Withholding of Removal under the INA, those granted CAT protection are unable to apply for immigration relief for spouses and minor children, unable to travel internationally, and not on a pathway to obtaining lawful permanent residence.<sup>332</sup>

Both of these forms of protection from removal prevent a migrant from being deported to the country where they have proven that it is more likely than not that they will be harmed or tortured.<sup>333</sup> For most applicants, this country is their country of citizenship or nationality. In the example of the so-called stateless individuals granted permanent residency in Mexico, it is likely that their applications for Withholding of Removal under the Immigration and Nationality Act or CAT will concern their countries of citizenship or nationality. For Isaac, this is Ghana.<sup>334</sup> The question remains, however, whether DHS will try to execute removal to Mexico for these individuals, given that they have received permanent residency in Mexico and thus have legal permission to leave and return. It is unclear under Mexican law whether this removal is legally possible,

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tion/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf (last visited Jan. 8, 2023).

<sup>327</sup> See EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 6 (Jan. 15, 2009), <https://www.aila.org/infonet/eoir-fact-sheet-asylum-withholding-of-removal-cat>.

<sup>328</sup> See *id.*; AM. IMMIGR. COUNCIL, THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL 1–2 (Oct. 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_difference\\_between\\_asylum\\_and\\_withholding\\_of\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf).

<sup>329</sup> See ARUNA SURY, QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE, IMMIGR. LEGAL RES. CTR. 1 (Apr. 2020).

<sup>330</sup> *Id.*; Procedures for Asylum & Withholding of Removal, 8 C.F.R. § 1208.16(c)(2) (2022).

<sup>331</sup> SURY, *supra* note 329, at 2.

<sup>332</sup> See *id.* at 2–3, 12.

<sup>333</sup> See EXEC. OFF. FOR IMMIGR. REV., *supra* note 327, at 6–8.

<sup>334</sup> See Interview with Isaac, *supra* note 26.

and further, whether Mexico would accept these individuals should the situation occur.

B. *Mexico*

In Mexico, migration laws are applied inconsistently and change on a regular basis. As of the writing of this article, migrants are required to first apply for refugee protection in Mexico with COMAR, before applying with INM for a humanitarian visa.<sup>335</sup> Even if they do receive a humanitarian visa, it is unclear whether they are allowed to transit through Mexico, as uneven interpretation of laws regarding freedom of transit of migrants through Mexico often results in people on the move being apprehended by Mexican National Guard and returned to Tapachula, in southern Mexico.<sup>336</sup> Two recent examples illustrate the arbitrariness of Mexican migration procedures, especially concerning Black migrants.

Between August and October of 2021, an influx of Haitian migrants entered Mexico irregularly across the border with Guatemala en route to the United States.<sup>337</sup> Many were forced out of Latin American countries, where many had lived for several years, because of cancellations of their long-held work visas.<sup>338</sup> Others had recently fled from Haiti, fleeing warfare, enormous political instability, violence, and economic deprivation.<sup>339</sup> While stating as a uniform rule that Haitians would likely not qualify for refugee status in Mexico, a problematic statement on its own, Mexico still required Haitians to apply for refugee status with COMAR and did not allow Haitians to travel outside of Tapachula.<sup>340</sup> By the end of August 2021, some 30,000 Haitians were waiting

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<sup>335</sup> See *How to Apply for Refugee Status in Mexico*, UNHCR, <https://help.unhcr.org/mexico/en/como-solicitar-la-condicion-de-refugiado-en-mexico/> (last visited Jan. 8, 2023).

<sup>336</sup> See generally MILLER, *supra* note 2, at 23; Grecko, *supra* note 317.

