

Contesting the Designation of the US as a Safe Third Country

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Amnesty International Canada and
Canadian Council for Refugees



Conseil canadien pour les réfugiés
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Executive Summary

The continued application of the Safe Third Country Agreement (STCA) poses a significant threat to refugees in North America, by returning asylum-seekers to US authorities despite well-documented failings in the US refugee protection system. In so doing, Canadian practice currently violates both international and domestic norms. Canada has an obligation under international human rights law to not return asylum-seekers to a third country where there are systemic deficiencies in the asylum system or in reception conditions. In addition, for a country designated as a “safe country” by Canada to maintain its designation, under s. 102 (2) and (3) of the Immigration and Refugee Protection Act the Governor in Council is required to continually review the country’s human rights record and “policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture.” Canada must rescind its designation of the US as a “safe country” in light of the ample documentary evidence on systemic failings of the asylum system and widespread human rights abuses against asylum-seekers.

While the US asylum system has long suffered from significant failings, these deficiencies have been exacerbated under the Trump administration. Since assuming office, President Trump has taken steps to implement a number of policies likely to significantly erode already deficient protections for asylum-seekers. This submission by Amnesty International Canada and the Canadian Council for Refugees to the Honourable Ahmed Hussen, Minister of Immigration, Refugees and Citizenship, and the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, highlights some of the more egregious failings of the United States’ refugee protection system, including:

- **The One-Year Bar:**

This bar for asylum claims prevents, with certain narrowly construed exceptions, asylum-seekers from receiving protection if they have not met a one-year filing deadline. This policy prevents the consideration of many meritorious asylum claims and disproportionately affects certain categories of refugees, including women and those suffering from Post-Traumatic Stress Disorder.

- **Expedited Removal:**

The Trump administration has ordered a significant expansion of this immigration enforcement process, which allows authorities to physically remove or deny entry to certain categories of persons without requiring hearings before immigration judges. The Trump administration has also adopted a more restrictive approach to credible fear and reasonable fear determinations which are essential for identifying individuals who may need asylum. As the screening procedures are already riddled with problems, these changes will likely place even more refugees at risk of *refoulement* (deportation to countries where they would be at risk of persecution).

- **Detaining Asylum-Seekers:**

The US’s punitive and excessive approach to detaining asylum-seekers already falls well short of international norms. New policies under the Trump administration order a

dramatic expansion of detention, as well as the detention of asylum-seekers for the duration of their asylum process. In addition, the standards for detention centres are reportedly set to be relaxed. These developments promise to significantly aggravate an already dire situation for asylum-seekers who are often separated from their families and detained in inappropriately penal conditions with insufficient access to medical care. Restricted access to legal representation in detention facilities already compromises asylum-seekers' chances of being granted protection.

- **Operation Streamline and the Prosecution of Asylum-Seekers:**

Current US practices of prosecuting individuals who have irregularly entered the US contain inadequate safeguards for asylum-seekers and therefore fail to comply with Article 31 of the Refugee Convention, which prohibits the penalization of refugees' irregular entry or presence. The Trump administration's emphasis on prosecuting immigration violations will place more asylum-seekers at risk of prosecution.

- **Turning back Asylum-Seekers at the Mexico Border and Extraterritorial Processing of Applications:**

Human rights groups have documented growing numbers of asylum-seekers being summarily turned back at official entry points along the Mexico-US border without the opportunity to make an asylum request, in direct contravention of obligations under the Refugee Convention. President Trump signed an Executive Order which proclaims that individuals should be returned to Mexico to be detained pending a formal removal proceeding in the US. The Department of Homeland Security memorandum on implementing this order proposes making individuals appear for removal hearings via teleconferencing. In view of significant and well-documented concerns about the detention of asylum-seekers in Mexico and their deportation therefrom, such policies raise further concerns of indirect *refoulement*.

- **Inconsistent Recognition of Gender-Based Asylum Claims:**

The US's approach to gender-based persecution claims has long failed to consistently provide protection to many female asylum-seekers. Recent judicial precedents have not given sufficiently clear guidance to immigration judges on gender-based claims, and immigration judges' treatment of these claims continues to be a significant barrier for asylum-seekers.

- **Inconsistent Adjudication of Claims and "Asylum-Free Zones":**

The rates of success for similar asylum applications vary widely among US immigration judges and among regions. Certain parts of the US have been informally dubbed "asylum-free zones" in light of the scant chances an application for asylum will succeed. Contributing factors to this phenomenon include the antagonistic and unreasonable behaviour of many immigration judges, "sub-regulatory rules" elaborated by judges, and deficient federal oversight.

In view of such overwhelming evidence of the US's failure to fulfill obligations under the Refugee Convention and the Convention against Torture, as well as to uphold the human rights of asylum-seekers generally, Amnesty International Canada and the Canadian Council for Refugees urge Canada to consider rescinding the Safe Third Country Agreement and, as an interim measure, to immediately suspend the agreement.

I. Introduction

Amnesty International Canada and the Canadian Council for Refugees (CCR) present this submission to the Honourable Ahmed Hussen, Minister of Immigration, Refugees and Citizenship, and the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, to outline a number of concerns with Canada's ongoing designation of the United States (US) as a "safe country" for asylum-seekers. The US asylum system has long suffered from protection gaps, and the CCR previously presented submissions to the government and parliamentary committees in 2006 and 2007 outlining these deficiencies and the problems with considering the US to be a safe country for refugees.¹ Our organizations also joined in a Federal Court challenge to the STCA, which was upheld in a 2007 Federal Court ruling but overturned by the Federal Court of Appeal the following year largely on procedural and jurisdictional grounds.

Following the election of Donald Trump as president of the US, additional problems have emerged signaling a new urgency to cease Canada's policy of returning certain refugee claimants to US authorities. Amnesty International Canada and the Canadian Council for Refugees urge the Government of Canada to immediately suspend the STCA and to consider rescinding the agreement altogether.

II. Background on the Safe Third Country Agreement

A "safe third country" clause first appeared in Canadian law in 1988 amendments to the Immigration Act of 1976. The provision allowed for the designation of another country as a "safe third country" such that refugee claimants seeking to enter Canada via such a country would be denied an opportunity to claim in Canada.

Through the 1990s, Canada engaged in negotiations with the US Government regarding a Memorandum of Understanding, later known as a Memorandum of Agreement, designating each other as safe third countries. An agreement was not concluded at this time. However, subsequently on December 12, 2001, the US-Canada Smart Border Declaration was issued, setting out a 30-Point Action Plan that included a new commitment to negotiate a safe third country agreement. Canada and the US signed the final text of the Safe Third Country Agreement (STCA) on December 5, 2002.² The agreement entered into force on December 29, 2004.

