

Politicizing International Human Rights: The United States' Border Apartheid Policies and the Universality of Human Rights

Ally Myers*

This Note uses the example of the United States' immigration policies to analyze the following questions: (1) what type of rights international human rights are; (2) where these rights come from; (3) how their content should be determined; and (4) what conditions need to exist in order for them to be enforced. The Note argues that answering these questions is an essential prerequisite to enforcing human rights in a way that is truly universal. Part I of the Note grounds these questions in human experience through the case of a refugee seeking asylum at the U.S. border in San Ysidro and discusses the various international human rights laws that are at stake. Part II discusses the meaning and content of human rights and highlights the problem of the indeterminacy of rights. Part III expands on the problem of indeterminacy, provides a critique of current discourse of universal human rights, and suggests that politicization of the concept of human rights is necessary in order for the content of international human rights law to serve its purpose of guaranteeing rights for all. Finally, Part IV returns to the problem at the U.S. border in order to provide an example of what politicization of human rights discourse would look like.

Introduction.....	124
Part I: The U.S.-Mexico Border Crisis.....	124
Part II: The Indeterminacy of International Human Rights.....	129
Part III: Politicizing International Human Rights from the Bottom Up.....	133
Part IV: Sovereign versus Human Dignity in U.S. Border Apartheid.....	135

* J.D. Candidate, University of California, Irvine School of Law, 2021. I would like to thank Achiri Geh, for allowing me to share his story, and my friend Anne-Marie Debbané, whose selfless devotion to fighting U.S. immigration practices brought my attention to the issues addressed in this Note and inspired me to write it. I would also like to thank Professor Shaffer, Pauline Duong, Amelia Haselkorn, Sharon Baek, and the rest of the editorial staff at the JITCL who worked on and improved the Note.

INTRODUCTION

This Note uses the example of the United States' immigration policies to analyze questions previous scholarship has raised about the international human rights project more broadly, including (1) what type of rights international human rights are;¹ (2) where these rights come from;² (3) how their content should be determined;³ and (4) what conditions need to exist in order for them to be enforced.⁴ While these questions may seem abstract, this Note argues that answering them is an essential prerequisite to enforcing human rights in a way that is truly universal. Part I will ground these questions in human experience through the case of a refugee seeking asylum at the U.S. border in San Ysidro and will discuss the various international human rights laws that are at stake. Part II will discuss the meaning and content of human rights, and will highlight the problem of indeterminacy. Part III will expand on the problem of indeterminacy, provide a critique of current discourse of universal human rights, and suggest that politicization of the concept of human rights is necessary in order for the content of international human rights law to serve its purpose of guaranteeing rights for all. Finally, Part IV will return to the problem at the U.S. border in order to provide an example of what politicization of human rights discourse would look like.

I. THE U.S.-MEXICO BORDER CRISIS

Achiri Geh arrived at the U.S. port of entry in San Ysidro in April 2017 and requested asylum from political persecution in his home country of Cameroon.⁵ A leader in the Southern Cameroon National Council since 2010, Geh had been involved in nonviolent political protests that sought independence for the

1. See, e.g., Costas Douzinas, *The End(s) of Human Rights*, 26 MELB. U. L. REV. 445, 463 (2002); Hersch Lauterpacht, *International Law and Human Rights*, in INTERNATIONAL HUMAN RIGHTS 150, 154 (Philip Alston & Ryan Goodman eds., 2013); Aryeh Neier, *Social and Economic Rights: A Critique*, 6 HUM. RTS. BRIEF, 1, 1 (2006); Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q. 63, 63 (2004); William Easterly, *Poverty Is Not a Human Rights Violation*, N.Y.U. DEV. RES. INST.: AID WATCH BLOG ARCHIVES (June 4, 2009), <http://www.nyudri.org/aidwatcharchive/2009/06/poverty-is-not-a-human-rights-violation>.

2. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] 306–08 (1997); Burns H. Weston, *Human Rights*, in INTERNATIONAL HUMAN RIGHTS, 490, 491–92 (Philip Alston & Ryan Goodman eds., 2013).

3. See, e.g., KENNEDY, *supra* note 2 at 319; Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U.B.C. L. REV. 69, 101 (1991).

4. See, e.g., JOEL R. PRUCE, THE MASS APPEAL OF HUMAN RIGHTS 157, 165 (2019); Serena Parekh, *A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights*, 3 J. HUM. RTS. 41, 42 (2004); Rhonda Copelon, *The Indivisible Framework of International Human Rights: Bringing It Home*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 216 (David Kairys ed., 1998); Stephen Meili, *Do Human Rights Treaties Matter: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom*, 48 N.Y.U. J. INT'L L. & POL. 209, 257 (2015).

