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Seeking asylum in the United States:  
Mandatory detention and international law  

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<tr>
<td>APA</td>
<td>Administrative Procedure Act</td>
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<td>BIA</td>
<td>Board of Immigration Appeals</td>
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<td>CBP</td>
<td>Customs and Border Protection</td>
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<td>C.F.R.</td>
<td>Code of Federal Regulations</td>
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<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>ExCom</td>
<td>Executive Committee for the High Commissioner’s Programme</td>
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<td>DHS</td>
<td>Department of Homeland Security</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICE</td>
<td>Immigration and Customs Enforcement</td>
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<td>IIRIRA</td>
<td>Illegal Immigration Reform and Immigrant Responsibility Act</td>
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<td>IJ</td>
<td>Immigration Judge</td>
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<td>INA</td>
<td>Immigration and Naturalization Act</td>
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<td>INS</td>
<td>Immigration and Naturalization Service</td>
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<td>NGO</td>
<td>Non-Governmental Organization</td>
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<td>Protocol</td>
<td>1967 Protocol Relating to the Status of Refugees</td>
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<td>Refugee Convention</td>
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<td>UNHCR</td>
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1 Introduction

In June 2014, the Artesia Detention Facility in New Mexico, United States held 287 families, including asylum seekers who were attempting to obtain protection in the United States due to their fear of persecution in their home countries. Asylum seekers’ ability to make effective asylum claims are limited because the facility is located hours away from the nearest legal service provider. Many of the women and children who are detained in the facility will be detained throughout the entire asylum process, which can last months and sometimes years. The United States’ practice of detaining asylum seekers is a massive undertaking and in 2013 it was reported that approximately 440,000 immigrants were detained across the country.

The United States is a country built on immigrants, and it has a history of admitting large numbers of immigrants into its territory. The same is true when it comes to admitting refugees. However, historical events and various influxes of refugees to its borders have made many Americans suspicious of admitting too many people to the U.S. The terrorist attacks of September 11, 2001, and the continuous conflicts and hardship faced in countries in Central- and South America resulting in large refugee flows to the U.S. are some, among many, factors that have exacerbated the overall negative view towards refugees and immigrants. This view has also affected U.S. immigration laws and policies. Even though the U.S. is bound by the provisions in the 1951 Convention Relating to the Status of Refugees (hereinafter the Refugee Convention), the adherence to international refugee law is questionable when looking at specific legislation that has been passed by the U.S. Congress in the 21st century.

Depriving someone of their liberty, especially when they have not been suspected of committing any crime, is a serious undertaking that should never be done heedlessly in a society based on the rule of law. The treatment of those who have come to seek protection from persecution as criminals is a troubling development that is happening in countries all over the world. Studying the impact of legislative measures that result in

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4 Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
depriving asylum seekers of their liberty is of significance to many jurisdictions. The legal dilemmas caused by these practices are therefore of universal importance.

This thesis is concerned with the United States’ compliance with its international obligations under the Refugee Convention. Specifically, this thesis will focus on the practice of detaining asylum seekers under the U.S. immigration system. The specific provisions regulating detention in the Refugee Convention, as well as provisions in other international human rights, documents will be analyzed in the thesis. A closer look at immigration laws and policies in the U.S. with regards to the detention of asylum seekers is also part of this thesis. How well the U.S. system lives up to its international obligations with regards to refugee rights, and specifically the practice of detention, is therefore the main topic of interest here.

1.1 Background and history

Throughout history, humans have found it necessary to move between lands. Whether because of lack of resources, the hope of finding a better life, or necessitated by war and conflict in one’s home country, the movement of people has always been a part of humanity. After the Second World War, it was deemed necessary to create regulations to improve the situation of those who had been displaced or had fled their country as a result of the war. As such, the Refugee Convention was adopted. This convention forms the foundation of international refugee law.\(^5\) International refugee law is a legal framework with the purpose of protecting those who are in dire need of protection, including ensuring that they are afforded their fundamental rights. It further aims to uphold the rights entitled to citizens in societies built around the rule of law and to ensure that these rights are also afforded to refugees.

Refugee law has historically struggled with the difficult balance between, on the one hand, the humanitarian viewpoint that states, that are able to, should help those in need, and, on the other hand, domestic policy issues and the sovereign right of nations to decide whether or not to admit or deny entrance to anyone who is seeking to enter their borders. This tension makes refugee law a complex area of international law where opposing interests demand attention.

When the Refugee Convention was adopted it was written in a way that limited its scope and application to certain temporal and geographical factors. The Protocol Relating to the Status of Refugees (hereinafter the Protocol) was therefore adopted in 1967, which bound its signatories by the provisions in the Refugee Convention but without the previous restrictions in time and space. The Refugee Convention lays down the fundamental rights and responsibilities of refugees. Article 1 provides for the definition of a refugee and this definition has become widely accepted around the world as the standard for ascertaining who qualifies as a refugee. A refugee is someone who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...” Furthermore, the Refugee Convention, together with other human rights documents, establishes the right of everyone who falls under the definition of “refugee” to seek asylum. It is important to note here that the Refugee Convention and other human rights documents only provides for the right to seek asylum, not to obtain it.

The United States has a long history of admitting people who are in need of protection and looking for a better life, and since 1975 the U.S. have admitted almost 3 million refugees. However, conflicting interests and perspectives have always shaped U.S. immigration policies. On the one hand, there is the view that since most of its citizens themselves came as immigrants, or their families did so in the past, the country should be open when it comes to letting new immigrants come and settle in their country. The humanitarian perspective that the United States should help those that are in dire need of protection also supports this view. On the other hand, there is the view that immigrants are causing domestic problems such as crime, unemployment and violence, and immigration must be restricted in order to ensure that the quality of life for U.S.

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6 The Refugee Convention was only applicable to persons who, as a result of events occurring in Europe before January 1, 1951, fell under the refugee definition. See Article 1 of the Refugee Convention. This definition was the result of the Refugee Convention being created as a response to the masses of refugees in Europe after World War II.


8 See Article 1, Refugee Convention.

9 See, for example, Article 14 in the Universal Declaration on Human Rights, 10 December 1948, General Assembly Resolution 217 A (III).


11 Weissbrodt & Danielson, p. 49.
citizens is maintained. These conflicting perspectives make the study of U.S. refugee law complex and at the same time very interesting.

I have chosen to focus on asylum law in the United States because of my general interest in the rights of refugees, as well as my interest in U.S. immigration policies. My interest in these matters has been intensified by the current debate regarding immigration and the treatment of refugees at the United States’ borders. I believe that the on-going debate on how to handle the massive refugee and immigrant flows in the U.S. is very important and is also relatable to the same sort of issues that European countries, as well as other countries around the world, are facing.

1.2 Purposes and objectives
This thesis proceeds in a two-fold manner: its initial objective is to explore what measures the United States has taken in its domestic legislation and jurisprudence to comply with the provisions in the Refugee Convention. In an effort to explore whether or not the international obligations that the United States has through its signing and ratification of the Protocol are complied with, an examination of the role of the Convention and the Protocol in domestic law and jurisprudence will be presented. Specifically, the case law that followed the Refugee Act of 1980 will be explored.

Secondly, this thesis will apply these measures when analyzing the mandatory detention provision that was enacted into U.S. law in 1996. This provision will be compared to the provision in Article 31(2) of the Refugee Convention, which prohibits states from imposing unnecessary restrictions on the movement of asylum seekers that are present within their borders. According to the Refugee Convention, detaining asylum seekers can only be done if deemed necessary. What is meant by necessary will be further explored in order to examine whether or not U.S. practice violates Article 31(2) or not.

When analyzing the detention of asylum seekers, it is important to not only explore Article 31(2) of the Refugee Convention, but also Article 9 in the International Covenant on Civil and Political Rights (hereinafter ICCPR). The United States ratified

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12 Weissbrodt & Danielson, p. 49.
13 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.
the ICCPR in June 1992. Article 9 lays down the fundamental principles that should be followed when detaining individuals and this provision also relates to the detention of asylum seekers.

The deprivation of the liberty of individuals must accord with the fundamental principle of due process. Due process considerations will therefore be part of the on-going discussion throughout the thesis. In order to explore the procedural protections that asylum seekers are afforded in the U.S., the practice of detention serves as a useful topic to analyze. Since detention involves the restriction of movement and deprivation of liberty of asylum seekers, the legal issues pertaining to detention under international law will be explored. This is coupled with an overview of U.S. law and practice in this area, in order to ascertain whether or not the practices are in conformity with international standards. Within this analysis, the expedited removal process that is part of the U.S. immigration system will be further examined, including its elements of mandatorily detaining asylum seekers on a summary basis.

Specific questions that will permeate this thesis are the following: What has the general view of international refugee law been in the United States since the signing and ratification of the Protocol? Can it be argued that the United States lives up to its obligations under the Refugee Convention? How does the U.S. practice of mandatorily detaining asylum seekers correspond to the prohibition of unnecessary restriction of movement in Article 31(2)? What are the consequences of mandatory detention of asylum seekers from an international law perspective?

1.3 Methodology
Since this thesis studies the United States’ compliance with international obligations under the Refugee Convention, the methodology used is to a large extent reflective of the basic structure of the American legal system, which is a system based on common law. Therefore, a brief overview of the basic components of the common law system in the U.S. is necessary.