¹ Canadian Council for Refugees, "Less Safe Than Ever: Challenging the designation of the US as a safe third country for refugees", November 2016, <http://ccrweb.ca/en/less-safe-ever-challenging-designation-us-safe-third-country-refugees> ; Canadian Council for Refugees, "Supplementary submission to Cabinet with respect to the designation of the U.S. as a safe third country for refugees", April 2007, <http://ccrweb.ca/en/supplementary-submission-cabinet-respect-designation-us-safe-third-country-refugees> .

² Agreement between the Government of Canada and the Government of the United States of America: For cooperation in the examination of refugee status claims from nationals of third countries (Dec. 5, 2002), <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> [STCA].

The STCA does not displace Canada's obligations with respect to refugee protection. Moreover, the STCA's preamble explicitly recalls both parties' international obligations and the need to ensure ongoing compliance with them.³ Article 10(2) of the STCA provides that either Canada or the United States may terminate the agreement with six months written notice. Under Article 10(3), either party may suspend the agreement for a renewable period of three months without notice.

A. Canadian Legislation Incorporating the Safe Third Country Agreement

Under s. 101(1)(e) of the Immigration and Refugee Protection Act⁴ (IRPA), a person entering Canada from a "designated country" is ineligible to have his or her claim for refugee protection considered by the Refugee Protection Division of the Immigration and Refugee Board. Section 102 of IRPA authorizes the Governor in Council to designate countries for this purpose. In designating a country, the Governor in Council is required to consider:

- a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
- b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
- c) its human rights record; and
- d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

Under s. 102(3), the Governor in Council "must ensure the continuing review" of these factors after designation. Canada has designated the United States as a safe third country for refugee claimants since 29 December 2004, when the US-Canada Safe Third Country Agreement came into force. The United States is the first, and to date the only, country designated for the purposes of s. 101(1)(e).

Under relevant provisions of the Immigration and Refugee Protection Regulations incorporating the STCA, refugee claimants who request protection at a US-Canada land port of entry are denied access to the refugee determination process in Canada, unless they meet one of the

³ *Ibid*, preamble ("AWARE that such sharing of responsibility must ensure in practice that persons in need of international protection are identified and that the possibility of indirect breaches of the fundamental principle of non-refoulement are avoided, and therefore determined to safeguard for each refugee status claimant eligible to pursue a refugee status claim who comes within their jurisdiction, access to a full and fair refugee status determination procedure as a means to guarantee that the protections of the Convention, the Protocol, and the Torture Convention are effectively afforded").

⁴ (S.C. 2001, c. 27).

enumerated exceptions in the regulations.⁵ The STCA applies only at land ports of entry. It does not apply at airports, harbour ports, or ferry landings, nor does it apply to claims lodged within Canada.⁶

B. The Previous Court Challenge by Amnesty International Canada, Canadian Council for Refugees, and Canadian Council of Churches

The Canadian Council for Refugees and Amnesty International Canada participated in a judicial review of the STCA before the Federal Court of Canada, along with the Canadian Council of Churches, and John Doe, an anonymous refugee claimant in the United States who claimed that he would have applied for refugee status in Canada but for the STCA. In this judicial review, the applicants sought a declaration that the agreement was unlawful and a breach of the Canadian Charter of Rights and Freedoms and international human rights and refugee law.

Phelan J of the Federal Court ruled in 2007 that the United States' human rights and refugee protection record at that time did not meet the requirements of Canadian law and overturned the designation on administrative law and Charter grounds. He found that the United States' resort to expedited removals and detention, taken in conjunction with other factors meant that the Governor in Council's designation of the United States as a safe country was unreasonable and the regulations giving effect to the STCA were *ultra vires* for failing to meet conditions in s. 102 of the IRPA. In particular, he highlighted that:

. . . there are a series of issues, which individually, and more importantly, collectively, undermine the reasonableness of the GIC's conclusion of U.S. compliance [with international conventions]. These include: the rigid application of the one-year bar to refugee claims; the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion. Lastly, there are the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country.⁷

Phelan J also found that the Safe Third Country Agreement as "currently structured and applied" violated the right to life, liberty and security of the person under s. 7 of the Charter and the right to equality under s. 15 of the Charter.⁸

⁵ *Immigration and Refugee Protection Regulations*, (SOR/2002-227), s. 159.5 (The categories include *inter alia* unaccompanied minors and claimants that have family members with specified status located in Canada).

⁶ *Ibid*, s. 159.4.

⁷ *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 FCR 606 at para 239.

⁸ *Ibid* at para 337.

The Federal Court of Appeal reversed this ruling in a decision in which the court found that as a matter of administrative law, the actual compliance of the United States with international treaties was not determinative as long as the Governor in Council considered and was satisfied with the United States' compliance, and that the respondents lacked standing for a Charter challenge under a legal test that is no longer valid law.⁹ The Court of Appeal did not, however, reverse or revisit the Federal Court findings with respect to human rights and refugee protection concerns in the United States, but instead deemed much of the evidence to be irrelevant because it postdated the decision to designate the United States a safe country. The Supreme Court of Canada declined to hear a further appeal.¹⁰

C. International Standards for Safe Third Country Agreements

The United Nations High Commissioner for Refugees (UNHCR) has long expressed concern about the application of safe third country agreements and the need to ensure such agreements do not directly or indirectly violate the principle of *non-refoulement* (deportation to countries where asylum-seekers would be at risk of persecution).¹¹ In 2002 a UNHCR-organized expert committee articulated a non-exhaustive list of factors to be considered in assessing whether transferred asylum-seekers will have “effective protection” upon transfer. These factors include the third state’s respect for human rights, the lack of real risk of deportation to another state where effective protection is unavailable, the existence of fair and efficient refugee determination procedures, the provision of sufficient means of subsistence, and the taking into account of “special vulnerabilities of the person concerned” and maintenance of the “privacy interests of the person and his or her family.”¹²

Since the Federal Court and Federal Court of Appeal’s judgments on the STCA, safe third country agreements have undergone judicial scrutiny in the European context, providing further clarity on the circumstances in which a country should not be considered safe for asylum-seekers and the

⁹ *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 FCR 136 at paras 80 & 100. Since this ruling, the Supreme Court of Canada has adopted a more flexible approach to evaluating public interest standing. Whereas in assessing public interest standing, previously Courts inquired, *inter alia*, whether there was another reasonable and effective way to bring a matter before courts, courts must now ask “whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court”. See *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 52.

¹⁰ *Canadian Council for Refugees v. Canada*, 2009 CanLII 4204 (SCC), <<http://canlii.ca/t/22d7x>>.

¹¹ UNHCR *Note on the Principle of Non-Refoulement*, November 1997 at G, <http://www.refworld.org/docid/438c6d972.html>.