5. John Washington, *He Fled Persecution*, MEDIUM (July 22, 2019), <https://gen.medium.com/he-fled-persecution-and-then-was-locked-up-in-u-s-detention-for-over-800-days-d6450325569d>.

Anglophone portion of the country.⁶ Following one protest in 2015, Geh was “hit with a water can[n]on, beaten, arrested, detained in inhumane conditions, tortured, and forced to sign documentation promising not to participate in future political demonstrations in order to be released from custody.”⁷ The torture Geh endured caused severe physical injuries and post-traumatic stress.⁸ Despite the Cameroonian government’s attempt to suppress Geh’s political speech and associations, Geh continued organizing political protests. About a year after Geh’s detention, Cameroon’s U.S.-backed military told Geh’s mother that “she wouldn’t like what they were going to do” to her son once they caught him.⁹ In 2017, after a warrant was issued for his arrest, Geh fled the country and made the journey to the United States, where he went “looking for freedom.”¹⁰

Geh’s experience upon arrival at the U.S. border is one shared by thousands of other migrants¹¹: he was immediately detained and charged with removal,¹² denied release except upon payment of an exorbitant \$50,000 dollar bond,¹³ and his claim for asylum was denied for apparently frivolous reasons.¹⁴ When the nonprofit organization RAICES attempted to pay Geh’s bond, Immigration and Customs Enforcement (ICE) informed them that he, in fact, did not have a bond.¹⁵ After over a year in the ICE detention center in Otay Mesa, California, ICE transferred Geh to another detention center in Georgia, more than 2,000 miles away from his attorney.¹⁶ The most recent news article about Geh’s detention noted that he had been detained for 819 days as of the date of publication.¹⁷

Geh’s experiences present a representative case study through which to examine the United States’ stance toward international human rights law, particularly in relation to the rights of noncitizens. International human rights institutions and scholars have documented concerns about U.S. border policies

6. *Id.*

7. Brief of Petitioner-Appellant at 7, *Geh v. Barr*, No. 19-72888 (9th Cir. Feb. 20, 2020) (available upon request).

8. *Id.*

9. Washington, *supra* note 5.

10. *Id.*

11. See ACLU Analytics & Immigrants’ Rts. Project, *Discretionary Detention by the Numbers*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention> (last visited Mar. 14, 2020) (“Since 2016, 9,188 people have been locked up in our immigration system for over 30 days despite having been granted bond, most often because they could not afford to pay it.”).

12. Brief of Petitioner-Appellant, *supra* note 7, at 6.

13. Geh’s bond was later increased to \$75,000, without notice or a hearing. *But see* Liz Robbins, ‘A Light for Me in the Darkness’, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/immigrant-detainee-letters.html>; Washington, *supra* note 5.

14. Brief of Petitioner-Appellant, *supra* note 7, at 11–13.

15. Washington, *supra* note 5.

16. *Id.*

17. *Id.*

since at least the Obama administration.¹⁸ The Inter-American Commission on Human Rights (IACHR) published a report on due process for immigrants in the United States in 2010, focusing on ICE's immigration operations.¹⁹ The report identified numerous violations of international human rights law, including personal liberty; due process and access to justice; humane treatment during detention; equality and nondiscrimination; and the right to family life and the inviolability of the home.²⁰ Other international human rights issues raised by the United States' immigration policies include the principle of *non-refoulement*,²¹ the right to be free from torture,²² and the right to life.²³ The "border crisis" this Note refers to is the crisis of rampant violations of human rights that is occurring at the border of Mexico and within the United States' immigration detention centers throughout the country.

Today's border crisis traces its legal origins to the passage of two immigration reform acts in 1996, during the Clinton Administration: the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA), which established a presumption of detention for broad categories of immigrants coming into the United States:

AEDPA and IIRIRA expanded mandatory detention without bond to large categories of non-citizens, including those seeking asylum. They also established expedited removal, a procedure allowing immigration officers to issue removal orders against migrants that were carried out without granting the migrant a hearing before an immigration judge. All migrants, including asylum seekers, who are placed into expedited removal, are subject to mandatory detention. They may claim asylum through what is known as the credible fear process, but they generally remain in detention during that process.²⁴

The passage of these two acts laid the groundwork for the increase in the detention and removal of noncitizens in the decades to follow. After the events of September 11, 2001, the expansion of anti-immigration policy continued with the creation of Immigration and Customs Enforcement (ICE) and the implementation of ICE's "Operation Endgame," which the IACHR described as "a ten year strategic plan to achieve a '100% removal rate.'"²⁵

18. *Ten Human Rights Standards Implicated by U.S. Immigration Policy Changes*, INT'L JUST. RES. CTR. (2018), (noting Obama administration's policy changes "add to long-standing human rights concerns related to U.S. immigration policy") [hereinafter *Ten Human Rights Standards*].