A common law system consists of an adjudication procedure that to a large extent relies on court precedent, making previous court cases critical when determining the outcome of a case.\(^{15}\) This results in vast importance being placed on the courts, since they, by design, develop and in many ways create the law.\(^{16}\) The importance of the courts in common law systems stems from the principle of *stare decisis*, referring to the binding force of precedent, which mean that the courts are bound to decide cases in accordance with precedent.\(^{17}\) This differs from legal systems based on civil law, which is constructed around the notion that the legislature is the exclusive lawmaker, and the written law enacted by the legislature is intended to cover every situation that is governed by law.\(^{18}\)

In the United States, the courts play a major part in making the law, which for example occurs when they interpret statutes or determine the constitutionality of actions taken by governing bodies, such as the federal government, state governments, and governmental agencies.\(^{19}\) However, in the current U.S. legal system, there is also a vast body of rules and regulations that influences the law on the state and federal level, including large codes in various areas, similar to the ones seen in civil law systems.\(^{20}\) Therefore, it is of importance to both look at case law and written law when analyzing a particular area within the American legal system. Court cases, alongside with the U.S. Constitution and enacted statutes, are considered primary sources of law in the U.S. legal system.\(^{21}\)

Due to the above-mentioned structure of the American legal system, a major part of my research has included reviewing court cases. This is in accordance with the way in which legal research is conducted in the United States.\(^{22}\) I have also used various articles from American law reviews and journals that analyze the issues that are of focus here in an effort to create a stronger foundation for my conclusions made at the end of

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\(^{18}\) Lewis, A.J., p. 11.

\(^{19}\) Lewis, A.J., p. 12.


\(^{22}\) Myers, p. 345.
this thesis. Law reviews and journals are also part of the traditional legal research in the U.S., and are considered to be secondary sources of law.\textsuperscript{23}

However, as this thesis is also concerned with public international law, I have used traditional legal sources\textsuperscript{24} in public international law when researching for this thesis as well, primarily focusing on the text of the Refugee Convention and commentaries to it. Further, within international law there is an area called \textit{soft law}, which includes non-binding documents such as guidelines, declarations and principles.\textsuperscript{25} For the purposes of this thesis, guidelines published by the United Nations High Commissioner for Refugees (UNHCR) have been used in order to discern the correct way of interpreting articles in the Refugee Convention.

The role of the UNHCR is, according to its Statute, to provide protection to refugees, but also to supervise the application of treaties relating to refugees.\textsuperscript{26} The UNHCR does not function as a judicial body, but it does issue guidelines and opinions in an effort to promote uniformity among states with regards to international refugee law. The so-called Handbook, issued by the UNHCR, provides guidance in how to make refugee determinations as well as providing overall legal interpretations on international refugee law.\textsuperscript{27} The Handbook is oftentimes used as a reference when states are interpreting the provisions in the Convention.\textsuperscript{28} Further, the United Nations’ Economic and Social Council (ECOSOC) created the Executive Committee of the High Commissioner’s Programme (ExCom) in 1958.\textsuperscript{29} ExCom issues conclusions on international refugee law

\begin{itemize}
\item\textsuperscript{23} Myers, p. 6.
\item\textsuperscript{24} The primary sources of public international law are enumerated in Article 38 of the Statute of the International Court of Justice, 18 April 1946, 33 UNTS 933. These consists of: international conventions (treaties); international customary law; general principles of law: judicial decisions and teaching of the most highly qualified publicists of the various nations.
\item\textsuperscript{26} Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, General Assembly Resolution 428 (V). See also Article 35 of the Refugee Convention.
\item\textsuperscript{29} UN Economic and Social Council, \textit{Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees}, April 30 1958, E/RES/672.
\end{itemize}
related to the practices of the UNHCR, which has contributed to the expanding role of the UNHCR in the development of international refugee law.\textsuperscript{30}

Within the United States, the UNHCR functions as a party that files amicus briefs and advisory opinions to U.S. courts on matters relating to international refugee law and on how the Convention should be interpreted, although their role in the U.S. legal system is rather marginal.\textsuperscript{31} Even though the UNHCR, from an international refugee law perspective, has a limited role within the U.S., the role of the UNHCR should not be understated when analyzing the provisions in the Refugee Convention. Therefore, I have deemed it necessary and relevant to use soft law from the UNHCR throughout this thesis. Additionally, reports from Non-governmental organizations (NGOs) have been used in the thesis since much of the research in the area has been conducted by various NGOs.

\textbf{1.4 Delimitations}

I have chosen to focus solely on American law and the U.S.’s implementation and application of the Refugee Convention, including Article 9 of the ICCPR, due to my focus on the detention of asylum seekers in the U.S. system. Therefore, there will be no analysis of other countries’ application of these conventions. As the purpose is to examine the application of Article 31(2) and Article 9, the question of the definition of a refugee and any deeper analysis of the fundamental principle of non-refoulement in Article 33(1) of the Refugee Convention will not be explored in this thesis. The principle of non-refoulement refers to the prohibition of states to expel or return a refugee to the territories where his or her life or freedom would be threatened. However, as the principle of non-refoulement is of major importance in any matters relating to the refugee process, it cannot be completely overlooked in this thesis and I will therefore continuously discuss the implications of detention by referring to the potential violation of Article 33(1).


International refugee law is a branch of international law that exists in parallel with international humanitarian law and human rights. The intertwined relationship between these three branches of international law stems from the purposes they have in common, which is to protect the fundamental rights of individuals who are in situations where their own state or the state where they are currently present cannot or will not protect their rights. Firstly, the reasons behind mass refugee influx can in many ways be explained by the application, or non-application, of international humanitarian law. Secondly, the detention of asylum seekers can have severe consequences on these individuals’ ability to exercise and enjoy their human rights, and the potential violations of international human rights standards is a part of the larger discussion on the treatment of refugees. Although Article 9 of the ICCPR is part of the analysis, other provisions in the ICCPR and other human rights documents are not treated in this thesis. The main focus is on the Refugee Convention and its prohibition of unnecessary restriction of movement in Article 31, and due to the nature of this topic Article 9 of the ICCPR is also included.

Finally, the purpose of this thesis is not to discuss solutions to the immigration and refugee problems that the United States is facing, but instead to analyze how the country is living up to its international obligations. Nonetheless, the concluding chapter contains a section where current proposals of changes in the U.S. immigration system are presented and discussed closer.

1.5 Disposition

In chapter 2, international refugee law is examined. Background, history and general concepts are presented, as well as the existing legal framework in this area. The international standards regarding the detention of asylum seekers are also presented here, including an overview of the requirements that need to be met in order for detention to be considered lawful.

In chapter 3, the thesis turns to U.S. law and the American immigration system. A presentation of the basic structure of the American legal system initiates the chapter.

Since the readers of this thesis will mainly be Swedish and are most likely not particularly familiar with the various components of the American legal system, including U.S. immigration law, a basic understanding of the U.S. immigration system is of importance and is therefore included in this chapter. The chapter also contains an overview of the asylum process in the U.S. system, and relevant statutes and provisions are presented. Furthermore, the third chapter also includes an overview of public international law in the U.S. system, describing how treaties are adopted and ratified, and what is needed to make a treaty applicable in domestic law. This overview is necessary for the understanding of the status of the Refugee Convention in the American legal system.

In chapter 4, U.S. practices of detaining asylum seekers are presented and discussed, with an aim to compare these practices to relevant international standards. The chapter contains an overview of the statute regulating mandatory detention of arriving non-citizens in U.S. law, which includes potential asylum seekers as well as other immigrants. The legislation, and the practice of detaining asylum seekers pursuant to the legislation, is explored and studied through the perspective of international refugee and human rights law, based on Article 31(2) of the Refugee Convention and Article 9 of the ICCPR. The concluding chapter contains some final remarks on U.S. asylum law and its compliance with international standards.

1.6 Terminology

In international refugee law, a refugee is someone who falls under the refugee definition as established in the Refugee Convention, and a person who qualifies as a refugee is eligible for asylum. In the United States, the term refugee has traditionally referred to an individual who is outside the U.S. and applying for relief. Reference to refugee applications has therefore historically meant those applications that are processed within the applicant’s home country, whereas the term asylum seeker refers to persons who are located in the U.S. or at a port of entry at the time of application. However, when determining if someone will be granted asylum or not, both these categories of people must qualify for the definition of a refugee under U.S. law, which makes the use of

these two terms somewhat confusing. In order to avoid further confusion, I have used the term ‘asylum seeker’ when discussing the detention and the rights of these individuals in this thesis, as this category of persons face mandatory detention when arriving at U.S. borders.
2 International Refugee Law

As mentioned above, the Refugee Convention is limited in its application in terms of time and space, and therefore the 1967 Protocol was created in order to remove the limitations.\(^\text{36}\) Under Article 3 of the Protocol, the states that become parties to the Protocol undertake to apply Articles 2-34 of the Refugee Convention in their treatment of refugees.\(^\text{37}\) Therefore, the fundamental provisions in the Refugee Convention bind states that become parties to the protocol. The Refugee Convention and the Protocol provide for rights and protections of individuals falling under the refugee definition, the most important ones being the right for individuals to seek asylum and the guarantee not to be forcibly repatriated to the country from which he or she fled (the principle of non-refoulement).\(^\text{38}\) Since the drafting and completion of the Refugee Convention and the 1967 Protocol, these documents have developed into being the cornerstone for international refugee law.\(^\text{39}\)

Although international law provides for a framework for refugee protection, it is important to bear in mind that refugee issues are mainly matters of domestic laws and policies, which to a large extent are connected with domestic immigration law.\(^\text{40}\) Therefore, international refugee law relies heavily on the interpretation and implementation of international refugee legislation by each country that has accepted to follow its provisions. This basic nature of refugee law is of importance when examining laws and practices in the area. While aiming at treating persons who have fled their countries in fear of persecution in a humane way, refugee law also rests on the demand of sovereign states to maintain control over those who are seeking to enter their territory.\(^\text{41}\)

In becoming a state party to the Convention or the Protocol, states undertake to ensure certain standards with regards to the treatment of refugees, as well as guaranteeing them certain rights.\(^\text{42}\) Further, states undertake to implement the Convention and the Protocol

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\(^{37}\) See Article 3 of the Protocol.