¹² UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003 at 15 (b)(c)(f)(g)&(h), <http://www.refworld.org/docid/3fe9981e4.html>.

need for authorities to proactively and attentively assess the risks of returning asylum-seekers.¹³ In recent years, both the European Court of Human Rights and the Court of Justice of the European Union have examined the issue of safe third countries in the context of challenges to the application of the Dublin Regime, which assigns responsibility for adjudicating asylum applications among member states. In 2011, in *M.S.S. v. Belgium and Greece*¹⁴, the Grand Chamber of the European Court of Human Rights found that the transfer of an asylum-seeker from Belgium to Greece violated Articles 3 (the prohibition on torture and inhuman or degrading treatment) and 13 (the right to an effective remedy) of the European Convention on Human Rights.¹⁵ The Grand Chamber reasoned that that the Belgian authorities knew or ought to have known that there was no guarantee the applicant's asylum application would be examined seriously in Greece due to serious deficiencies in that country's asylum system.¹⁶ In addition, the Grand Chamber considered that transferring the applicant to Greece exposed the applicant to living conditions and conditions of detention amounting to degrading treatment.¹⁷ In subsequent cases, the European Court of Human Rights has likewise found other instances of transferring asylum-seekers to other safe third countries under the Dublin regime to amount to violations of European Convention on Human Rights Articles 3 and/or 13¹⁸ and has emphasized that authorities must proactively and individually assess risks of Article 3 violations upon return where documentary evidence is widely available.¹⁹

In the same year *M.S.S. v. Belgium and Greece* was rendered, the Court of Justice of the European Union decided *N.S. v. Secretary of State for the Home Department*²⁰, in which the Court found that the presumption that a country is safe is rebutted when there are systematic deficiencies in asylum procedures and reception conditions for asylum-seekers, which can amount to a real risk of inhuman or degrading treatment, as prohibited under Art. 4 of the Charter of Fundamental Rights of the European Union.²¹ The Court found that member states are

¹³ Although Canada is not a party to pertinent European instruments, this jurisprudence nonetheless has persuasive value in interpreting substantially similar protections under other human rights instruments, as well as under the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada has often considered European Court of Human Rights jurisprudence in interpreting domestic rights protections. See e.g. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras 96-98.

¹⁴, ECHR App. No. 30696/09, Grand Chamber judgment, 21 January 2011.

¹⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, entered into force 3 September 1953) 213 UNTS 221, Eur TS 5.

¹⁶ *Ibid* at 358.

¹⁷ *Ibid* at 367.

¹⁸ See e.g. *Diallo v Czech Republic*, ECHR App No 20493/07, 23 June 2011; *Tarakhel v. Switzerland*, ECHR App. No. 29217/12, 04 November 2014.

¹⁹ *Ilias and Ahmed v. Hungary*, ECHR App. No. 47287/15, 14 March 2017 at para 118.

²⁰ C-411/10 and C-493/10.

²¹ 18 December 2000 (2000/C 364/01).

required to not transfer asylum-seekers to face these circumstances under Art. 3(2) of the Dublin II Regulation, the “sovereignty clause”, which provides a means for member states to not transfer an asylum-seeker under the Dublin Regime.²²

Subsequent European jurisprudence from national courts has blocked a number of Dublin transfers due to over-use of detention in receiving states. German administrative courts have suspended transfers to Hungary on the basis that its detention regime does not adequately incorporate individual assessments and fails to ensure the necessity and proportionality of detention.²³ Austrian courts have similarly found that Hungarian detention practices are arbitrary, disproportionate and excessive in contravention of EU law.²⁴

D. The Ongoing and Pressing Need to Suspend the Safe Third Country Agreement

Nearly all of the deficiencies in refugee protection that the Federal Court identified in 2007 have continued to pose significant risks to asylum-seekers in the US. In two deficient areas identified in 2007, the US’s overbroad approach to terrorism exclusion and inconsistent and arbitrary jurisprudence on gender-based persecution, subsequent improvements have been piecemeal and have not adequately resolved the protection gaps.²⁵ As for the other areas Phelan J identified as problematic, US treatment of asylum-seekers in fact deteriorated between 2007 and the end of the Obama administration in 2016. Amnesty International and the Canadian Council for Refugees consider that these deficiencies in the United States’ asylum system present clear evidence of the continuing – and in fact even greater – validity of the Federal Court’s 2007 evidentiary conclusion that the United States was not a safe country.

With the election of Donald Trump to the presidency of the United States, the threat to asylum-seekers in the United States is more acute than ever, and a number of Canadian and American civil society organizations have called for the immediate suspension of the STCA.²⁶ Much public

²² *Ibid* at para 123.

²³ Berlin Administrative Court, Decision of January 23, 2015, Az. 23 L 717.14 A; Munich Administrative Court, Decision of 20 February 2015, Az. M 24 S 15.50091; Cologne Administrative Court, Decision of July 15, 2015, Az. 3 K 2005 / 15.A, cited in European Council on Refugees and Exiles, “Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary”, January 2016 at 8, <http://www.asylumlawdatabase.eu/en/content/ecre-case-law-fact-sheet-prevention-dublin-transfers-hungary>

²⁴ Austria Federal Administrative Court, Decision of 24 September 2015, W 1442114716-1 / 3 E, cited in European Council on Refugees and Exiles, *Ibid* at 8.

²⁵ Blaine Bookey, “Gender-based Asylum Post-*Matter of A-R-C-G*: Evolving standards and Fair application of the law” (2016) 22 *Soutwestern J Int’l L* 1; Hadeer Soliman, “The ‘Material Support to Terrorism’ Bar: Despite Recent Modifications, Bona Fide Refugees Still Find No Safe Haven”, *Diversity and Social Justice Forum*, Autumn 2016, at 41, <https://www.chapman.edu/law/files/publications/2016-dsj-soliman.pdf>.

²⁶ See e.g. Amnesty International, “Canada must strip USA of ‘safe third country’ designation for refugee claimants”, 30 January 2017, <http://www.amnesty.ca/news/amnesty-international-canada-must-strip-usa->

attention has focussed on the President's two executive orders from 27 January 2017 and 6 March 2017 restricting the ability to travel to the US for nationals of designated Muslim-majority states.²⁷ However, two other executive orders, the Interior Enforcement Order²⁸ and the Border Enforcement Order²⁹, both issued on 25 January 2017, call for implementing policies likely to directly undermine legal protections for asylum-seekers in contravention of the United States' international obligations, including those under the Refugee Convention and the Convention against Torture.³⁰ As discussed in further detail in this submission, through these orders, President Trump has called for the:

- expanded application of expedited removal, a process that fails to ensure the consistent identification of asylum-seekers prior to deportation;
- increased use of immigration detention (in addition, the administration has reportedly begun to weaken standards for detention facilities coinciding with this expansion);

[%E2%80%9Csafe-third-country%E2%80%9D-designation-refugee-claimants](#) ; Canadian Civil Liberties Association, "CCLA Calls for Concrete Action from Canadian Government on U.S. Travel Ban", 29 January 2017, <https://ccla.org/ccla-calls-for-concrete-action-from-canadian-government-on-u-s-travel-ban/> ; Canadian Association of Refugee Lawyers, "CARL Calls For Suspension Of Safe Third Country Agreement, Increased Refugee Re-Settlement, In Wake Of Trump Executive Orders", 30 January 2017, <http://www.carl-acadr.ca/articles/139> ; Harvard Immigration and Refugee Legal Clinic, Letter to the Right Honourable Justin Trudeau and the Honourable Ahmed Hussen re: the Impact of President Trump's Executive Orders on Asylum Seekers, 8 February 2017, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Canada-Trudeau-letter-Feb-8-2017.pdf> .