<sup>337</sup> See Yael Schacher & Rachel Schmidtke, *Report: Pushed into the Shadows: Mexico's Reception of Haitian Migrants*, REFUGEES INT'L (Apr. 28, 2022), [https://www.refugeesinternational.org/reports/2022/4/25/pushed-into-the-shadows-mexicos-reception-of-haitian-migrants#:~:text=In%20August%20and%20September%202021, horseback%20in%20Del%20Rio%2C%20Texas.](https://www.refugeesinternational.org/reports/2022/4/25/pushed-into-the-shadows-mexicos-reception-of-haitian-migrants#:~:text=In%20August%20and%20September%202021, horseback%20in%20Del%20Rio%2C%20Texas.;); Isáin Mandujano, *Comunidad haitiana atrapada en Tapachula protesta por dilación en trámites de refugio*, CHIAPAS PARALELO (Aug. 23, 2021), <https://www.chiapasparalelo.com/noticias/chiapas/2021/08/comunidad-haitiana-atrapada-en-tapachula-protesta-por-dilacion-en-tramites-de-refugio/>.

<sup>338</sup> Schacher & Schmidtke, *supra* note 337.

<sup>339</sup> See Miriam Berger, *More than 100 Haitians Found in Trailer in Guatemala as Desperate Efforts to Reach U.S. Continue*, WASH. POST (Oct. 10, 2021, 4:44 PM), <https://www.washingtonpost.com/world/2021/10/10/guatemala-migrants-haiti-smuggling-shipping-containers/>.

<sup>340</sup> See *La mayoría de los haitianos no obtendrán refugio en México*, EFE NEWS (Sept. 30, 2021), <https://www.efe.com/efe/america/ame-hispanos/la-mayoria-de-los-haitianos-no-obtendran-refugio-en-mexico/20000034-4641992> [<https://web.archive.org/web/20220>

in the city.<sup>341</sup> Haitian migrants protested on a regular basis to demand basic human rights and free transit through Mexico.<sup>342</sup> As a result, the Mexican government began bussing Haitian migrants to different Mexican cities.<sup>343</sup> Immigration files were not transferred from southern Mexico to other destination cities, and due to lack of interpretation and translation, Haitian migrants did not understand their rights under both Mexican and international law or any obligations they needed to undertake in order to secure a humanitarian or transit visa through Mexico.<sup>344</sup> The result, predictably, was chaos.<sup>345</sup>

In March 2022, Mexican President López Obrador made plans to visit the city of Tapachula, which had again become a chokepoint for Haitian and African migrants.<sup>346</sup> Along with Central American migrants, Haitian and African migrants protested the lack of information they received about their immigration cases and their ability to transit through Mexico in front of INM offices in Tapachula.<sup>347</sup> As a result of these protests, Black migrants who arrived at INM offices were given humanitarian visas to transit through Mexico, without having to first (or ever) file refugee claims with COMAR.<sup>348</sup> Consequently, many migrants left Tapachula before President López Obrador's visit.<sup>349</sup>

As demonstrated by the speed with which the President's arrival could shift processing of migrant applications, Mexico's application of its immigration laws is wildly inconsistent. This inconsistency presents numerous challenges for migrants. During interviews, many migrants complained that they had not received a humanitarian visa after waiting in Tapachula for over five months and attending a weekly check-in at INM offices, while newcomers to the city received a humanitarian visa within twenty-four hours of their arrival.<sup>350</sup> INM

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119201522/https://www.efe.com/efe/america/ame-hispanos/la-mayoria-de-los-haitianos-no-obtendran-refugio-en-mexico/20000034-4641992].

<sup>341</sup> See Mandujano, *supra* note 337.

<sup>342</sup> See *id.*

<sup>343</sup> Carrie Kahn, *On Mexico's Southern Border, the Latest Migration Surge is Haitian*, NPR (Dec. 18, 2021, 11:07 AM), <https://www.npr.org/2021/12/18/1065135970/on-mexicos-southern-border-the-latest-migration-surge-is-haitian>.

<sup>344</sup> See *id.*; Schacher & Schmidtke, *supra* note 337.

<sup>345</sup> Schacher & Schmidtke, *supra* note 337.

<sup>346</sup> Néstor Jiménez, *Ante vista de AMLO, acelera el INM trámites en Tapachula*, LA JORNADA (Mar. 11, 2022, 6:00 AM), <https://www.jornada.com.mx/notas/2022/03/11/politica/ante-visita-de-amlo-acelera-el-inm-tramites-en-tapachula/>.