\(^{38}\) Lambert, p. 4.

\(^{39}\) Lewis, C., p. 70.

\(^{40}\) Lambert, p. 6.


in their domestic legal system, although they are allowed to freely choose how to implement them. To examine whether a state has taken adequate measures in implementing the provisions of an international document, it is important to look at both domestic legislation and case law, but it is also important to consider the element of administrative discretion.\textsuperscript{43} With regards to refugees and asylum seekers, this is of special importance since the administrative agencies are given broad authority to make determinations.\textsuperscript{44} Due to the nature of refugee law, where a person who is denied refugee status risks being sent back to persecution, torture and even death, the responsibility of the administrative agencies dealing with these matters is highly significant.

2.1 Refugee law and its relationship to human rights law
The purpose of the Convention is to ensure refugees the widest possible exercise of their fundamental right and freedoms.\textsuperscript{45} As mentioned earlier, international refugee law is part of the larger body of international human rights law, and refugees are entitled to the rights laid down in human rights documents as conferred to them as individuals, as well as the rights in the Convention conferred to them due to their status as refugees.

Refugee protection therefore has a very close connection to the protection of human rights, since refugees flee from their home states in order to escape human rights violations there.\textsuperscript{46} When the home state cannot guarantee the protection of human rights, other states may step in and protect these rights by granting the individual refugee status.\textsuperscript{47} Although one must always look at refugee law through the perspective of human rights, it is also important to keep these two areas of international law separated in order to distinguish the particular rights entitled to refugees.

2.2 Detention
Article 31 of the Refugee Convention contains provisions for how to handle refugees who enter or remain unlawfully in the country of refuge, with the second paragraph

\textsuperscript{43} Goodwin, in Feller, et al, p. 216.
\textsuperscript{44} Weissbrodt & Danielson, p. 84.
\textsuperscript{45} See the Preamble of the Refugee Convention.
\textsuperscript{46} Gibney, M., \textit{Global Refugee Crisis}, 2\textsuperscript{nd} edition, ABC-CLIO, LLC, 2010, p. 27.
\textsuperscript{47} Gibney, p. 67.
containing the provision that “the Contracting States shall not apply to the movement of such refugees restrictions other than those which are necessary...”\(^ {48}\) This provision regulates the detention of refugees. Further, the term *detention* “refers to the deprivation of liberty or confinement in a closed space which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centers or facilities”.\(^ {49}\) The practice of detaining asylum seekers thus involves the deprivation of liberty and restriction of the freedom of movement of individuals, although they are not suspected of having committed a crime.

According to international refugee law, as well as human rights law, detention of asylum seekers should be considered a measure of last resort and avoided if possible.\(^ {50}\) The deprivation of liberty is only permissible if it is done in order to achieve a legitimate government interest. Such government interest can include the verification of the identity of the person, discovering the basic elements of the asylum seeker’s claims, as well as ensuring that the person does not pose a risk to the society.\(^ {51}\) Article 31(2) therefore acknowledges the right of states to initially limit the freedom of movement of asylum seekers, but their continued detention has to be ‘necessary’. According to Guy Goodwin, detention is only ‘necessary’ in situations that can be justified on security grounds or in an extraordinary situation of mass influx.\(^ {52}\) Although states do have authority and power to detain asylum seekers, the initial determination to detain an asylum seeker must not be conducted in an arbitrary manner.\(^ {53}\) The prohibition on arbitrary detention is found in Article 9 of the ICCPR.\(^ {54}\)

The detention of asylum seekers can thus be considered lawful if it complies with domestic law, the Refugee Convention, and international law in general. The decision of detaining someone further has to be subject to judicial or administrative review in order to guarantee that the detention remains necessary.\(^ {55}\) While detention of asylum seekers is allowed under the auspices of the Refugee Convention, it is important to bear in mind that it is not permissible to enforce massive and indiscriminate detention of all asylum

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\(^{48}\) Emphasis added.


\(^{50}\) Detention Guidelines, p. 6.

\(^{51}\) Gibney, pp. 30-31.

\(^{52}\) Goodwin, in Feller, et al, p. 222.


\(^{54}\) See Article 9, ICCPR.

\(^{55}\) Jastram & Achiron, p. 81.
seekers in order to dissuade refugee flows or based simply on general national security grounds.\textsuperscript{56} Similarly, it is impermissible to indefinitely detain persons who have been denied asylum but cannot, for one reason or the other, be returned to their home country warranted under the Convention.\textsuperscript{57} This has been established by scholars of international refugee law, as well as by the UNHCR, as a response to practices by countries (in particular the U.S.) that seem to have had the above-mentioned motivations behind them.\textsuperscript{58}

It could be argued that the U.S. is currently facing a situation of mass influx at its borders. Such a designation would then, according to Goodwin, permit the mandatory detention of asylum seekers as it could be argued to be ‘necessary’ and therefore acceptable under Article 31 of the Refugee Convention. However, as will be discussed further down in this thesis,\textsuperscript{59} the structure of the current legislation in the U.S. regarding asylum seekers who arrive at U.S. borders results not only in arbitrary detention, which is not allowed under international law, but also in continued detention of persons who have demonstrated a credible fear of persecution. Due to insufficient asylum determinations and procedures, the continued detention results in a potential risk of deporting individuals, who might face persecution if they are sent back. This would violate the principle of non-refoulement. In my opinion, this potential foreseeable consequence renders any arbitrary and continued detention of asylum seekers a violation of international law.

2.2.1 Detention determinations

Since detention should be used as a measure of last resort, a legislative presumption against detention should further exist in the domestic legal systems. If a decision to detain someone is made, contrary to the presumption, authorities should conduct a proportionality test in order to determine whether or not the detention is reasonable and proportional in relationship to the objectives that will be achieved through the detention.\textsuperscript{60} This correlates with the legal proportionality principle, where a negative measure taken by the government against an individual is only permitted if the public

\textsuperscript{56} Gibney, p. 31.
\textsuperscript{57} Gibney, p. 31.
\textsuperscript{58} Jastram & Achiron, p. 81.
\textsuperscript{59} See infra, chapter 4.
\textsuperscript{60} Jastram & Achiron, p. 82.
policy objectives reached outweighs the interest of respecting the rights and freedoms of
the individual affected by the measure.\textsuperscript{61} Further, the measure taken must not exceed
what is strictly necessary in order to achieve the intended purpose of the measure, and if
there are any measures that are less restrictive or invasive on the individual these must
always be preferred.\textsuperscript{62}

As mentioned above, the UNHCR established the principle that detention should
“normally be avoided” in 1986.\textsuperscript{63} This principle has been reaffirmed in later
publications made by the UNHCR.\textsuperscript{64} Therefore, since it is lawful to detain asylum
seekers in certain instances that cannot be avoided, exceptions to the presumption
against detention have been adopted. There are four exceptions to the presumption
against detention. Under the exceptions, detention may be resorted to in the following
situations: (1) in order to verify the identity of the asylum seeker; (2) to determine the
elements of the asylum claim; (3) in situations where the asylum seeker have destroyed
their identity documents or used fraudulent ones; and (4) in order to protect national
security and public order. Detention based on reasons or justifications other than the
ones listed above are conflicting with established norms of international law.\textsuperscript{65}

Article 31(2) of the Refugee Convention, Article 9 of the ICCPR, and the various
guidelines published by the UNHCR, provides for the manner in which the detention of
asylum seekers should be conducted. Although international law is clear on what
constitutes a lawful detention of asylum seekers and requires due process guarantees,
many states do not follow these guidelines in their practices.\textsuperscript{66} One such example is the
expedited removal process in the United States. This process contains elements of
arbitrary detention that does not comply with standards of international law and will be
examined later on in the thesis.

\textsuperscript{61} Detention Guidelines, p. 21.
\textsuperscript{62} Detention Guidelines, p. 21.
\textsuperscript{63} Executive Committee Conclusion No. 44, Detention of Refugees and Asylum-Seekers, UNHCR,
October 13, 1986.
\textsuperscript{64} UNHCR, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum
Seekers, 1999.
\textsuperscript{65} Jastram & Achiron, p. 82.
\textsuperscript{66} Goodwin, in Feller, et al, p. 226.
2.2.2 Procedural safeguards

Asylum seekers who are detained should further be entitled to certain minimum procedural guarantees, which mean that they have a right to certain due process safeguards.\(^{67}\) Some of these rights are the right to be informed of the reason for one’s detention, the right to be informed of one’s right to legal counsel, the right to have one’s detention decision reviewed before an independent authority as well as regular reviews of the necessity of the detention, and the right to have a opportunity to proceed with one’s asylum claims and procedures.\(^{68}\)

These minimum standards aim to ensure that when decisions are made to detain asylum seekers, these decisions are made in accordance with the rule of law and due process principles.\(^{69}\) These safeguards have been established by the UNHCR to function as detention guidelines with regards to asylum applications. However, the standards stem from the rights entitled to all persons under Article 9 of the ICCPR, who have been deprived of their liberty.

\(^{67}\) Detention Guidelines, p. 27.
\(^{68}\) Detention Guidelines, p. 27-28.
\(^{69}\) Feller, et al, p. 16.
3 The United States

The immigration debate in the United States is surrounded by the tension between the fact that the U.S. is a nation of immigrants and was built upon an open immigration policy, which makes it hard to justify that present citizens should keep future immigrants from entering the country, and the view and argument that the U.S. cannot allow everyone to come, and that there must be some limits on immigration. Further, there is a fear that open borders will result in increasing domestic problems such as crime, drugs and violence, and this view has resulted in continuous attempts to regulate and keep out what is viewed as dangerous foreign elements. Looking at immigration legislation, one can find a compromise between these two viewpoints, where immigration is encouraged if a family connection can be established or with respect to people with certain skills needed in the U.S. economy, but immigration is instead discouraged when it comes to people that are potentially posing a financial burden on the economy or viewed as a threat to the security of the nation.