19. Inter-Am. Comm'n on H.R. [IACHR], *Report on Immigration in the United States: Detention and Due Process*, ¶ 7, OEA/Ser.L/V/II. Doc. 78/10 (Dec. 30, 2010) [hereinafter *Report on Immigration*].

20. *Id.* ¶¶ 33–43, 56–59, 64–70, 94–95, 96–98.

21. Meili, *supra* note 4, at 222.

22. *Ten Human Rights Standards*, *supra* note 18.

23. *Id.*

24. Meili, *supra* note 4, at 231–32.

25. *Report on Immigration*, *supra* note 19, ¶ 7.

One of the IACHR's main concerns in its report, and the one most relevant to Geh's case, is "the increasing use of detention based on a presumption of its necessity, when in fact detention should be the exception."²⁶ The right to be free from arbitrary detention is enshrined in the Universal Declaration of Human Rights (UDHR), Article 9; the International Covenant on Civil and Political Rights (ICCPR), Article 9; and the American Declaration of the Rights and Duties of Man (American Declaration), Article 25. The United States has contested the binding nature of the American Declaration. However, the Inter-American court has held that it is binding on all members of the Organization of American States (OAS) (which includes the United States) as an "authoritative interpretation of human rights commitments contained in the OAS Charter."²⁷ Similarly, although the United States is not legally obligated under the UDHR because it is a nonbinding document, the UDHR is recognized as "an authoritative interpretation of the 'human rights and fundamental freedoms' which do constitute an obligation, however imperfect, binding upon the members of the United Nations."²⁸ In other words, the UDHR is looked to as a statement of the human rights norms that are binding on all nations as part of customary international law.²⁹ Therefore, the United States is arguably legally bound by Article 9 of the UDHR as customary international law.

Furthermore, the United States has ratified—and is therefore bound by—the ICCPR, although it has not been implemented into domestic law.³⁰ As a party to the treaty, the United States is required to submit periodic reports to the treaty body, the Human Rights Committee.³¹ In the Committee's concluding observations in response to the United States' most recent report submitted in 2014, the Committee voiced its concern "that under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant."³²

The United States has also ratified the 1967 Protocol to the Convention Relating to the Status of Refugees.³³ The Protocol incorporated Articles 2 through

26. *Id.* ¶ 17.

27. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 778–79 (2008).

28. Lauterpacht, *supra* note 1, at 153.

29. See also PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 158 (2013).

30. Meili, *supra* note 4, at 226.

31. ALSTON & GOODMAN, *supra* note 29, at 158.

32. Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 15, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

33. Meili, *supra* note 4, at 221.

34 of the Convention.³⁴ Article 31 of the Convention, binding on the United States under the Protocol, provides:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.³⁵

It is likely that mandatory detention of refugees entering the country violates this article as an imposition of a penalty. Indeed, the United Nations High Commissioner for Refugees has stated that “detention of asylum-seekers should normally be avoided and be a measure of last resort.”³⁶

In sum, under four international human rights instruments, the United States’ policy of automatic, mandatory detention of certain classes of immigrants without regard to individual circumstances violates the country’s international law obligations. Yet, the United States Supreme Court has upheld these laws without consideration of the country’s international law obligations,³⁷ despite the Court’s (perhaps nominal) acceptance of international law as “part of our law.”³⁸ Many scholars have noted the United States’ refusal to comport to international human rights obligations, particularly as applied to non-citizens.³⁹ The common recognition of the United States’ flagrant violations of international human rights law and the lack of enforcement mechanisms available to force the country’s hand in compliance raise serious questions about the utility and efficacy of the international human rights regime. What purpose does international human rights law serve in the United States, and can the regime be seized to a more powerful effect? After exploring these questions in Parts II and III, the Note will apply the proposed answers to Geh’s case in Part IV.

34. Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

35. Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 137.

36. U.N. High Comm’r for Refugees, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), available at: <https://www.refworld.org/docid/503489533b8.html>.

37. *Demore v. Kim*, 538 U.S. 510 (2003) (upholding the mandatory detention requirement of the Immigration and Nationality Act without discussing any legal obligations under international law).

38. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

39. David Weissbrodt & Stephen Meili, *Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Human Rights?*, 28 REFUGEE SURV. Q. 34, 57 (2010); Copelon, *supra* note 4, at 223; Meili, *supra* note 4, at 212; *see also* Jed Rubenfeld, *Unilateralism and U.S. Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1997 (2004).