²⁷ These orders, identically titled "Protecting the Nation from Foreign Terrorist Entry into the United States" are not currently in force. The application of President Trump's second order, which superseded the first, was temporarily halted pending the resolution of a constitutional challenge. See *State of Hawaii v. Trump*, Order Granting Motion for Temporary Restraining Order, 15 March 2017, CV. NO. 17-00050 DKW-KSC.

²⁸ *Executive Order: Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> ["Interior Enforcement Order"].

²⁹ *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> ["Border Enforcement Order"].

³⁰ Harvard Immigration and Refugee Legal Clinic, "The Impact of President Trump's Executive Orders on Asylum Seekers", 8 February 2017, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> ; Harvard Immigration and Refugee Legal Clinic, "Request for Emergency Hearing on the Safe Third Country Agreement between Canada and the United States at the March 2017 Ordinary Period of Sessions and/or Request to Participate in the Hearing on the Impact of the Executive Orders on Human Rights in the United States on March 21, 2017", Letter to the Inter-American Commission on Human Rights, 28 February 2017, <https://harvardimmigrationclinic.files.wordpress.com/2017/03/iachr-hearing-request-final.pdf> .

- increased prosecution of immigration violations, including those affecting asylum-seekers, such as illegal entry;
- transfer of apprehended individuals to Mexico to be detained pending a formal removal proceeding in the US;
- and adoption of a more stringent approach to credible and reasonable fear interviews: the US's eligibility interviews for claims for protection.

While the measures in the orders do not for the most part explicitly target asylum-seekers, they nonetheless have the potential to directly impact them and are likely to further erode an already deficient refugee protection regime.

E. Testimonies of Refugee Claimants on their Motivations for Coming to Canada

While the numbers of refugee claimants arriving in Canada from the US have been increasing for at least a year, a more recent increase has coincided with the concrete policy changes that the current US administration has ordered. In 2017, despite the cold weather, the RCMP intercepted 315 asylum-seekers between ports of entry in January, 658 in February and 877 in March,³¹ high numbers when compared to the total of 2,400 crossed irregularly in all of 2016.³² Manitoba and Quebec have in particular seen significant increases in irregular arrivals from the US. Individuals who have crossed the border this winter have done so at their own peril and have in certain instances lost their fingers and toes from frostbite.³³ The increase of irregular arrivals from the US is likely encouraging smuggling³⁴ and thereby placing individuals at risk of exploitation. The willingness of such individuals to expose themselves to dangers to life and limb to avoid the application of the Safe Third Country Agreement is a compelling indication that the US is no longer perceived as a “safe country” by many refugees.

Amnesty International researchers conducted preliminary research interviews during the week of February 20th with refugee claimants who had recently arrived in Manitoba from the United

³¹ Government of Canada, “Key figures on asylum claims made in Canada”, <http://www.cic.gc.ca/english/refugees/asylum-claims-made-in-canada.asp>.

³² Paul Vieira, “Refugees Trek to Canada as U.S. Tightens Rules on Immigration”, *Wall Street Journal*, 2 March 2017, <https://www.wsj.com/articles/refugees-trek-to-canada-as-u-s-tightens-rules-on-immigration-1488475641>.

³³ Austin Grabish, “Frostbitten refugee will lose fingers, toe after 7-hour trek to cross U.S.-Canada border”, CBC, 11 January 2017, <http://www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146>.

³⁴ Canadian media have reported investigations and prosecutions of human smuggling over the US border in recent months. In December five individuals were charged in Quebec and Ontario with conspiracy and aiding or abetting the illegal entry of one or more persons into Canada. In April two individuals in Regina were arrested as part of an investigation into human smuggling. See David Shield, “Canadian couple arrested as part of human smuggling investigation”, CBC News, 20 April 2017, <http://www.cbc.ca/news/canada/saskatchewan/3-more-arrests-sask-human-smuggling-1.4077163>.

States, having irregularly crossed the border into Canada.³⁵ Amnesty conducted further preliminary research interviews on 27-28 March 2017 with refugee claimants who had crossed irregularly from the US into Quebec. These interviews reveal that some of the primary motivations of the refugee claimants included:

- **Immigration detention:**

Widespread and unjustified immigration detention continues to be a very serious concern in the United States. Several individuals told Amnesty International that they were detained upon arrival in the USA, and throughout the duration of their asylum claim. It was very difficult to locate, retain, or work with immigration lawyers from detention in preparation for hearings. A number of the individuals described being held in harsh conditions, including overcrowded cells of up to 35 detainees in which the temperature was so cold that people had to wrap themselves in thin foil blankets to keep warm.

- **Claims rejected in the United States:**

Amnesty International researchers interviewed one individual whose claim, based on his sexual orientation, was rejected while he was held in US detention. He was subsequently released from detention after he was able to raise funds for a bond. He crossed the border irregularly into Canada. His claim was heard recently by the Immigration and Refugee Board and was so clear that he immediately received a positive decision at the completion of the hearing.

- **Increased immigration raids:**

Somalis whom Amnesty International interviewed described friends and neighbours being suddenly and inexplicably arrested and detained when reporting for a regular immigration appointment or in raids at workplaces and apartment complexes. This was a key factor pushing many individuals to make the decision to leave the United States for Canada.

- **The One-Year Bar:**

One refugee claimant from El Salvador was no longer eligible to apply for asylum due to the US's one-year bar on asylum claims, which generally bars claims made more than one year after arrival.³⁶ He stated that he was uninformed about the asylum process until it was too late for him to apply.

These accounts of refugee claimants who had made unimaginably difficult and dangerous journeys halfway around the world – always with an eye to reaching freedom in the United States – only to quickly feel that the situation in the United States had changed dramatically and become potentially hostile and unwelcoming, provide a very strong measure of how deeply troubling and unsettling conditions have become for asylum-seekers in the United States.

³⁵ These findings were summarized in a 5 March 2017 letter to Prime Minister Trudeau.

³⁶ This policy is described in greater detail in the next section.

Amnesty International's findings indicate that many of these refugee claimants have left the United States after perceiving various failings in the US asylum system, facing xenophobic treatment, and fearing that the human rights situation may further deteriorate in the current political climate following the election of a president who is overtly hostile towards refugees and migrants. The subjective fear of staying in the United States that refugee claimants expressed to Amnesty International is consistent with a large body of research indicating gaping holes in the United States' refugee protection system. Below is a non-exhaustive overview of some of the most salient areas where the United States' laws and practices fail to meet international standards.