In order to achieve a deeper understanding of the asylum process and its procedures in the United States, an initial overview of the basic components of U.S. immigration law is required. The following chapter firstly describes basic principles and foundations of the American legal system, followed by an overview of the immigration laws and procedures. A brief explanation of the status of international treaties in the U.S. legal system is also part of this chapter, which is necessary in order to understand what standing the Refugee Convention has in the domestic legal system.

3.1 The American legal system

One of the most fundamental functions of the American legal system is that the system is based on the separation of powers. Separation of powers is the idea that the three essential functions of government, namely legislative, executive and judicial, should be divided into three separate branches of government. In the U.S. Constitution, the first three articles lay down the structures and powers of the legislative branch (Congress),

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70 Weissbrodt & Danielson, p. 51.
71 Weissbrodt & Danielson, p. 51.
72 Weissbrodt & Danielson, p. 52.
the executive branch (the Presidential Office) and the judiciary branch (the courts). Another fundamental feature of the American legal system is the principle of federalism, which involves the division of authority between the federal government and the state governments in the fifty states.\textsuperscript{74} Each state government has its own state constitution and state laws that govern within that particular state, although all of these are subordinate to the provisions in the U.S. Constitution and federal statutes adopted by Congress when they conflict. Each state system is based on the principle of separation of powers as well, and they all have their own legislative, executive and judiciary branches.

The court system in the United States consists of a hierarchical, three level system of courts: trial courts, appellate courts and a supreme court. Both the state governments and federal government have this three level court system. In the federal court system, there are 94 District Courts, and 12 Courts of Appeals (these are divided into so called circuits, and in each circuit several states may be included).\textsuperscript{75} While decisions by the United States Supreme Court are binding on all courts (state and federal), U.S. appellate court decisions only have binding precedential value within its circuit, and decisions from state supreme courts only have binding precedential value within that particular state.\textsuperscript{76}

The United States Congress (hereinafter Congress) has the primary authority to make law in the U.S.\textsuperscript{77} Congress is divided into two chambers, consisting of the House of Representatives with 435 members and the U.S. Senate with 100 members.\textsuperscript{78} However, as the role of government has expanded, Congress and state legislatures have found it necessary to delegate power to various government agencies that enables them to create and enforce rules and regulations in the specific area of government that they are responsible for.\textsuperscript{79} Agencies are also sometimes entrusted with settling disputes between parties that have a claim that falls under the agency’s designated area. As a result, agencies often perform quasi-judicial functions.\textsuperscript{80}

\textsuperscript{74} Scheb & Sharma, p. 32.
\textsuperscript{75} Zweigert & Kötz, p. 253.
\textsuperscript{76} Fine, p. 43.
\textsuperscript{77} See Article 1, Section 1 of the United States Constitution.
\textsuperscript{79} Scheb & Sharma, p. 432-433.
\textsuperscript{80} Scheb & Sharma, p. 446.
Agency adjudication is governed by the Administrative Procedure Act (APA), which can be found under title 5 in the United States Code (U.S.C.). The APA contains basic elements of due process, but it is important to bear in mind that agency adjudication is also subject to the due process rights laid down in the U.S. Constitution. Because of this delegation of powers to government agencies, agencies often perform duties that can have major impacts on the individual’s life, which is very much the case when it comes to immigration and asylum control.

3.2 Immigration law
The power to regulate immigration in the United States belongs to Congress. Immigration laws passed by Congress can be found in title 8 of the U.S.C. The Immigration and Nationality Act of 1952 (INA) further forms the foundation for immigration law in the US. In 1980, Congress amended the INA by passing the Refugee Act, which consists of provisions relating to the status of refugees. The Refugee Act broadened the previous definition of refugees in order to better comply with the international definition in the Refugee Convention and Protocol. The Refugee Act remains one of a very few statutes in U.S. domestic law that has directly incorporated the language and concepts of an international treaty.

Up until 2003, the Immigration and Naturalization Service (INS) was responsible for carrying out the nation’s immigration laws. However, this agency was abolished when Congress passed the Homeland Security Act in 2002. Since then, three subdivisions, so called bureaus, under the Department of Homeland Security (DHS) have been responsible for enforcing and administering immigration law. The U.S. Citizenship and Immigration Services (USCIS) is responsible for asylum and refugee applications, the

81 Administrative Procedure Act (APA), Public Law No. 79-404, 60 Stat. 237, enacted in June 1946.
82 The United States Code (U.S.C.) is a compilation of the laws passed by Congress, divided into fifty titles based on different areas of the law.
83 Weissbrodt & Danielson, p. 70. See also Article I, Section 8 of the United States Constitution.
84 Immigration and Nationality Act (INA), Public Law No. 82-414, 66 Stat. 163 (1952). May be accessed under title 8, U.S.C. § 1101-1537. When discussing statutes under the INA, I will continuously cite to the specific section of the U.S.C., in order to enable the reader to access the correct section in the easiest possible way.
85 Weissbrodt & Danielson, p. 15.
87 Weissbrodt & Danielson, p. 19.
U.S. Immigration and Customs Enforcement (ICE) is responsible for enforcing the immigration laws, including the detention of non-citizens, and the U.S. Customs and Border Protection (CBP) is responsible for customs inspections at U.S. ports of entry and border crossings.90

3.3 Judicial deference and the absence of judicial review

U.S. courts oftentimes refer to judicial deference when examining administrative construction and interpretation of statutes, thereby giving agencies broad discretion and power to interpret the statutes in question. The judicial deference practice derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*91 The doctrine established in *Chevron* instructs courts to, in cases of ambiguous wording and no clear intent expressed by Congress on how to interpret a statute, defer to the agency’s interpretation of a statute, and hence not perform further review of the interpretation, as long as the statutory interpretation is reasonable.92

The judiciary has further been very reluctant to scrutinize legislation in the immigration area, often referring to the plenary power of Congress to control this area of the law.93 This results in a practice where the courts do not perform judicial review over Congress’ legislation in this area, and this is also true on issues concerning asylum.94 From the individuals’ point of view this can be problematic. Not only do the courts in many instances “stay away” from reviewing the legality of a governmental legislative decision, courts are also in many instances precluded under law from reviewing decisions made by the agencies that are responsible to make determinations regarding non-citizens. One example of this is that the determination of a non-citizen’s credible fear, resulting in the granting or denial of their asylum claim, is not subject to judicial review.95 Hence, the courts both will not and cannot perform review of certain decisions with regards to non-citizens. The result is that, in practice, decisions made by individual

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90 Weissbrodt & Danielson, p. 83-86.
92 Farbenblum, p. 1064.
93 Weissbrodt & Danielson, p. 71.
94 Weissbrodt & Danielson, p. 79.
95 Weissbrodt & Danielson, p. 81. See also 8 U.S.C. § 1252(a)(2)(A)(iii), which states that no court shall have jurisdiction to review a decision made under 8 U.S.C. § 1225, which includes the determination made by an asylum officer if a non-citizen has a credible fear of persecution or not.
agency officers are oftentimes exempt from judicial oversight.\textsuperscript{96} The lack of legal certainty that this system creates is, in my opinion, striking.

However, when it comes to issues that raise questions concerning the constitutionality of a statute, the Supreme Court will perform judicial review to establish whether or not agency interpretations of statutes are constitutional, and will strike down practices if they are deemed unconstitutional. Therefore, although Congress has plenary power in this area, that power is subject to constitutional limitations and Congress has to choose “constitutionally permissible means of implementing” that power.\textsuperscript{97} Since the detention of asylum seekers involves deprivation of individual liberty, a freedom that is protected under the U.S. Constitution, a closer look at case law relating to these matters is taken further down in the thesis.

The Supreme Court has continuously applied constitutional due process requirements to situations where agency decisions have affected individual interests in various ways.\textsuperscript{98} The Court has however been reluctant to say just how far the due process protection goes when it comes to agency adjudication, although it might be argued that the greater the interference in an individual’s life or liberty that is at stake, the greater the need for strong due process protections.\textsuperscript{99} The admission or the denial of an asylum seeker’s right to stay in the country should therefore, in my opinion, be considered to be a situation where the due process protections should be very high.

Enormous responsibility is thus placed on the agencies administering the asylum process, as a result of courts’ application of the judicial deference doctrine and the fact that judicial review is in some instances barred when it comes to asylum claims. If the individuals in these agencies are not properly educated and trained there is a risk that they will make wrongful determinations. I believe this demonstrates a gap in the U.S. asylum system, where the desired standards of asylum determinations are not always met. Furthermore, this might be one explanation as to why international law is mostly overlooked in U.S. asylum practices.

\textsuperscript{98} See, for example, Goss v. Lopez, 416 U.S. 565 (1975) and Jones v. Flowers, 547 U.S. 220 (2006).
\textsuperscript{99} Scheb & Sharma, p. 447.
3.4 The asylum process

Under the INA, there are two forms of relief that non-citizens, who are at risk of facing persecution in their home country, can use in order to not be ordered removed from the United States: asylum or withholding of removal.\textsuperscript{100} Anyone who is determined to be a refugee may be granted asylum.\textsuperscript{101} Further, any person whose life or freedom would be threatened if returned to a specific country cannot be removed under U.S. law and falls under the withholding of removal statute in INA § 241.\textsuperscript{102} The withholding of removal provision is the U.S.’ version of the fundamental principle of non-refoulement, one of the Refugee Convention’s most important provisions.