II. THE INDETERMINACY OF INTERNATIONAL HUMAN RIGHTS

In order to discuss the relevance of the international human rights regime to United States policies, the definition of “human rights” must be clarified. One definition of human rights looks at rights from a purely legalistic perspective: rights do not exist unless there is a legal mechanism for their enforcement⁴⁰ and a remedy for their violation.⁴¹ Scholars who support this definition of human rights believe that “[t]he only useful definition of human rights is one where a human rights crusader could identify WHOSE rights are being violated and WHO is the violator.”⁴² Jeremy Bentham, for example, derides unenforceable rights as “imaginary rights.”⁴³ This perspective is seductive: what point is there in talking about rights that cannot be enforced, practically speaking? The legalistic definition is also useful to the enforcement strategy of shaming, because it renders nonsensical any claim that a State can support human rights without enforcing them.

However, the legalistic definition of human rights has the effect of limiting discourse on human rights to only those rights protected by law that could plausibly have some mechanism of enforcement, to the detriment of other, equally necessary rights. For example, one scholar used this definition of human rights to dismiss the possibility that freedom from poverty could be a human right: “Poverty does not fit this definition of rights. Who is depriving the poor of their right to an adequate income? There are many theories of poverty, but few of them lead to a clear identification of the violator of this right.”⁴⁴ Under the legalistic definition, many economic and social rights—such as the right to water or the right to housing—are excluded from the conversation, not because anyone believes human beings do not deserve these basic necessities, but because they are difficult to enforce and remedy. However, as many scholars have argued, economic and social rights are intrinsically tied to civil and political rights: one cannot truly have one without the other. For example:

[T]he promise of the UDHR cannot be met by simply protecting liberty or simply providing food. These are inseparable and interdependent in that the opportunity to exercise liberty will influence the production and distribution of food, at the same time as hunger is antithetical to the enjoyment of liberty and full participation in society.⁴⁵

The distinction drawn between rights whose violators can be named (typically civil and political rights) and rights whose violators cannot (typically economic and social rights) is far too limiting, because it does not acknowledge the interdependence of

40. Neier, *supra* note 1, at 1.

41. Lauterpacht, *supra* note 1, at 154.

42. Easterly, *supra* note 1; see also Roth, *supra* note 1, at 67–68.

43. Jeremy Bentham, *Anarchical Fallacies, Art. I.*, in *THE WORKS OF JEREMY BENTHAM* II 489, 523 (1843).

44. Easterly, *supra* note 1.

45. Copelon, *supra* note 4, at 216.

rights. Civil and political rights cannot truly be achieved without economic and social rights, and vice versa.

A more abstract way of discussing human rights is needed, such as Duncan Kennedy's concept of "outside rights":

The outside right is something that a person has even if the legal order doesn't recognize it and even if 'exercising' it is illegal. 'I have the right to engage in homosexual intercourse, even if it is forbidden by the sodomy statutes of every government in the universe.' Or 'slavery denies the right to personal freedom, which exists in spite of and above the law of slave states.'⁴⁶

Kennedy's outside rights are not incompatible with the legalistic definition of human rights: instead, these two different definitions of what we mean by "human rights" serve different purposes. The legalistic definition is useful in naming the state of international human rights law *as it exists today*; these human rights are discoverable by looking to international law instruments and jurisprudence. In contrast, outside rights are not tied to the law:

In a strange, almost metaphysical way, human rights 'exist', even when they have not been legislated. When the American civil rights activists asserted the right to equality, when torture victims all over the world claim the right to be free in their bodily integrity, when gays and lesbians in homophobic cultures proclaim the dignity of their identity, or when an abandoned lover demands his 'right to love', they acted, or are acting, strictly within the human rights tradition, even though no such legal rights existed, or currently exist, or would have been or are likely to be accepted. . . . In this sense, human rights have a certain independence from the context of their appearance. Legal procedures, political traditions and historical contingencies may be part of their constitution, but human rights retain a critical distance from law and stretch its boundaries and limits.⁴⁷

Outside rights are the rights humans possess by the fact of being human. They are derived from human nature, while legal rights are derived from the political and legal acts of states. The concept of outside rights is an important tool in shaping the contents of legal human rights because it shifts the conversation away from legalistic discourse and instead focuses on how to achieve human flourishing. Moreover, legal rights can shift the Overton window of what is accepted as part of the content of outside rights. Outside rights and legal rights, therefore, stand in recursive relation to one another.

As the previous paragraph suggests, the contents of both legal human rights and metaphysical outside rights are indeterminate. Outside rights are indeterminate because they are only discoverable through abstraction and are subject to politically

46. KENNEDY, *supra* note 2, at 306.

47. Douzinas, *supra* note 1, at 463.

situated understandings of what it means to be a human being. Legal human rights are indeterminate insofar as they are open to judicial interpretation because they require “a balancing of conflicting rights claims.”⁴⁸ Because of this indeterminacy, human rights can be used to justify and legitimize a wide range of conduct.