III. The One-Year Bar

The one-year bar is a provision in the Immigration and Nationality Act, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.³⁷ This rule requires asylum-seekers to apply for asylum within one year of entry unless applicants fall into one of two exceptions: he or she can demonstrate "changed circumstances which materially affect the applicant's eligibility for asylum" or "extraordinary circumstances relating to the delay in filing".³⁸ Regulations provide examples of changed or extraordinary circumstances and also stipulate that where an exception applies, applicants must apply within a "reasonable period":³⁹ a criterion whose vagueness has been criticized by rights groups.⁴⁰ Although the intent for instituting the one-year bar may have been to target fraudulent or frivolous asylum-claims, many genuine refugees fail to apply within the one-year period for a variety of reasons, including lack of knowledge of the rule or of eligibility for asylum, linguistic barriers, and lack of resources for securing legal counsel.⁴¹

Individuals who are barred from applying for asylum due to the one-year bar may be eligible for protection under "withholding of removal", a more limited form of relief.⁴² Although refugees granted withholding of removal are protected from deportation to their country of origin, they cannot apply for permanent residence, are not allowed to bring children or spouses to the United States, are unable to return to the US if they travel abroad and can be deported to a third

³⁷ Division C of Pub.L. 104-208, 110 Stat. 3009-546, enacted September 30, 1996.

³⁸ INA § 208(a)(2)(D).

³⁹ 8 C.F.R. § 1208.4(a)(4-5).

⁴⁰ Human Rights First, "The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency", September 2010 at 38, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

⁴¹ Human Rights First, "The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency", September 2010, p. 2, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> .

⁴² 8 U.S.C. § 1231(b)(3).

country. This procedure is also an inadequate substitute for asylum applications: it is far more difficult for applicants to succeed because they must meet a much higher standard of proof by establishing that they are more likely than not to be persecuted on Convention grounds.⁴³ In 2007, Phelan J of the Federal Court of Canada recognized that this different evidentiary standard coincided with much lower acceptance rates in withholding of removal.⁴⁴ He therefore concluded that “the weight of the expert evidence is that the higher standard for withholding combined with the one-year bar may put some refugees returned to the U.S. in danger of refoulement.”⁴⁵ As a result US law, practice, and policies in this respect were inconsistent with obligations under the Refugee Convention, as well as Canadian practice.⁴⁶ The One-Year Bar also diverges from practice in other jurisdictions, including the United Kingdom and Australia.⁴⁷

Before the STCA was implemented, both the House of Commons Standing Committee on Citizenship and Immigration and the UNHCR expressed concerns about the one-year deadline, and the Standing Committee recommended that Canada receive assurances that persons returned to the US would not be subjected to this deadline.⁴⁸ Although the UNHCR has considered certain time limits on asylum requests permissible, it has nonetheless noted that the failure to meet those requirements “should not lead to an asylum request being excluded from consideration.”⁴⁹ In 2010, then-UN High Commissioner and current UN Secretary-General António Guterres described the US’s filing deadline as “diverg[ing] from international standards” and stated that it “makes it more difficult for many asylum seekers to establish their need for protection.”⁵⁰ The UNHCR has since urged the US to repeal the One-Year-Bar, especially for all children with claims.⁵¹

⁴³ 8 CFR 208.16.

⁴⁴ *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 FCR 606 at paras 152-154 (at the time, the difference 38% acceptance for asylum claims versus 13% for withholding of removal claims).

⁴⁵ *Ibid* at para 154.

⁴⁶ *Ibid*.

⁴⁷ Misha Seay, “Better Late than Never: A Critique of the United States Asylum Filing Deadlines from International and Comparative Law Perspectives” (2011) 34 *Hastings Int'l & Comp. L. Rev.* 407.

⁴⁸ UNHCR Comments on the Draft Agreement between Canada and the United States of America for “Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries” (July 26, 2002), <http://www.refworld.org/docid/3d4e69614.html> at 2; The Safe Third Country Regulations Report of the Standing Committee on Citizenship and Immigration, December 2002, <http://www.parl.gc.ca/content/hoc/Committee/372/CIMM/Reports/RP1032292/cimmrp01/cimmrp01-e.pdf> at 9.

⁴⁹ Executive Committee of the High Commissioner's Programme, “Refugees Without an Asylum Country No. 15 (XXX) - 1979” (1979), principle h (vi)(i), www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html .

⁵⁰ António Guterres, U.N. High Commissioner for Refugees, Closing Keynote at “Renewing U.S. Commitment to Refugee Protection: The 30th Anniversary of the Refugee Act,” co-hosted by Human Rights

Academic studies in recent years have provided further concrete evidence of the significant, arbitrary, and detrimental effect the one-year bar has on the US's refugee protection system. A 2010 empirical study of the more than 300,000 cases in the Department of Homeland Security (DHS) database found, *inter alia*, that:

- more than 30 per cent of all asylum applicants missed the filing deadline;⁵²
- the grant rate for applicants who applied for asylum within one year was equivalent to those of late asylum applicants who qualified for an exception to the bar, suggesting that late applications were not less meritorious;⁵³
- between 1998 and 2009, an estimated 15,000 asylum applications would have been granted but for the one-year bar;⁵⁴
- the one-year bar disadvantaged certain nationalities more than others, a possible result of asylum-seekers from certain nationalities having more extensive support networks or fewer cultural barriers;⁵⁵
- the eight different regional asylum offices found applications to be timely (i.e. filed within the one-year deadline) at varying rates, even when corrected for other factors such as nationality. The authors worried that “differences in operation assumptions and procedures in the different Asylum Offices caused these variations.”⁵⁶

US courts have generally applied the one-year bar in an exceedingly rigid manner, in effect depriving the exceptions to the one-year bar of much of their ability to mitigate the deficiencies of this policy. A report by the US-based National Immigrant Justice Center, Human Rights First, and Penn State Law analyzed 662 Board of Immigration Appeals (BIA) cases that involved the one-year filing deadline and found that in 22 cases, asylum-seekers found to face a clear probability of persecution upon return had their claims rejected due to the filing deadline.⁵⁷ The

First and Georgetown University Law Center in Washington, DC (Mar. 16, 2010), cited in Human Rights First, “The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency”, September 2010, at 11, n. 42, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> .

⁵¹ UN High Commissioner for Refugees (UNHCR), “Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review”, 2014, at 8, www.refworld.org/docid/55474c1b4.html .

⁵² Philip G Schrag et al, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum" (2010) 52:3 Wm & Mary L Rev 651 at 756.

⁵³ *Ibid* at 745.

⁵⁴ *Ibid* at 754.

⁵⁵ *Ibid* at 744.

⁵⁶ *Ibid* at 758.