The asylum seeker must show that s/he meets the refugee definition in INA 101(a)(42)(A)\textsuperscript{103} in order to qualify for asylum. As mentioned above, the definition in the INA codifies the refugee definition in the Refugee Convention. Further, there are two different ways in which individuals can seek asylum: affirmatively or defensively. An affirmative applicant seeks asylum on their own initiative by sending in an application to the USCIS, whereas a defensive applicant is someone who has been apprehended by the DHS and removal proceedings have started against the person, at which point that person applies for asylum.\textsuperscript{104} Asylum seekers who are subject to the expedited removal process, which is explained below, initiate a defensive asylum application of sorts when apprehended at the border by U.S. officials, and such an asylum application is therefore considered to constitute a third way to file an asylum application.\textsuperscript{105}

Asylum officers within the USCIS conduct the initial interview with the asylum seeker and can either grant or deny asylum, or refer the asylum claim to an immigration court.\textsuperscript{106} If referred, an immigration judge (IJ) then reviews the decision made by the asylum officer at the USCIS, and, if the applicant is denied asylum, s/he can appeal the
decision to the Board of Immigration Appeals (BIA). Lastly, asylum applicants may apply for a review of an unfavorable BIA decision in a U.S. Court of Appeals.

The decisions made by the BIA are to a large extent unpublished, and in reality there are very few that become subject to review by the U.S. courts of appeals. Further, the practice of the courts demonstrates that they, to a large extent, defer to the BIA’s decisions, in accordance with the standard of deference that Congress codified in 1996. According to this standard, the courts should uphold the previous findings of fact unless “any reasonable adjudicator would be compelled to conclude the contrary.” The same reasoning should be used when it comes to reviewing credibility determinations, resulting in the large amount of deference granted to the decisions of the BIA.

The tendency by courts to neglect to review decisions made by the BIA by referring to the judicial deference doctrine, coupled with the fact that these decisions in many instances are not published, causes concern relating to the procedural safeguards granted to asylum seekers in the U.S. asylum system. One such concern is whether or not asylum applications are treated equally across the country, which is difficult to analyze as a result of this practice. The difficulty of ensuring that equal cases are treated equally is of course exacerbated by the very fact that the decisions in many instances are neither reviewed nor published. In fact, it has been shown that the granting of asylum claims in asylum offices, immigration courts and courts of appeals varies a great deal in the various jurisdictions in the United States. I believe that these concerns in many ways are intensified when looking closer at the practice of expedited removal.

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107 8 C.F.R. § 1003.1(b)(3). Code of Federal Regulations (C.F.R.) is a compilation of administrative law that contains the rules and regulations published by the executive departments and agencies of the federal government of the United States.
109 Farbenblum, p. 1073.
112 Ramji-Nogales et al, p. 16.
3.5 Expedited removal

When Congress enacted the Illegal Immigration Reform and Immigration Responsibility Act\textsuperscript{114} (IIRIRA) in 1996, potential asylum seekers became subject to the expedited removal process that was part of the new legislation. Expedited removal allows authorities to remove a person from the United States immediately after their arrival, if an immigration officer at the port of entry has deemed the person inadmissible.\textsuperscript{115} There are various sub-categories of persons that are subject to the expedited removal process. One such sub-category of persons is individuals who arrive without proper travel documentation or documentation that the officer determines to have been obtained in a fraudulent way.\textsuperscript{116}

Since individuals who seek asylum usually have fled the government that otherwise would issue valid documents, and to request such documents in many cases would be very dangerous, most asylum seekers do not carry documents that can identify them properly.\textsuperscript{117} Further, due to the increase in stricter immigration laws in many countries, asylum seekers often turn to smugglers when trying to reach a safe haven and are without travel documents due to using so called illegal and irregular modes of travelling.\textsuperscript{118} Therefore, asylum seekers often fall under this sub-category and become subject to the expedited removal process.

When arriving at border crossings in the United States, the Customs and Border Protection (CBP) inspects all persons in a two-phase process, containing a primary and a secondary interview.\textsuperscript{119} If the inspector in the primary interview believes someone to be ineligible for admission, the person is sent to an area for the secondary interview. During this second interview, all the documents that the person is carrying are reviewed, and after the interview has been conducted the person can be admitted or denied

\textsuperscript{114} Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law No. 104-208, 100 Stat. 3009. The IIRIRA is codified, together with the INA, in various sections under title 8 in the U.S.C.


\textsuperscript{119} Pistone & Hoeffner, p. 172.
entrance. In the latter case the person will be ordered removed from the United States.\textsuperscript{120}

During this process, the individual is not allowed to seek legal assistance or help from someone else, resulting in extreme importance being placed on the individual’s ability to communicate their situation in a language that they in many instances may not fully comprehend.\textsuperscript{121} Thus, in these early stages of the process, potential refugees might be denied entrance and ordered removed if they cannot adequately express what situation they are in so that the officer can determine that the person has a “credible fear” of return to their home country.

If the individual is able to demonstrate a \textit{prima facie} fear of persecution however, or intent to apply for asylum, the officer interviewing them at the secondary stage will send them to a “credible fear” interview conducted by an asylum officer.\textsuperscript{122} Credible fear is established if there is a “significant possibility” that the person will qualify as a refugee under INA § 208,\textsuperscript{123} including an assessment of the credibility of the statements made by the non-citizen coupled with other information known by the asylum officer.\textsuperscript{124} If this interview is “passed” and credible fear is found, the applicant is entitled an asylum hearing before an immigration judge. All applicants are then mandatorily detained at a detention facility awaiting this interview.\textsuperscript{125} Further, if credible fear is found during the interview, the applicant will continue to be detained while the asylum application is processed.\textsuperscript{126} The mandatory detention of asylum seekers will be analyzed in chapter 4.

\section*{3.6 The status of international law in the United States}

When the United States ratifies a treaty and thus becomes a party to that piece of international legislation, the treaty acquires the equivalent legislative status as federal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{120} 8 U.S.C. § 1225(b)(1)(A)(i).
\item \textsuperscript{122} Pistone & Hoeffner, p. 174.
\item \textsuperscript{123} 8 U.S.C. § 1158.
\item \textsuperscript{124} Weissbrodt & Danielson, p. 325.
\item \textsuperscript{125} 8 U.S.C. § 1225(B)(b)(iii)(IV).
\item \textsuperscript{126} 8 U.S.C. § 1225(B)(b)(ii).
\end{enumerate}
\end{footnotesize}
legislation. This conclusion has been drawn by looking at the language of the Supremacy Clause in the U.S. Constitution. Pursuant to this clause, federal laws (and also treaties) are superior to conflicting state laws. According to the U.S. Constitution, the President has the power to enter into treaties on behalf of the United States. This power is found in Article II, Section 2, which states that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” The exercise of ratification, when a nation affirms its willingness to be bound by a treaty, is not mentioned in the treaty clause of the Constitution. However, the treaty clause has been interpreted to mean that the President should perform the formal act of ratification, after getting the advice and consent of the Senate.

Since treaties have the status of federal legislation, they can affect the outcome in domestic jurisprudence and practice, as well as displacing preceding laws that were inconsistent with the provisions in the treaty. However, not all treaties have the potential of overriding preceding legislation, as there is a difference between so-called ‘self-executing’ international treaties and ‘non-self-executing’ treaties. A self-executing treaty automatically becomes effective in the domestic legal system when entering into force, whereas a non-self-executing treaty requires additional implementation through domestic laws in order for the treaty to become part of the domestic legal system. The President determines if supporting legislation is required for a specific treaty, and if such legislation has not been enacted, it will ultimately fall upon the judiciary in determining whether or not a treaty is self-executing.

In sum, there are four provisions in the U.S. Constitution that together form the basis of U.S. law on treaties. These include Article I, Section 10 (prohibiting states to enter

128 See Article VI, Section 2 of the United States Constitution, which reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land…” (Emphasis added).
131 Article II, Section 2 of the United States Constitution.
132 Committee on Foreign Relations, p. 2.
133 Sager, p. 45.
134 Sager, p. 45.
treaties with other nations), Article II, Section 2, Clause 2 (the President has the power to make treaties with the advice and consent of the senate), Article III, Section 2, Clause 1 (judicial power extends to all cases arising under the Constitution, including treaties) and finally Article VI, Section 2 (includes treaties to be the Supreme Law of the Land, having the same status as federal law). The U.S. legal system therefore provides mechanisms for enacting international legislation, as well as interpreting and utilizing international law in its domestic practices. However, as will be demonstrated, these mechanisms are not always applied by administrative agencies or by the U.S. courts.

3.7 Case law

This section will look at two cases where the Supreme Court has referred to provisions in the Refugee Convention and the Protocol in order to interpret legislation or decide the outcome of a case. These cases serve as examples of when the judiciary in the U.S. uses international law to establish precedents and standards of interpretation within the U.S. immigration and asylum system. Although the first case that is examined dates back to 1987, it remains one of the most important cases in this area. The Supreme Court has not addressed the provisions of the Refugee Act in very many instances; therefore no coherent methodology exists for interpreting and applying the terms of the Convention.

There is, however, a substantial amount of case law from the various appellate courts in the United States, but as mentioned above, their precedents are only relevant to the specific circuit in which they operate. Although these decisions can illustrate how the various jurisdictions utilize and interpret international legislation, it is important to bear in mind that they do not have binding precedential effect on the entire country.