No neutral principles of deciding between conflicting rights are available; when rights conflict, the decision of which right will prevail depends on the political ideology of the judge making the decision.⁴⁹ Because of this indeterminacy, human rights can be used to justify and legitimize a wide range of conduct, raising the possibility of human rights being used as a tool of oppression: “Thus, rights concepts are sufficiently elastic so that they can mean different things to different people. People who seek to reinforce hierarchy and perpetuate domination can speak the language of rights, often with sincerity.”⁵⁰

The most common conflict in international human rights law is the conflict between the right of the sovereign and the rights of individuals; despite the purpose of international human rights instruments to serve as checks on state power, the right of the sovereign will typically prevail:

To put the problem roughly, if there is a conflict between the will of the nation (for self-determination, self-protection, self-purification, etc.) and the rights of an individual (to asylum, to citizenship, to legal protection, etc.), the former always, and necessarily, is victorious. This draws out an inherent tension between political structures (like, but not limited to, the nation-state) and human rights.⁵¹

There is an inherent tension in the problem of getting a sovereign state like the United States to conform to international human rights obligations. The indeterminacy of legal rights leaves at least some room to interpret the contents of those rights in the hands of the state. International human rights, by definition and purpose, are those rights intended to protect individuals from the sovereign. Yet the content of the legal rights of individuals vis-à-vis the power of the state *is determined by the state*.

This tension reveals the potential for the international human rights regime to be wielded by the powers that be to reinforce currently existing social, political, and legal orderings, without regard to the content of outside rights. This tension is visible in the United States’ political approach to human rights, beginning with its reluctant support of the UDHR:

[T]he U.S. vote to approve the UDHR had more to do with the desire to show up the Soviet Union, which was among the abstainers, than with a commitment to the declaration’s principles. The prospect of international scrutiny of U.S. domestic policy would not be part of the bargain, nor

48. KENNEDY, *supra* note 2, at 319.

49. *Id.*

50. Klare, *supra* note 3, at 100.

51. Parekh, *supra* note 4, at 41.

would the international framework be recognized as a touchstone for domestic policy.

The United States' use of international human rights instruments and engagement in legalistic human rights discourse to reinforce its own sovereignty continues in the modern day, as can be seen in the Obama administration's response to the IACHR report:

International law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of state sovereignty. Immigration detention can be an important tool employed by States in exercising their sovereignty, as they ensure public safety and remove as expeditiously as possible individuals who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly immigration detention, provided it is employed in a manner consistent with a State's international human rights obligations, is permitted under international law. . . . [C]ontrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man nor international law generally establish a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws.⁵²

In response to allegations of human rights obligations, the United States reasserts its sovereignty over individuals, and adopts the discourse of human rights law as a means to subvert it for its own gains: "[I]mmigration detention . . . is permitted under international law."⁵³ Rather than engaging in a discourse of outside rights, the Obama administration's response was to focus on the legalistic definition of human rights, which allowed the United States to act without consideration of human dignity as a moral right. As one scholar puts it, "[h]egemonic ideologies ingest alternative perspectives and regurgitate them as their own, as pacified, sanitized modes of politics."⁵⁴

This hegemonic use of international human rights law for the purpose of reinforcing the existing structures of hierarchy goes against the purpose of these international human rights documents and threatens to render international human rights law impotent against state conduct. The indeterminacy of human rights is the source of this issue. In the next section, this Note will argue that the indeterminacy of human rights also offers the opportunity to reclaim international human rights for those who need it most.

52. *Report on Immigration*, *supra* note 19, at 7.

53. *Id.*

54. PRUCE, *supra* note 4, at 166.

III. POLITICIZING INTERNATIONAL HUMAN RIGHTS FROM THE BOTTOM UP⁵⁵

The indeterminacy of human rights means that they are liable to be used by hegemonic institutions to justify conduct that goes against the purpose of international human rights instruments. However, by rejecting the mass appeal of human rights and acknowledging the political nature of determining their content, human rights can be repurposed to serve the needs of the marginalized. This section begins by examining the problem of the “universality” of human rights, then analyzes the benefits of rejecting palatable universal rights by embracing the ideological nature of rights.