⁵⁷National Immigrant Justice Center, Human Rights First & Penn State Law, “The One-Year Asylum Deadline and the BIA: No Protection, No Process”, October 2010 at 5, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/1YD-report-FULL.pdf> .

same report concludes that the BIA often states cursorily that the immigration judge correctly applied the one-year bar without engaging in any substantive analysis as to whether the application of the one-year bar was in fact required by law.⁵⁸ The authors identified 34 cases wherein the BIA declined to recognize a refugee's circumstances as justifying an exception in reference to the list of examples of changed and extraordinary circumstances in the regulations, in effect treating the list as exhaustive rather than illustrative.⁵⁹

The one-year bar has had a disproportionate effect on female asylum-seekers, who file very late claims at a rate more than 50 per cent higher than men.⁶⁰ Women who face gender-based persecution may face more difficulty in applying for asylum within the one-year time limit, including due to lack of knowledge that spousal abuse can be grounds for a refugee claim or reluctance to reveal sexual violence.⁶¹ The bar also has a disproportionately negative impact on lesbian, gay, bisexual, transgender and HIV positive individuals.⁶² The bar precludes bona-fide, non-fraudulent claims through ignoring the effects of psychological disorders.⁶³ Refugees suffering from Post-Traumatic Stress Disorder (PTSD) disproportionately struggle to meet the one-year timeline.⁶⁴ PTSD has been rejected as a basis for an exception to the bar in multiple instances, such as in one case where an applicant was found to have continued the "totality of [her] life activities" and in another where an applicant had managed to go to church while suffering from PTSD.⁶⁵

The above documentary evidence clearly demonstrates that the one-year bar's arbitrary and often discriminatory effects deprive asylum-seekers of protection for reasons unrelated to the merits of

⁵⁸ *Ibid* at 7.

⁵⁹ *Ibid* at 8.

⁶⁰ Philip G Schrag et al, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum" (2010) 52:3 *Wm & Mary L Rev* 651, p. 702.

⁶¹ Amy K Arnett, "One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights under the Safe Third Country Agreement" (2005) 9 *Lewis & Clark LR* 951; Philip G Schrag et al, "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum" (2010) 52:3 *Wm & Mary L Rev* 651 at 702.

⁶² Victoria Neilson & Aaron Morris, "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal" (2005) 11:31 *NY City L Rev* 233; Jessica Young, "The Alternate Refuge Concept: A Source of Systematic Disadvantage to Sexual Minority Refugee Claimants" (2010) 60 *UNBLJ* 294; Karen Musalo & Marcelle Rice, "Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum" (2008) 31:2 *Hastings Intl & Comp L Rev* 693.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ Human Rights First, "The Asylum Filing Deadline Denying Protection to the Persecuted and Undermining Governmental Efficiency", September 2010 at 31, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

their claims. In so doing, the one-year bar places individuals at risk of *refoulement* for purely administrative reasons.

IV. Turning Back Asylum-Seekers at the Mexico Border and Extraterritorial Processing of Applications

Since July 2016, Customs and Border Protection (CBP) agents have reportedly turned back asylum-seekers at official border crossings into the US from Mexico without affording them any opportunity to claim asylum, a phenomenon that is leading some asylum-seekers to conduct dangerous, irregular crossings into the US.⁶⁶ Human Rights First researchers visited border regions in California, Texas, and Arizona from February-April 2017 and documented 125 instances of individuals being unlawfully denied access to asylum procedures.⁶⁷ CBP officers have reportedly provided misinformation to individuals at the border, such as stating that they cannot apply for asylum, require visas, must apply for asylum from Mexican authorities beforehand, or are in need of an “appointment” from Mexican officials.⁶⁸ Such practices are a direct violation of the US’s obligations under the Refugee Convention⁶⁹, and those summarily turned back at the border are at risk of chain *refoulement* due to Mexico’s deficient refugee protection system. In addition, those turned back to Mexico are at risk of violence within Mexico’s northern border states, areas where migrants have been subjected to abuses including kidnappings, rape, disappearances, and extortion.⁷⁰ Some asylum-seekers have been returned to

⁶⁶ Human Rights First, “Violations at the Border: The El Paso Sector”, February 2017 at 1-2, www.humanrightsfirst.org/resource/violations-border-el-paso-sector; Human Rights First, “Crossing the Line U.S. Border Agents Illegally Reject Asylum Seekers”, May 2017 at 14, <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>.

⁶⁷ Human Rights First, “Crossing the Line U.S. Border Agents Illegally Reject Asylum Seekers”, *Ibid*.

⁶⁸ American Immigration Council et al., Letter to Megan H. Mack, DHS Officer for Civil Rights and Civil Liberties & John Roth, DHS Inspector General Re: U.S. Customs and Border Protection’s Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border, 13 January 2017 at 1-2 <https://www.americanimmigrationcouncil.org/content/us-customs-and-border-protections-systemic-denial-entry-asylum-seekers-ports-entry-us> ; Human Rights First, “Crossing the Line U.S. Border Agents Illegally Reject Asylum Seekers”, May 2017 at 8, <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>.

⁶⁹ One of the critical factors for assessing “effective protection” in third countries is whether there is “no real risk that the person would be sent by the third State to another State in which he or she would not receive effective protection or would be at risk of being sent from there on to any other State where such protection would not be available.” See UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003 at 15(c), <http://www.refworld.org/docid/3fe9981e4.html>.

⁷⁰ Washington Office on Latin America, Latin American Working Group, and Kino Border Initiative, “Situation of Impunity and Violence in Mexico’s Northern Border Region,” Testimony submitted to the

Ciudad Juarez, a city once described the most dangerous in the world and where rates of violence are again on the rise.⁷¹

Mexican private security guards and immigration enforcement agents assist the US's violations of the Refugee Convention by stopping asylum-seekers from traveling to the US and telling them that the US is no longer granting asylum.⁷² Under the Obama administration, US policies of lending political and financial support to Mexican border enforcement to decrease the numbers of Central American asylum-seekers were already criticized for "outsourcing refoulement."⁷³ Mexico has engaged in large-scale policies of detention and deportation of Central Americans with inadequate procedures in place to ensure proper adjudication of asylum claims.⁷⁴ Despite the existence of laws on refugee protection in Mexico, the UNHCR has emphasized the continued problems of access to asylum procedures and the need to reduce the risk of *refoulement* for those needing protection as a priority for 2017.⁷⁵ The failings of the Mexican asylum system have been well-documented, such as widespread failure to screen children for protection needs and inform them of their rights.⁷⁶

Under the Trump administration, new risks of onward *refoulement* may emerge if planned extraterritorial processing policies are implemented. In addition to calling for the construction of a wall along the US's southern border, President Trump's Border Enforcement Order instructs the DHS to return applicants for admission arriving on land from Mexico and Canada to those countries to await their removal proceedings in the United States.⁷⁷ This policy would be a clear violation of the US's obligations under the Refugee Convention, and asylum-seekers might be detained for possibly years on end during the processing of their applications by US authorities. However, as Mexican Foreign Minister Luis Videgaray has reportedly declined to cooperate with

Inter-American-Commission on Human Rights, March 2017 at 1, <https://www.wola.org/wp-content/uploads/2017/04/Situation-of-Impunity-and-Violence-in-Mexicos-northern-border-LAWG-WOLA-KBI.pdf>.