135 Committee on Foreign Relations, p. 27-28.
136 Farbenblum, p. 1065.
137 Farbenblum, p. 1065.
138 See supra, p. 20.
3.7.1 INS v. Cardoza-Fonseca

In Cardoza-Fonseca, the respondent was a Nicaraguan woman who had been ordered deported from the United States and had filed an asylum application in the deportation proceedings. Under INA § 241, a non-citizen can be granted ‘withholding of removal’ if it is shown that it is more likely than not that the person would be subject to persecution if sent back home. In an asylum claim under INA 208(a), a well-founded fear of persecution must be shown in order for the non-citizen to fall under the refugee definition and be granted asylum. In Cardoza-Fonseca, the immigration judge applied the ‘more likely than not’ standard when determining if she should be granted asylum or not, and since she had not shown a “clear probability of persecution” her claim was denied.

The respondent appealed, arguing that when determining if she fell under the definition of a refugee, the ‘well-founded fear’ standard should be used as opposed to the ‘more likely than not’ standard. The INS and the government claimed that even though the ‘well-founded fear’ should be applied in asylum cases, an applicant must still prove a ‘clear probability of persecution’ – which suggests a similar test akin to the ‘more likely than not’ standard. The Supreme Court established that the ‘clear probability’ standard should not be used when determining if an asylum application will be granted or not, since the legislative intent of Congress demonstrated that different standards should apply for these two different provisions in the INA. According to the Supreme Court, it was clear that the legislative intent for the asylum provision in the Refugee Act was to bring U.S. law into better conformity with the Refugee Convention and Protocol, citing a committee report where this intention was clearly stated.

In Cardoza-Fonseca, the Supreme Court also referred to the UNHCR handbook and its analysis of the refugee definition in the Convention. Although the Court stated that the Handbook does not have any binding force, it is still important that the Court, in forming its opinion, used the guidelines of the Handbook and UNHCR. The Handbook

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140 8 U.S.C. § 1231(b)(3).
141 8 U.S.C § 1158.
provides “significant guidance” when construing the provisions in the Protocol, and it was to these that Congress intended to conform when the Refugee Act was enacted.\textsuperscript{144}

For the purposes of this thesis, this case illustrates that the Court will look at the intent of Congress when interpreting a statute and if that intent is to conform to provisions in an international treaty, both the judiciary and the administrative agency has a responsibility to comply with that intent. Additionally, due to its attention to international law, the case is considered a “high-water mark” among asylum cases in the U.S. and therefore serves as a good example of how international refugee law can be given importance in domestic laws and policies in the U.S.\textsuperscript{145} However, as will be shown below, there are not many cases in Supreme Court history concerning asylum claims, and even fewer where international refugee law standards are taken into consideration.

\textit{Cardoza-Fonseca} established that the Refugee Act was enacted in order to create better compliance in U.S. law with its international obligations. Although the Court specifically stated that the provisions in the Refugee Convention should be turned to when looking at U.S. statutes that concern the same situations, the subsequent case law unfortunately demonstrate that the Court does not follow the \textit{Cardoza-Fonseca} method. Since \textit{Cardoza-Fonseca}, there have been two Supreme Court cases where the Refugee Convention was mentioned in the court’s opinion, but in both of these the Court did not make use of the provisions in the Refuge Convention when deciding the case. Although \textit{Cardoza-Fonseca} is a highly cited case in subsequent case law, there is no case where the articles in the Refugee Convention are used to directly decide the outcome of the case.

\textbf{3.7.2 Negusie v. Holder}

In \textit{Negusie},\textsuperscript{146} the legal issue was whether or not the so called “persecutor bar”\textsuperscript{147} in the INA, under which a person cannot obtain asylum or withholding of removal status if he or she has been part of persecuting others in their home country, applied to persons who

\begin{itemize}
\item \textsuperscript{144} See note 22 in INS v. Cardoza-Fonseca, p. 439.
\item \textsuperscript{145} Fitzpatrick, p. 7.
\item \textsuperscript{146} Negusie v. Holder, 555 U.S. 511 (2009).
\end{itemize}
had participated in persecution under coercion or duress. The Refugee Convention does not have a provision that directly relates to the persecutor bar, but it can be shown in the legislative history that the intent of Congress was to comport with the principles in Article 1(F)(a) of the Convention.\footnote{Farbenblum, p. 1093.}

In Negusie, the Court cited Cardoza-Fonseca in finding that, when enacting the Refugee Act, one of Congress’ primary purposes was to implement the Protocol and its principles.\footnote{Negusie v. Holder, p. 520.} Although the Court mentioned that the intent of Congress was to implement the Refugee Convention, its relevant article was not mentioned when forming the verdict in the majority’s opinion. Instead, the court distinguished\footnote{The term ‘distinguish’ refers to when courts determine that the legal reasoning behind a precedent cannot be applied in the present case due to different material facts between the two cases. See Fine, p. 14.} Cardoza-Fonseca on the basis that the legislative intent of Congress was not as clear in the present case.\footnote{Negusie v. Holder, p. 518.} Farbenblum has argued that this is an unfortunate and confusing conclusion made by the Court since it initially had referred to the fact that the Protocol was indeed a source when the persecutor bar was implemented, but then decided not to utilize it in its interpretation of the persecutor bar in the present case.\footnote{Farbenblum, p. 1095.}

In a dissenting opinion, Justice Stevens criticized the majority’s decision to distinguish Cardoza-Fonseca and thus not turn to the language of the Refugee Convention.\footnote{Negusie v. Holder, p. 528-529.} He argued that the U.S. ‘persecutor bar’ provision reflects Article 1(F)(a) of the Refugee Convention, stating that the non-refoulement obligation under Article 33 does not pertain to persons who have committed certain crimes. Because of the connection to Article 1(F)(a) in the Refugee Convention, Justice Stevens argued that the wording of the Article should be turned to when interpreting the ‘persecutor bar’ provision, and he also considered the statements in the UNHCR Handbook regarding the article when reaching his conclusion.\footnote{Negusie v. Holder, p. 536-537.}

The Negusie case illustrates a situation where the court very well could have turned to the provisions of the Refugee Convention in its determination of the case at hand, and as Justice Stevens and Farbenblum argues it is very unfortunate that the Court did not take this opportunity. Had the Court done so, the case might have led to an increased
application by U.S. courts of the provisions of the Refugee Convention, which ultimately would lead to a better compliance of U.S. obligations under international refugee law in the U.S. asylum system.
4 Detaining asylum seekers in the United States

As mentioned in the introduction, there were approximately 440,000 immigrants held detained in the United States in 2013, and ICE has a capacity to detain over 33,000 per day.\(^\text{155}\) As of 2011, the cost of detention is approximately $2 billion annually.\(^\text{156}\) This mass detention can be partly explained by the view held by ICE that detention is necessary to effectively enforce immigration laws, as well as ensuring removal.\(^\text{157}\) The overwhelming majority of the individuals detained is non-violent and have no criminal convictions.\(^\text{158}\) The excessive detention practices raise questions concerning the conformity with international standards regarding the necessity of the deprivation of liberty of non-citizens in the United States.

Detention of asylum seekers is, as mentioned above, permissible under international law under certain circumstances. Although the ExCom conclusions are not legally binding, they provide guidance in how to interpret the provisions of the Refugee Convention. The list of acceptable justifications for detaining asylum seekers that the ExCom has provided is exclusive, as well as limited to situations where detention is justified vis-à-vis the ‘necessary’ requirement.\(^\text{159}\) Since the U.S. is a party to the Protocol and is thus obliged to follow the provisions in the Refugee Convention, the requirements that need to be met when detaining asylum seekers are fully applicable to immigration practices in the U.S. The following section will examine the laws that regulate detention of immigrants, its practice, as well as relevant case law. This includes a general overview of the practice and legal understanding of detaining non-citizens, as well as specifically looking at the detention of asylum seekers under the expedited removal process. The ambition is to provide for an analysis of how well U.S. laws and practices comport with Article 31(2) of the Refugee Convention.

\(^{155}\) See supra note 1, p. 6.
\(^{158}\) ACLU, p. 5.
4.1 The legislative meaning of detention

In the United States, the removal of asylum seekers and other non-citizens is considered a civil sanction as opposed to a criminal punishment, and detention is thus governed by civil rules and regulations, as well as principles related to civil law. So-called punitive detention is only permitted within criminal law, which results in detention of non-citizens instead being preventative in its nature.

Since detention does deprive non-citizens of their physical liberty and their freedom of movement, David Cole discusses the importance of ensuring that the use of detention adheres to strict due process constraints and that it is only used when deemed necessary in order to aid in removal proceedings, and that it should never be used as what could be seen as a punitive measure. In order for civil detention to be permissible, the decision should be justified through an individualized procedure where it is demonstrated that the detention is necessary in the particular case, and this conclusion must come after a full and fair adversarial hearing has been conducted. Such an individualized process would correspond well with the ‘necessary’ requirement under the Refugee Convention.

4.2 Mandatory detention

According to 8 U.S.C. § 1225(b)(1)(B)(ii), a non-citizen who has been determined to have a credible fear of persecution by an asylum officer upon arrival in the United States, must be detained while the application is further considered. The same provision exists for non-citizens seeking admission that is not based on an asylum claim, but where the immigrant officer has determined that it is not clear and beyond doubt that the non-citizen is entitled to be admitted. Under the same statute, mandatory detention is proscribed for any non-citizen who is subject to the procedures under the statute, stating that they should be detained pending a final determination of whether or not the
applicant has a credible fear of persecution. If it is determined that there is no such fear, the non-citizen should be detained until removal.165

The mandatory detention provision could be argued to violate due process, since it does not include an individual determination of the necessity of the detention in the specific case.166 Further, the provision seemingly contradicts the ‘necessary’ requirement in Article 31(2) of the Refugee Convention, since no determination of necessity is made. Instead, mandatory detention is conducted on a general basis where no individualized determination to detain, or the grounds for detainment, needs to be demonstrated. Under this provision of the INA, detention of non-citizens is thus “applied as a blanket policy”.167

This results in summarily conducted deportation processes, and although additional protection is available in order to ensure that asylum seekers are not deported through this process, this can and does happen due to the hasty nature of expedited removal proceedings.168 The additional protection given to asylum seekers under this process comes in the form of their right to have their asylum claim tried if a credible fear is found, and they will therefore not be ordered removed immediately. However, practice shows that potential refugees have in fact been deported through this process.169 The legislation therefore results in clear violations of the commitments that the United States has under international law.