<sup>347</sup> See Mandujano, *supra* note 337.

<sup>348</sup> See Jiménez, *supra* note 346; *Información Migratoria*, SECRETARÍA DE GOBERNACIÓN 8–10 (Mar. 12, 2022), <https://www.inm.gob.mx/gobmx/word/wp-content/uploads/2022/03/Tarjeta-Migratoria-120322.pdf>; Interviews with migrants in Tapachula, Mex. (Mar. 2022) (on file with author).

<sup>349</sup> See Jiménez, *supra* note 346.

<sup>350</sup> Interviews with migrants in Tapachula, Mex. (Mar. 2022) (on file with author).



and COMAR offices in Tapachula regularly close due to “overwhelming demand,” but do not address the policies which cause offices in Tapachula to be more crowded than others in the country, namely the requirement that migrants file a refugee case before they are able to receive a humanitarian visa.<sup>351</sup> The results of the inconsistency with which Mexico applies its migration laws to people in migration, notably Black migrants, are numerous violations of regional and international human rights treaties and mechanisms.

#### 1. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR), an arm of the Organization of American States (OAS) in which both the United States and Mexico are member states, functions to promote the observance and defense of human rights in the Americas.<sup>352</sup> The IACHR examines petitions brought forth by individuals, groups of individuals, or organizations that allege violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man (the American Declaration), the American Convention on Human Rights (the American Convention), and other inter-American human rights treaties.<sup>353</sup> Mexico has signed and ratified the American Convention and other regional and international human rights treaties.<sup>354</sup> Notably, despite signing and ratifying these various instruments, the Mexican government has repeatedly been reprimanded by international human rights monitoring bodies for failing to meet its obligations towards Afro-Mexicans, Black migrants and asylum-seekers, and other vulnerable groups.<sup>355</sup>

The American Convention lists various human rights that should be enjoyed by all those in Mexico, including “The Right to Personal Liberty,” “The Right to a Nationality,” and “The Right to Equal Protection.”<sup>356</sup> Interestingly, Article 20, Section 3, states: “No one shall be arbitrarily deprived of his nationality or of the right to change it.”<sup>357</sup> Here, it appears that Isaac, and likely many other African and extracontinental asylum-seekers, were in fact deprived of their

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<sup>351</sup> *Id.*; *Si estás interesado en continuar tu procedimiento de persona refugiada en México, está atento porque adelantamos fechas en Tapachula*, COMM’N MEX. AYUDA REFUGIADOS (Aug. 1, 2022), <https://www.gob.mx/comar/galerias/si-estas-interesado-en-continuar-tu-procedimiento-de-persona-refugiada-en-mexico-esta-atento-porque-adelantamos-fechas-en-tapachula?idiom=es> (noting the addition of new appointments as they “reopen”).

<sup>352</sup> *What is the IACHR?*, INTER-AM. COMM’N ON HUM. RTS., <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> (last visited Jan. 8, 2023); *Member States*, ORG. OF AM. STATES, [https://www.oas.org/en/member\\_states/default.asp](https://www.oas.org/en/member_states/default.asp) (last visited Jan. 8, 2023).

<sup>353</sup> See *What is the IACHR?*, *supra* note 352.

<sup>354</sup> See *id.*; see also Convention relating to the Status of Stateless Persons, *supra* note 166.

<sup>355</sup> See MORLEY ET AL., *supra* note 5, at 18.

<sup>356</sup> See Organization of American States, American Convention on Human Rights, *supra* note 181, at arts. 7, 20, 24.

<sup>357</sup> *Id.* at art. 20, § 3.

nationality by being labeled as stateless in Mexico.<sup>358</sup> Additionally, Mexico's refusal to provide translation or interpretation for African migrants and asylum-seekers, and further its refusal to issue transit/exit visas or humanitarian visas likely present equal protection challenges.<sup>359</sup>

## 2. United Nations Instruments: The Universal Periodic Review

The Universal Periodic Review provides an opportunity for all U.N. member states to review the human rights records of other member states.<sup>360</sup> This cyclical review occurs every four to five years, and allows for peer-to-peer recommendations by states.<sup>361</sup> During upcoming reviews of Mexico's human rights records, reviewing states should make note of Mexico's enhanced interpretation of statelessness as "no effective nationality," and call on Mexico to ratify and implement the 1961 Convention on the Reduction of Statelessness. In addition, Mexico should fulfill its obligations under the U.N. Convention on the Elimination of All forms of Racial Discrimination, to combat the indirect racism that occurs in the implementation of its migration law and policies.