The discourse of international human rights gets much of its legitimacy from its widespread acceptance: “[t]he modern human rights system has become a common, even popular, public and policy discourse.”⁵⁶ Disagreeing with human rights as a principle does not seem to be an option. Human rights are accepted by all: “[i]t unites left and right, the pulpit and the state, the Minister and the rebel, the developing world and the liberals of Hampstead and Manhattan.”⁵⁷ The universality of human rights was asserted from its beginning, with the inception of the Universal Declaration. Some scholars argue that widespread acceptance of human rights is a necessary prerequisite for enforcing them. For example:

Human rights implementation in the international arena relies primarily on publicity and shaming rather than on mandatory enforcement mechanisms. The same could be true domestically. . . . This requires integration of the international frameworks and agreements into popular education and social justice advocacy to build a culture that accepts and demands human rights as the basis of a decent social order.⁵⁸

The assertion of the universality of rights as inscribed in human rights instruments, however, has been challenged by other scholars, often from the perspective of decolonization in the Global South.⁵⁹ Integrating the very international frameworks that serve to reify Western and Northern supremacy cannot solve the United States’ dehumanizing border policies; on the contrary, these frameworks must be challenged as part of the solution to the border crisis.

55. See Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 1, 4 (2005) (“[T]he specific contribution of this volume and the common thread running through all its chapters lies in the particular, bottom-up perspective on law and globalization that it advances and empirically illustrates.”).

56. John Nguyet Erni, *Reframing Cultural Studies: Human Rights as a Site of Legal-cultural Struggles*, 7 *COMM. & CRITICAL/CULTURAL STUD.* 221, 221 (2010).

57. Douzinas, *supra* note 1, at 445.

58. Copelon, *supra* note 4, at 229.

59. See, e.g., Makau Mutua, *The Complexity of Universalism in Human Rights*, in *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 51, at 61 (“International human rights falls within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world.”).

The discourse of universality, in the context of sovereign states using human rights to serve their political purposes, threatens to deprive human rights discourse of its potency by rendering it apolitical.

This is the core tension of the mass appeal [of human rights]: . . . In order for shaming strategies and fund-raising drives to be effective, for example, human rights organizations must appeal to the broadest, basest constituency imaginable. In the process, mass media and popular culture become “indispensable” tools for outreach, recruitment, and general communication efforts. . . . The mass appeal is fashioned after commercials and marketing pitches, rather than as calls to action against injustice and abuse. Mass appeals “ape the methods” of consumer capitalism, undercutting the unrealized potential of the global human rights movement. Defeatists and conformists too frequently suggest that this is a game that must be played and that there are no alternatives.⁶⁰

In order to resist the hegemonic appropriation of human rights discourse, politicization of the content of human rights is necessary. Those seeking to restore the utility of human rights “should not cast human rights as the palatable alternative to ideological politics,”⁶¹ but instead should reinvigorate human rights by seeking to make their content as radical as possible, for the service of the world’s marginalized. This can only be done by rejecting the top-down approach of looking to hegemonic institutions to determine the content of rights, and instead, looking to the experiences of the oppressed in order to determine the content of rights. In a critique of international human rights as a neo-liberal project of cosmopolitanism, Boaventura de Sousa Santos argued that cosmopolitanism can be reclaimed:

Instead of discarding cosmopolitanism as just one more variety of global hegemony, we propose to revise the concept by shifting the focus of attention to those who currently need it. Who needs cosmopolitanism? The answer is straightforward: whoever is a victim of local intolerance and discrimination needs cross-border tolerance and support; whoever lives in misery in a world of wealth needs cosmopolitan solidarity; whoever is a non- or second-class citizen of a country or the world needs an alternative conception of national and global citizenship. In short, the large majority of the world’s populace, excluded from top-down cosmopolitan projects, needs a different type of cosmopolitanism. Subaltern cosmopolitanism, with its emphasis on social inclusion, is therefore of an oppositional variety.⁶²

The struggle over the content of international human rights between the sovereign and the individual “cannot be met but by privileging the excluded as actors and

60. PRUCE, *supra* note 4, at 165.

61. PRUCE, *supra* note 4, at 170.

62. de Sousa Santos & Rodríguez-Garavito, *supra* note 55, at 14.

beneficiaries of new forms of global politics and legality,”⁶³ meaning “the most desperate and marginalized — those living in poverty and excluded from the benefits of social citizenship due to class, gender, racial, or ethnic oppression.”⁶⁴

Mirroring the feminist refrain that “the personal is political,”⁶⁵ the Subaltern/bottom-up approach to international human rights discourse promises to delegitimize Western paternalism and the imposition of ostensibly “universal” ideals by imperialist powers onto the Global South. It can decentralize control over the content of international rights, moving discursive focus away from the powerful institutions that distort human rights for the advancement of existing social, political, and legal orders. Instead, the bottom-up approach places control over the focus of human rights discourse in the hands of those who need human rights most.