There is one possibility to be released from detention while awaiting the asylum decision, and that is to be granted parole.170 There are five categories of non-citizens who may be granted parole: (1) persons with a serious medical condition; (2) pregnant women; (3) certain juveniles; (4) persons who are going to be witnesses in proceeding in the United States; and (5) persons whose “continued detention is not in the public interest”.171 The first four categories are easy to interpret and are limited in their application; however, the fifth one is more vague and open to interpretation. Parole is further determined under the discretion of ICE officials, thus making ICE both an

166 Cole, p. 1026.
167 Brane, & Lundholm, p. 157.
170 8 C.F.R. 212.5(b).
171 8 C.F.R. 212.5(b).
adjudicating and an enforcing agency in this particular matter, since they are responsible for both detaining individuals and determining if they will be granted parole from detention or not.\textsuperscript{172} In 2007, only 4.5 \% of detained asylum seekers were released on parole.\textsuperscript{173} When parole denials have been appealed, federal courts have refused to review these decisions, referring to the obligations they have to defer to the judgment of immigration officials, and as long as a reason for the parole denial was presented by ICE officials, the decision was not reviewed further by the courts.\textsuperscript{174}

4.3 Case law
Since the enactment of the IIRAIRA, there have not been any significant court cases that have addressed its mandatory detention provision from an international law perspective.\textsuperscript{175} Instead, subsequent adjudications demonstrate what I believe to be an unwillingness by the courts to adhere to the provisions in the Refugee Convention and Protocol, for example through stating that since they are non-self-executing, but have been incorporated through the Refugee Act, the Protocol or Refugee Convention does not give individuals any additional rights beyond the ones existing in the Refugee Act.\textsuperscript{176} Therefore, individuals cannot directly refer to violations of rights under the Refugee Convention or Protocol, but must use available U.S. immigration statutes. While the interpretation that one cannot use certain rights directly under the Refugee Convention might be correct, the relevant immigration statutes should be interpreted in the light of the provisions in the Refugee Convention, as established in Cardoza-Fonseca. Therefore, it is very unfortunate that the existing case law demonstrate complete disregard to the international refugee framework.

However, there have been several cases that have addressed the detention of non-citizens from a constitutional point of view. The constitutional protections that concern due process rights comply well with due process requirements under international refugee law. It is therefore of interest to look closer at the how the courts handle

\textsuperscript{172} Human Rights First 2009, p. 32.
\textsuperscript{173} Human Rights First 2009, p. 6.
\textsuperscript{174} See, e.g., Nadarajah v. Gonzalez 443 F.3d 1069 (9th Cir. 2006).
\textsuperscript{175} I have conducted an overview of case law relating to U.S.C. § 1225 and mandatory detention of asylum seekers, which have shown that when the statute has been challenged, it has in most instances been by reference to other legal matters than to the Refugee Convention and Protocol. When international refugee law was referred to, the adjudicating body dismissed its application and only looked at relevant U.S. law to determine the outcome of the case.
\textsuperscript{176} In re D-J, 23 I&N Decision 572 (Board of Immigration Appeals, March 2, 2003).
questions on the detention of asylum seekers and its compliance with the U.S. Constitution. The following section will therefore present two cases relating to these issues. Although these cases handle detention of non-citizens, none of them concern the specific mandatory detention statute that governs detention of asylum seekers at their point of arrival. They are instead concerned with detaining individuals who have been convicted of committing a crime and are detained while awaiting their deportation. However, the legal repercussions of depriving individuals of their liberty are as severe, if not more, when it comes to detaining asylum seekers, and the concerns raised by the courts in these cases are therefore of a general interest to the practice of detention.

4.3.1 Zadvydas v. Davis

In Zadvydas,177 two non-citizens had been ordered removed from the United States due to criminal charges, but there was no country that would receive these non-citizens and they were therefore held detained on an indefinite basis. The underlying circumstances of the case are therefore not directly relatable to the purposes of this thesis, but the Supreme Court laid down some important principles regarding the due process rights of non-citizens.

In Zadvydas, the Court stated that interpreting a statute to permit indefinite detention of non-citizens would raise serious constitutional problems. The Court referred to the Fifth Amendment’s Due Process Clause, which prohibits the government from depriving a person’s liberty without due process of the law, and emphasized that the freedom from imprisonment “lies at the heart of the liberty that the Clause protects.”178 The Court further stated, by referring to older cases,179 that non-punitive and non-criminal detention has to have special justifications that outweigh the interest of the individual to not be deprived of his or her liberty; otherwise it would violate the Fifth Amendment.180

Another important statement by the Court in Zadvydas was that the Due Process Clause applies to all persons within the United States, meaning that once an alien enters the country, whether lawfully or unlawfully, he or she is protected by the due process

177 See supra note 23.
178 Zadvydas v. Davis, p. 690.
180 Zadvydas v. Davis, p. 690.
guarantees laid down in the Fifth Amendment. However, this does not apply to non-citizens who are not considered to have entered into the United States. As such, asylum seekers who have been detained through the expedited removal process are not considered to have “entered” the country, and are thus not protected by constitutional due process. Instead, the asylum seeker is only entitled to the specific due process protections codified by Congress. Due to the fact that the courts’ deference to acts of Congress is particularly strong in this area, it is not clear just how far the protection goes, or what process is considered due, in these matters.

The Court did conclude that, in order to avoid a serious constitutional threat, the statute at hand did not authorize indefinite detention. After this conclusion, the Court stated that a determination must be made as to when detention of a non-citizen exceeds a period that is “reasonably necessary” to achieve the purported goal of the detention and at the same time remain constitutional. In this particular case the aim of the detention was to secure removal of the two individuals held detained. The reasonableness should be measured from the basic purpose of the statute. If the purpose cannot be achieved through the detention, the detention should be considered unreasonable and therefore no longer authorized by the statute.

In my opinion, this “reasonableness test” could and should be applied to the detention of non-citizens who have just entered the country and are placed in detention while awaiting the resolution of their asylum claim. Although it might be argued that it is reasonable to detain someone while gathering information on the identity of the person and the grounds for their claim, when that information has been obtained, the purpose of detention has been achieved and the detention is no longer reasonable. Further, the person’s interest in not being deprived of his or her liberty should always be a factor in this reasonable test. If conducted this way, this system would accord with the ‘necessary’ requirement in Article 31(2). However, as the mandatory detention statute does not specify the purported goals of detention, and these have not yet been tried in a court of law, it is difficult to directly apply the reasonable test used in Zadvydas on the mandatory detention of asylum seekers at their point of arrival.

181 Zadvydas v. Davis, p. 693. This has also been established by the Court in other cases, see, for example, Plyler v. Doe, 457 U.S. 202 (1982), p. 210; Mathews v. Diaz, 426 U.S. 67 (1976), p. 77.
182 White, p. 240.
183 White, p. 240.
4.3.2 *Rodriguez v. Robbins*

In *Rodriguez*,\(^{185}\) the issue was whether or not detained asylum seekers, among others, should be allowed a hearing after 6-months in detention. The plaintiffs argued that without such a right, the statute at hand would create serious constitutional concerns.

One important conclusion that was made in this decision is that there should be avenues for recourse available for detained non-citizens; in this particular case the measure was an injunction allowing a hearing after a certain amount of time, in order to ensure that individuals are not “needlessly detained.”\(^{186}\) This is the only time the Court mentioned the desire not to detain non-citizens unless necessary. The Court further stated that the purpose of allowing injunction hearings once the 6-months limit is reached, is to ensure that the nature and duration of the detention remains reasonable in relation to the purpose for detaining the individual in the first place.

While affirming that ICE is entitled to enforce the mandates that Congress has established to be part of the bureau’s duties, the Court noted that it is important that ICE carries these duties out in a manner “consistent with our constitutional values.”\(^{187}\) Although the case was concerned with allowing a hearing after an immigrant had already been detained for 6-months, which from an international refugee law perspective still does not comply with the detention provision in Article 31(2), the case demonstrated a will of the court to ensure that individuals are not detained unnecessarily. If anything, the right to a hearing after this period is a step in the right direction.

### 4.4 Effects of detention

Reviewing the laws and practices regarding detention of asylum seekers reveals violations of international law standards. This is not only true of the mandatory, and therefore arbitrary, element of detaining asylum seekers when they arrive, but also of the consequences detention have on the applicants’ asylum claims. One such consequence is the difficulty in obtaining legal representation for detained

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\(^{185}\) *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Circuit 2013).

\(^{186}\)*Rodriguez v. Robbins*, p. 1145.

individuals. In various studies on the representation of asylum seekers, it has been found that having legal representation is the single most important factor in whether or not an applicant will be granted asylum. Asylum seekers who are subject to the expedited removal process and who have legal representation were, according to a report conducted by the United States Commission on International Religious Freedom (USCIRF), granted asylum in 25% of the time, whereas only 2% of asylum seekers without counsel were successful in their claims.

This major disparity in successful claims becomes even more problematic when comparing detained asylum seekers to non-detained asylum seekers, where the latter group is able to obtain representation to a larger extent than the former. In 2008, it was reported that over a third of detained asylum seekers were not represented, compared to 80% of non-detained asylum seekers having legal representation. Although these numbers do not demonstrate a major disparity between detained and non-detained asylum seekers with regards to having legal representation, the vast difference in successful asylum claims and its correlation to legal representation indicate that any disparities between detained asylum seekers and non-detained asylum seekers is of vast importance as it might be the difference between obtaining asylum or not.