## CONCLUSION

In both its Migration and Refugee Laws, a decade old and aligned with international standards, Mexico holds the promise of protection for those in need. In practice, however, Mexico seldom delivers on this promise of protection. Black migrants are particularly impacted by the interconnected barriers posed by racism and xenophobia in every encounter with governmental authorities in Mexico. According to researchers:

In the context of Mexico, the lack of involvement of the state, the migrants' lack of financial resources to access market-provided services, the small size of the African community, and the mistrust of other migrant groups (partly induced by the government), leave individual migrants dependent almost solely on the [civil society] and their transnational social networks.<sup>362</sup>

While Mexico might argue that any migrant entering Mexico irregularly without an embassy or consular representation might be labeled "stateless" and granted permanent residency, the practical result is that for a time in 2019 and 2020, only Black migrants were labeled as such. The result is an example of indirect discrimination, in that a policy or procedure is written to be applied equally to all persons but, in practice, it puts persons in a particular protected

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<sup>358</sup> *See id.*

<sup>359</sup> *See id.* at art. 24. A detailed exploration of this topic is beyond the scope of this article.

<sup>360</sup> *See Basic Facts about the UPR*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/upr/basic-facts> (last visited Jan. 8, 2023).

<sup>361</sup> *See id.*; *Cycles of the Universal Periodic Review*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hr-bodies/upr/cycles-upr> (last visited Jan. 8, 2023).

<sup>362</sup> Serra Mingot & González Zepeda, *supra* note 294 at 11.

group at a disadvantage when compared to other groups. Here, the law makes no mention of race, yet it disproportionately, if not entirely, impacts Black migrants.

What is not clear, and will perhaps never be fully illuminated, is whether the Mexican government knew the impact that an offer of permanent residence for the so-called stateless would have on future U.S. asylum claims: namely, triggering the firm resettlement bar. Were Mexico's actions negligent, reckless, or both? What is clear, however, is that Mexico labeled predominately—if not exclusively—Black African migrants as “stateless,” based not on the internationally recognized legal definition, but on an outdated concept of “no effective nationality” for those who did not have an embassy or consular representation in Mexico.

Interestingly, while U.S. regulations are clear that a person could be found to have been “firmly resettled” even if they do not accept the permanent residency offered,<sup>363</sup> there is an absence of case law on whether a person can be considered to have been firmly resettled if they did not consent to it, received no translation or interpretation in interactions with the granting country's migration authorities, and did not actually know or understand the legal immigration status they were receiving. Advocates should argue that forced permanent residency or legal status in a county of transit does not equate to firm resettlement, but is instead the consequence of the externalization of borders for people in migration.

The closure and increased danger of traditional routes to Europe has increased extracontinental migration to Latin America.<sup>364</sup> The solution to the so-called “crisis” is a regional solution based on the premise that migration in and of itself is not a crisis, but that the crisis is the border as “a central modality for state formation, hierarchical social ordering, and population control through exclusions and expulsions.”<sup>365</sup> From denial of language access, to lack of information, to perpetual liminality, the treatment of people in migration in Mexico presents numerous human rights violations. As the United States dithers and delays in adopting migration policies which respect human rights and are in accordance with international norms and treaties, people are victimized and some die on the other side of the border. The United States has outsourced its border control to Mexico, and in turn, Mexico, with its militarization, checkpoints, and controls over people in migration, has itself become the border wall.

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<sup>363</sup> See 8 C.F.R. §§ 207.1(b), 208.15.

<sup>364</sup> See YATES & BOLTER, *supra* note 85, at 5.

<sup>365</sup> HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 28 (2021).