⁷¹ Human Rights First, "Violations at the Border: The El Paso Sector", February 2017 at 1-2, www.humanrightsfirst.org/resource/violations-border-el-paso-sector at 2.

⁷² Human Rights First, "Crossing the Line U.S. Border Agents Illegally Reject Asylum Seekers", May 2017 at 8 & 10, <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>.

⁷³ Aaron Korthuis, "Outsourcing Refoulement: The United States and the Central American Refugee Crisis", Yale J Int'l L, 24 October 2016, <http://campuspress.yale.edu/yjil/outsourcing-refoulement-the-united-states-and-the-central-american-refugee-crisis/>.

⁷⁴ *Ibid.*

⁷⁵ UNHCR, *Northern Triangle of Central America Situation Factsheet (February 2017)*, February 2017 at 7, <http://www.refworld.org/docid/58aae2bb4.html>.

⁷⁶ Human Rights Watch, *Closed Doors Mexico's Failure to Protect Central American Refugee and Migrant Children*, 2016, ISBN: 978-1-6231-33306, https://www.hrw.org/sites/default/files/report_pdf/mexico0316web_0.pdf.

⁷⁷ Border Enforcement Order, s. 7.

this policy, considerable uncertainty remains as to the fate of asylum-seekers returned to Mexico.⁷⁸ Due to the increase of detentions and deportations from Mexico,⁷⁹ this order raises serious concerns that extraterritorial processing will lead to *refoulement*.

V. Expedited Removal

Expedited removal is an immigration enforcement process that allows for the physical removal of or denial of entry to certain categories of non-citizens without requiring hearings before immigration judges. First introduced as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, expedited removal is codified in section 235 of the Immigration and Nationality Act, which provides that “[i]f an immigration officer determines that an alien” who is inadmissible for lacking proper documentation or has sought to obtain a visa, other documentation, or admission through fraud or misrepresentation, “the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution”.⁸⁰ The non-citizen’s inadmissibility is determined during a single encounter with a CBP officer. All non-citizens placed in expedited removal proceedings are typically subject to detention.⁸¹ Following expedited removal, individuals are barred from entering the US for five years.⁸² If they are able to re-enter they are placed in “reinstatement of removal” proceedings, are rendered ineligible for asylum, and must rely instead on withholding of removal, a more narrow form of relief.⁸³

In creating expedited removal in 1996, the US Congress granted the Attorney General the discretion to apply the proceedings to two categories of non-citizens: those “arriving in the United States” and those in the United States who have not been continually present for two years.⁸⁴ At first, the Attorney General opted to apply the expedited removal to only the former category. However, in 2002, the Attorney General also applied expedited removal to non-citizens

⁷⁸ Mark Hensch, “Mexico ‘will not accept’ Trump deportation guideline”, *The Hill*, 22 February 2017, <http://thehill.com/policy/international/americas/320686-mexico-will-not-accept-trump-immigration-rules> .

⁷⁹ Washington Office on Latin America, *Mexico Now Detains More Central American Migrants than the United States*, 11 June 2015, <https://www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/> .

⁸⁰ 8 U.S.C. § 1225(b)(1)(A)(i).

⁸¹ 8 U.S.C. §1225(b)(1)(B)(iii)(IV).

⁸² 8 U.S.C. § 1182(a)(9)(A)(i).

⁸³ Emily Puhl, “Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol”, (2015) 25 Berkeley La Raza L J 87 at 96.

⁸⁴ 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(II).

who had entered the United States by sea without inspection and who had not been continuously present within the United States for two years.⁸⁵ In 2004, the Attorney General again expanded expedited removal to allow its use for any non-citizen apprehended within fourteen days of entry and within 100 miles of the border.⁸⁶

President Trump's "Border Enforcement Order" of 25 January 2017 directs the DHS to expand "expedited removal" to the maximum extent possible. In accordance with the statutory authority granted to the Attorney General in 1996, this order would extend expedited removal throughout the US, including regions bordering Canada, to individuals who entered the United States without documents and cannot prove that they have been continuously present for the previous two years.⁸⁷ The DHS memorandum on implementing the Border Enforcement order also stipulates that all individuals who are determined by immigration officers to be inadmissible will be removed "without further hearing or review."⁸⁸ Considering the well-documented problems in expedited removal, this dramatic expansion of the application of these procedures would deny an even greater number of asylum-seekers effective procedural guarantees. A growing number of individuals in need of protection will likely find themselves at risk of deportation without being accorded the chance to participate in a fair hearing of the merits of their claims.

A. Inadequate Safeguards for Asylum-Seekers in Expedited Removal Procedures

When the application of expedited removal was first expanded in 2002 to encompass individuals who had already entered the US, US authorities introduced certain measures to address concerns that asylum-seekers would be summarily deported without being afforded the opportunity to seek protection. In particular, the US introduced "credible fear" interviews with asylum officers to which assess whether individuals have a credible fear of persecution or torture and adopted certain procedures for identifying potential asylum-seekers for referral to these interviews. Despite the existence of such theoretical safeguards for those in need of protection, in practice they fail to act as a consistent and reliable bulwark against *refoulement*.

Already in 2007, Phelan J. recognized potential protection gaps in expedited removal procedures. Although he considered that there was "insufficient evidence to reasonably conclude that the U.S. process of expedited removal, highly criticized by the UNHCR, as well as the

⁸⁵ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924–25 (Nov. 13, 2002).

⁸⁶ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).

⁸⁷ Border Enforcement Order at s. 11(c).

⁸⁸ Dept. of Homeland Security, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies", 20 February 2017 at 6, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf .

Standing Committee on Citizenship and Immigration, would itself lead to refoulement”,⁸⁹ he nonetheless found that the use of expedited removal and that of detention raised issues of compliance with international obligations and, when taken in conjunction with “more clear contradictions with Convention provisions call the reasonableness of the GIC’s determination into question”.⁹⁰

Since 2007, a growing body of evidence has emerged showing that expedited removal in itself exposes asylum-seekers to rights abuses, including *refoulement*, through US authorities’ failure to apply sufficiently robust procedural guarantees in both the initial screening process carried out by CBP Officers and in credible fear interviews with asylum officers. These problematic aspects of the US immigration system are likely to persist, as chances for a judicial overhaul of the flawed expedited removal system were dealt a significant blow in April 2017, when the US Supreme Court declined to hear an appeal of the Third Circuit’s decision in *Castro v. DHS*⁹¹, in which the Court found that the petitioners, asylum-seekers who had been subject to expedited removal, were not entitled to judicial review of their claims.⁹²

i. Deficiencies in Border Screening for Asylum-Seekers

Although routinely not respected in practice, CBP Officers are required to identify non-citizens who fear persecution and refer them for a credible fear interview by an asylum officer.⁹³ To achieve this goal, CBP Officers are required to inform non-citizens of the possibility of seeking protection and must ask whether they fear returning to their country of origin.⁹⁴ CBP Officers must read or have read to individuals Form I-867A, which informs, *inter alia*, that “U.S. law provides protection to certain persons who face persecution, harm, or torture upon return to their home country”.⁹⁵

The *International Religious Freedom Act* of 1998 authorized the U.S. Commission on International Religious Freedom (USCIRF) to appoint experts to assess the situation of asylum-seekers in Expedited Removal. In their first assessment in 2005, the Commission highlighted the inconsistent application of protections for asylum-seekers in expedited removal and the “serious

⁸⁹ *Ibid* at para 231.