One explanation of the high number of unrepresented detainees is that in the United States, as well as in other countries, detention facilities are often placed in remote locations, making it difficult for asylum seekers to enjoy their right to counsel. Unlike in criminal proceedings, where there can be a right to counsel paid for by the government, no such right exist for asylum seekers since their cases are civil in nature. Asylum seekers do have a right to legal representation, but this must be at no expense to the government. Instead, pro bono lawyers from non-profit organizations most often represent asylum seekers. These organizations are usually overstretched and

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188 Human Rights First 2009, p. 44.
189 Human Rights First 2009, p. 44.
190 USCIRF Report, p. 633.
191 Human Rights First 2009, p. 44.
192 Goodwin, in Feller et al, p. 223.
underfunded, and are therefore in many cases unable to send lawyers to detention facilities that are located hours away from their headquarters.\textsuperscript{195}

Since individuals who face mandatory detention have difficulties obtaining legal representation, which in the end can result in bona fide asylum seekers having their applications denied, the consequences can in the worst-case scenario result in persons being sent back to countries where they will face persecution, torture and death. This is one of the most egregious potential consequences of the system of expedited removal. It clearly violates U.S. law and the international principle of \textit{non-refoulement}.

\textbf{4.5 Compliance with international law}

As mentioned above, after it has been determined that the asylum seeker does have a credible fear of persecution, asylum seekers are still kept detained throughout the entire process in which their asylum claims are pending. In a study conducted between 2003 and 2008, it was found that individuals who were later determined to qualify for refugee status had been detained for an average of five to six months.\textsuperscript{196}

The U.S. system of detaining asylum seekers thus lacks the safeguards necessary in order to ensure that the detention complies with the country’s legal commitments under international law, which aims to protect victims of persecution.\textsuperscript{197} The detention is mandatory and summary in nature and hence does not consist of an individualized determination, and the only possibility for release for arriving asylum seekers is through the parole provision. As mentioned above, ICE officials deny the overwhelming majority of parole applications, and any further review of their decisions is in practice nonexistent.\textsuperscript{198} Therefore, the provision in the ICCPR, which states that all detained individuals have the right to have the lawfulness of their detention reviewed by a court, is not being respected in this case. Under Article 9(4), the lack of such review results in arbitrary detention of asylum seekers.

To prevent detention from being arbitrary and a violation of article 9 ICCPR, an individualized determination is required in every case, where the detention has to be

\begin{footnotesize}
\begin{itemize}
  \item Human Rights First 2009, p. 58.
  \item Human Rights First 2009, p. 16.
  \item Human Rights First 2009, p. 32.
  \item See \textit{supra}, p. 38.
\end{itemize}
\end{footnotesize}
deemed necessary as well as reasonable, and in accordance with the law.\textsuperscript{199} The detention of asylum seekers in the U.S. pursuant to the mandatory detention statute\textsuperscript{200} does not live up to the requirement of an individualized determination of necessity and reasonableness. This sort of determination calls for detailed deliberations of all circumstances in the specific case, including a weighing between state interests and the interests of the individual, as well as considering alternative options to detaining the individual.\textsuperscript{201} As this thesis’ study of U.S. law and practice with regards to the mandatory detention statute of asylum seekers demonstrates, the international requirements for the deprivation of liberty are not met.

A general conclusion that can be drawn from U.S. case law on the detention of asylum seekers is this: the courts do not take into consideration the relevant article in the Refugee Convention, nor Article 9 in the ICCPR, when considering appeals and challenges to the detention statutes. Instead, the cases that have been analyzed focuses mainly on constitutional concerns. These concerns have essentially been structured around the issue of the length of detention, and whether or not it is acceptable to detain non-citizens indefinitely. The cases do not analyze the basis for detaining the individuals in the first place, or the potential arbitrariness of the detention in itself. This demonstrates what can be seen as reluctance by the courts to utilize the international standards available in cases relating to the rights of asylum seekers. The international standards laid down in the Refugee Convention provide for guidance in how asylum seekers should be treated, and since the Refugee Convention binds the U.S., the courts should turn to its provisions in cases relating to the rights of asylum seekers.

I believe it is very unfortunate that courts limit their adjudication to constitutional concerns, since the provisions in the Refugee Convention, as well as in the ICCPR, could provide for a comprehensive foundation for arguing that detention of asylum seekers should not be conducted in the summary manner which is proscribed in § 1225 under the IIRIRA. Further, as mentioned above, the constitutional guarantees and safeguards only apply to persons who are considered to have entered the country.\textsuperscript{202} Since asylum seekers who are immediately detained at the border are not considered to

\textsuperscript{199} Human Rights First, \textit{Arbitrary Detention of Asylum Seekers and U.S. Commitments under the International Covenant on Civil and Political Rights (ICCPR)}, August 2010 (hereinafter Human Rights First 2010), p. 4.
\textsuperscript{200} \textit{8 U.S.C. § 1225}.
\textsuperscript{201} Human Rights First 2010, p. 4.
\textsuperscript{202} See \textit{supra} p. 40.
have entered the country, the provisions in the Constitution are not applicable to them and thus do not offer them protection. The international instruments and its provisions relating to this category of people are however applicable, and their purpose is to offer protection. As a signatory to the Refugee Convention as well as the ICCPR, the United States is obliged, under international law, to follow its provisions in its treatment of these individuals.
5 Concluding remarks

The United States has throughout its history been known to let people come to its territories in search of a better life. The U.S. has also been known as a place where fundamental rights are of extreme importance, and the foreign policies of the country reflects the view that these rights are important everywhere in the world. The asylum system in the U.S. was reformed and changed in the 1970s and 1980s to better comply with international obligations and standards. In the Cardoza-Fonseca case, the Supreme Court was very clear that the Refugee Act of 1980 was to be read in accordance with the provisions in the Protocol and the Refugee Convention. It was stressed that this was the legislative intent of Congress when enacting the Refugee Act.

However, as this thesis has shown, the subsequent history of asylum adjudication and legislation has demonstrated ignorance to international law and has resulted in the rights entitled to refugees being neglected. U.S. courts and adjudicators have been reluctant to use international legislation when making determinations in asylum cases, and the enacted domestic legislation that has been of focus in this study directly violate Article 31(2) of the Refugee Convention, as well as Article 9 of the ICCPR.

What my research has shown is that the international standards available, including the prohibition on arbitrary detention and the ‘necessary’ requirement for detaining asylum seekers, are not turned to when analyzing the legality of detention provisions within immigration law in the United States. The Refugee Act was enacted in order to implement international refugee law standards, and the Cardoza-Fonseca case showed initial promise that the courts and administrative agencies would turn to the Refugee Convention when interpreting statutes relating to the treatment of asylum seekers. As has been shown, this promise has now been forgotten and since the enactment of the IIRIRA, U.S. asylum law continuously violates provisions in the Refugee Convention.

When it comes to detention of non-citizens, U.S. courts have however used constitutional concerns in order to protect the rights of detainees and have established that indefinite detention is not permitted under U.S. law. As has been discussed, the constitutional protection is, according to the present interpretation of the protections offered by the U.S. constitution, limited to protecting persons who have entered the U.S. and thus renders asylum seekers placed in mandatory detention without such protection. One might find a string of hope in the fact that the Supreme Court has established that
there should be a limit on detention of non-citizens, which recognizes that these individuals have rights and protections afforded to them under U.S. law. The protection and the rights of asylum seekers remain, however, unclear and insufficient.

In 2010, a bill was presented to Congress, called the Refugee Protection Act of 2010.\textsuperscript{203} The bill included amendments to the INA, specifically the part containing the IIRIRA provisions, with an aim of better securing the rights of asylum seekers. One important suggestion in the bill was to change the wording of “shall be detained” to “may be detained” in the mandatory detention statute, as well as changing “may be released” to “shall be released” from detention, if the asylum seeker’s identity is established, credible fear is found, and the person does not pose a security risk nor is a flight risk.\textsuperscript{204} According to Patrick Leahy, the senator who introduced the bill, the intended purpose of the bill was to “renew America’s commitment to the Refugee Convention, and to bring our law back into compliance with the Convention’s promise of protection”.\textsuperscript{205}

Unfortunately, the bill was not passed in Congress. A new bill was then introduced to the Senate in 2013 where various changes had been made, but the suggestion to remove the mandatory detention provision remains.\textsuperscript{206} The session of Congress that the bill was introduced under came to an end in January 2015, and the bill never made it to a vote in Congress. However, it will hopefully be re-introduced by Senator Leahy in the current session of Congress. These bills demonstrate that there is a will among some members of Congress to change the current laws in order to better comply with the U.S. international obligations under the Refugee Convention. In the meanwhile, thousands of asylum seekers are continuously detained throughout the country.

\textsuperscript{203} A Bill to Amend the Immigration and Nationality Act to reaffirm the United States’ historic commitment to protect refugees who are fleeing persecution or torture, S. 3113, U.S. Senate, 111\textsuperscript{th} Congress, March 15, 2010 (hereinafter Bill S.3113).

\textsuperscript{204} See Bill S.3113, section 8.

\textsuperscript{205} Statements on Introduced Bills and Joint Resolutions, Leahy, Patrick, Congressional Record, 111\textsuperscript{th} Congress, March 15 2010, p. s1517.

\textsuperscript{206} S.645, A Bill to Amend the Immigration and Nationality Act to reaffirm the United States’ historic commitment to protect refugees who are fleeing persecution or torture, U.S. Senate, 113\textsuperscript{th} Congress, March 21, 2013.
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