PART IV: SOVEREIGN VERSUS HUMAN DIGNITY IN U.S. BORDER APARTHEID

The bottom-up approach to international human rights looks to the experiences of the marginalized in order to inform the content of human rights, both in terms of abstract outside rights and in terms of shaping, recursively, the rights enshrined in international human rights law. Looking to Geh’s experiences with the United States’ policy of border apartheid can inform the content of human rights and reveal the need to politicize human rights discourse. I choose the word “apartheid” here both to stress the extent and severity of the cruelty of the United States’ border policy as well as to connect it to a larger discourse on global apartheid, which is defined as “a condition in which the wealthiest regions of the world erect physical and bureaucratic barriers against the movement of people from poorer regions of the world.”⁶⁶ The physical and “paper walls”⁶⁷ erected by policies of border apartheid are visible in Geh’s story and are intrinsically connected to an ideology that conditions human rights on citizenship. What is most egregious about what is happening at the border is not just the lack of process—arbitrary detention, lack of access to attorneys, and unreasonably high bonds—but the overall project of dehumanizing the Other. This section aims to address the domestic political conditions that allow for legitimizing illegal border policies.

The human rights regime, as used by hegemonic powers, generally conditions enforcement of acknowledged rights on an individual’s citizenship status or geographic situation: “[T]he separation between human and citizen is the main

63. *Id.* at 9.

64. *Id.*

65. See Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 535 (1982) (“[W]hat it is to know the politics of woman’s situation is to know women’s political lives.”).

66. Jenna M. Loyd, Matt Mitchelson & Andrew Burrige, *Introduction: Borders, Prisons, and Abolitionist Visions*, in BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 1, 1 (2012).

67. *Id.* at 7.

characteristic of modern law. The modern subject reaches their humanity by acquiring political rights of citizenship. The alien is not a citizen.”⁶⁸ In the United States, the Supreme Court has justified its refusal to enforce human rights on the basis of citizenship. In *Demore v. Kim*, the Court approved of legislative discrimination on the basis of citizenship, stating that “Congress may make rules as to aliens that would be unacceptable if applied to citizens.”⁶⁹ Similarly, the Human Rights Committee General Comment 15, while stating that almost all rights under the ICCPR should be protected without discrimination on the basis of citizenship, made two exceptions: political rights, like the right to vote, and freedom of movement.⁷⁰

The right to freedom of movement is at the core of Geh’s story, as his ability to escape political persecution in his home country depended on his freedom to move elsewhere. However, the United States, according to the General Comment, is not obliged to grant a noncitizen the freedom of movement, or the freedom to choose his own place of residence. Also at play here is the gap created by the provision of a legal right to leave one’s home country under UDHR Article 13, but the absence of a correlating right to enter another country. The right to leave one’s home country is essential to the ability to escape human rights abuses. However, the lack of the correlative right to enter another country leaves those individuals escaping persecution, like Geh, vulnerable to further abuses. The result is the inability of individuals like Geh to exercise those basic human rights that are essential to human dignity:

[I]t is clear that limited and conditional mobility on the international scale also exacerbates situations of unequal life chances, ‘limiting options for the poor’ and vulnerable by denying access to resources in spaces that provide greater life- and security-enhancing options. . . . these linkages between the denial of mobility and injury are obscured and embedded in the globe’s political and economic fabric. . . . The effect is to deny most people across the globe some of the most basic human rights.⁷¹

The lack of protections for noncitizens to exercise the “outside right” to determine their place of residence and to move freely without restraint means that a large portion of the population have no means of safely exercising their civil and political rights. The right to leave one country and enter another is required in order for an individual to be truly free to exercise political rights such as the right to freedom of speech and political belief.

In Geh’s case, his ability to continue participating in the political activities of the Southern Cameroon National Council despite the potential for political

68. Douzinas, *supra* note 1, at 449.

69. *Demore v. Kim*, 538 U.S. 510, 522 (2003).

70. CCPR Gen. Comment No. 15: The Position of Aliens Under the Covenant, ¶¶ 2, 8 (Apr. 11, 1986), <https://www.refworld.org/docid/45139acfc.html>.

71. Joseph Nevins, *Policing Mobility: Maintaining Global Apartheid from South Africa to the United States*, in *BEYOND WALLS AND CAGES* 19, 24 (2012).

persecution depended on the availability of the option to flee the country. The gap created by the absence of a right to enter another country threatens to neutralize civil and political rights that are essential to personhood. The trend in the United States (and elsewhere) of criminalizing and penalizing asylum seekers has a chilling effect on the ability of individuals around the world to participate in political and other activities that come with a potential for persecution. This outcome is inconsistent with the purpose of international protections for refugees and can only be remedied by ending international acceptance of discrimination against noncitizens.

However, the acceptance of citizenship discrimination is tied to the palatability and apoliticization of international human rights discourse. Purportedly progressive administrations such as the Obama administration, which welcomed human rights discourse and participation in international human rights law, use the neutralized concept of human rights that exists today in order to legitimize the right of sovereign states to violate basic rights through inhumane immigration policies. Yet this use of human rights discourse is not neutral; it is inherently political. It is accepted by U.S. citizens as legitimate because it is in alignment with political ideology that is central to the U.S. identity: democratic constitutionalism.⁷² Democratic constitutionalism is the ideology that rights derive only from democratic processes, and therefore, only those who participate in the process—citizens of the state—have the ability to claim those rights.⁷³ The Supreme Court's decision in *Demore* follows the ideology of citizenship-based rights.

This rights ideology is in opposition to universal constitutionalism, which holds that “rights are universal. They are rights people have by nature, by virtue of being persons, by reason of morality, or by reason of Reason itself.”⁷⁴ Under an ideology of universal constitutionalism, rights “possess an authority superior to that of politics, including, of course, democratic politics. . . . On this view, constitutional principles and structures ought in principle to be supra-national. Constitutional rights transcend national boundaries. Constitutional principles are superior to claims of national sovereignty or self-determination.”⁷⁵ In order for human rights to be truly *human* rights instead of *citizens'* rights, the ideology of democratic constitutionalism—the idea that rights are given by the state—must be rejected in favor of universal constitutionalism—the idea that rights are given on the basis of humanity. Despite its purpose as a supranational regime limiting the powers of sovereign states, the international human rights regime has done little to challenge the ideological linking of human rights to geopolitical bounds.⁷⁶

72. Rubinfeld, *supra* note 39, at 1993.

73. *Id.*

74. *Id.*

75. *Id.*

76. Arguably, there are regional exceptions of supra-national human rights enforcement, such as the European Council and the Inter-American Court of Human Rights, which has been fairly

Because border apartheid is legitimized by ideology, countering it requires addressing the political discourse of immigration and noncitizenship within the United States. The dehumanization of refugees and immigrants through violations of their human rights legitimizes and is legitimized by the dehumanization of refugees and immigrants in popular representations:

There are two images of undocumented migrants that are widely disseminated in popular culture. One image portrays a group of dark, shadowy figures sneaking across the U.S.-Mexico border. Along Interstates 5 and 805 in California are neon yellow signs depicting what is presumably an undocumented family – a male, a female, and a child; the purpose of the sign is to caution drivers to watch out for undocumented migrants, and the graphic has become a popular T-shirt. The other image is of undocumented immigrants in detention, handcuffed or shackled, or being escorted into the back of a Border Patrol truck. Countless television broadcasts, newspaper articles, documentaries, and films keep these images in popular circulation. . . . Viewing migrants through the lens of criminalization, these images deflect attention away from structural and institutional violence.⁷⁷

The popular construction of immigrants as criminals offers an easy justification for border policies that does not need to address the imbalance of power between the Global North and the Global South. It serves to justify the sovereign state's protection of its own citizens to the detriment of the Other, who is cast as undeserving of human rights.

International human rights instruments do not offer a framework to address decolonization, and they do not offer a means of protecting individuals who cannot depend on protection from their own, or any, state. In order to begin addressing these problems and ensure the protection of rights regardless of geopolitical boundaries, human rights discourse needs to examine “the structural reasons that explain the *failure* of ostensibly progressive global legal designs.”⁷⁸ Enforcing the international human rights legal regime as it stands today will do nothing to increase access to human rights and human flourishing for the globally marginalized.⁷⁹ Instead, human rights discourse needs to be reinvigorated by rejecting neutralized

successful in checking the power of states vis-à-vis marginalized individuals and groups. However, in order for human rights to be truly universal, they must be available to all, not just those belonging to a particular region.

77. Jodie M. Lawston & Ruben R. Murillo, *Policing Our Border, Policing Our Nation: An Examination of the Ideological Connections Between Border Vigilantism and U.S. National Ideology*, in *BEYOND WALLS AND CAGES* 181, 185–86 (2012).

78. de Sousa Santos & Rodríguez-Garavito, *supra* note 55, at 5.

79. For a comparison of immigrant protections in the United States and in the United Kingdom, where international human rights law is implemented in domestic law, see Meili, *supra* note 4, at 257 (finding it reasonable to conclude “that U.S. courts have been no less protective of detained asylum seekers than their U.K. counterparts, even though U.S. courts are less bound by human rights treaties.”).

human rights concepts that have been seized by hegemonic powers and politicizing human rights through a bottom-up perspective.