⁹⁰ *Ibid* at para 238.

⁹¹ 835 F.3d 422 (3d Cir. 2016).

⁹² Human Rights First, “Supreme Court Upholds Flawed Ruling Against Asylum Seekers”, 17 April 2017, <http://www.humanrightsfirst.org/press-release/supreme-court-upholds-flawed-ruling-against-asylum-seekers>.

⁹³ 8 U.S.C. §1225(b)(1)(A)(ii); 8 C.F.R. §235.3(b)(4)

⁹⁴ 8 C.F.R. §235.3(b)(2)(i).

⁹⁵ US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 8 February 2005 at 21 http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

problems” that put asylum-seekers at risk of *refoulement*.⁹⁶ The primary recommendation to address these failings was to appoint a high-ranking official to coordinate between multiple agencies and implement reforms on refugee issues. However, a decade later, the same commission noted that although a Senior Advisor for Refugee and Asylum Policy was appointed in 2006, this position did not report to the Secretary or Deputy Secretary of Homeland Security, and the position had been vacant since 2011.⁹⁷ USCIRF also concluded that most of the recommendations from the 2005 report remained unimplemented and that there were “continuing and new concerns about the processing and detention of asylum-seekers in Expedited Removal”.⁹⁸

In its 2005 report, the USCIRF found that in approximately half of inspections they observed, CBP officers did not read the pertinent part of Form I-867A on the possibility to seek protection for those fearing returning home.⁹⁹ The USCIRF also found that the individuals who received this information were seven times more likely to be referred for a credible fear interview.¹⁰⁰ In violation of a clear statutory obligation, CBP Officers failed to refer individuals who expressed a fear of return in 15% of cases observed by the Commission.¹⁰¹

In researching their 2016 report, the USCIRF observed five CBP interviews and found that:

Despite the small sample of CBP interviews observed, USCIRF found several examples of non-compliance with required procedures, including: failure to read back the answers to the interviewee and allow him to correct errors before signing, as required; interviewing individuals together instead of separately and in private; failure to read the required script from the I-867A; and failure to record an answer correctly.¹⁰²

In the same report, the USCIRF also found that the credible fear interviews they observed confirmed significant shortcomings with CBP officers’ approach to interviewing and record

⁹⁶ *Ibid* at 4 & 10.

⁹⁷ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016 at 17, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>

⁹⁸ *Ibid*.

⁹⁹ US Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations*, 8 February 2005 at 6, http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf .

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid* at 53.

¹⁰² US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016 at 20, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

keeping. These interviews revealed that the I-867 forms sometimes include inaccurate information or answers to questions that were never asked.¹⁰³

The 2016 USCIRF report confirms that CBP officers often fail to correctly identify individuals fearing return to their countries of origin:

While many asylum seekers in ICE [Immigration and Customs Enforcement] detention centers reported that CBP officers did ask them about fear of return, others reported that CBP officers did not ask them the fear questions, asked them incorrectly, recorded “no” when interviewees answered “yes,” inquired into their fear claims in detail, and/or dismissed assertions of fear.¹⁰⁴

The USCIRF also noted that such failings of the CBP screening process are consistent with anecdotal information provided from USCIS indicating that most credible fear referrals come from ICE and not CBP.¹⁰⁵

The USCIRF report appears to suggest a willful disregard by certain CBP officers of their legal obligation to identify potential asylum-seekers:

Of particular concern are reports of CBP officials denying non-citizens in Expedited Removal the opportunity to claim fear. For example, a Guatemalan asylum seeker in ICE custody who had previously been deported told USCIRF that on her first apprehension by BP [Border Patrol], she “was not given the opportunity to talk;” instead, she said that when she tried to explain why she had fled to the United States, the agent forced her to sign papers instead. One Central American man said he was told “whether you sign or not, we are going to deport you.” Others said BP agents told them that “it’s better if you just ask to be deported” or “we’re going to throw you out.”¹⁰⁶

The findings of the USCIRF are consistent with interviews of deportees to Honduras conducted by researchers from Human Rights Watch that identified severe shortcomings in the CBP screening process, including failure to refer individuals to credible fear interviews despite expressing fear of return.¹⁰⁷ As part of the same investigation, Human Rights Watch observed CBP interview procedures at the McAllen Border Patrol station, where they noted additional

¹⁰³ *Ibid* at 21.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at 22.

¹⁰⁶ *Ibid*.

¹⁰⁷ Human Rights Watch, “You Don’t Have Rights Here: US Border Screening and Returns of Central Americans to Risk of Serious Harm”, October 2014 (ISBN: 978-1-6231-32002) at 26 (“Human Rights Watch spoke with deportees who reported that they were not informed of the availability of protection or that they were not referred to an asylum officer for a credible fear interview after they told a Border Patrol agent they were afraid to return to their country. Some would-be asylum seekers also reported that Border Patrol officers harassed, threatened, and attempted to dissuade them from applying for asylum”).

problems in the screening process, including that interviews were often conducted in crowded settings and failed to guarantee confidentiality.¹⁰⁸ Officers conducted interviews without their weapons but in uniform with holsters, creating an intimidating environment for individuals fearful of security forces in their countries of origin.¹⁰⁹

The UN Committee against Torture has expressed concern with “a growing number of reports that CBP and other U.S. immigration agencies fail to identify and refer many of the individuals placed in expedited removal for an asylum-screening interview.”¹¹⁰ This trend appears to be worsening, with immigration lawyers reporting growing numbers of asylum-seekers being sent back upon requesting asylum at ports of entry since President Trump took office.¹¹¹

A February 2017 report by the Borderland Immigration Council, a coalition of immigration lawyers, non-profits and community members, further documented the significant rights abuses in expedited removal through interviews with 25 legal experts in the El Paso sector conducted between September 2016 and January 2017. The authors of the report found that in 12 per cent of cases documented, individuals who expressed a fear of return were not referred to credible fear interviews.¹¹² Legal experts interviewed as part of this investigation likened CBP screening interviews to interrogations, with individuals being “badgered” in interviews that sometimes last for hours to elicit responses sought by DHS officials, namely that they have not come to the US to seek safety, but instead to rejoin family members or to work.¹¹³ Half of the lawyers interviewed for the report indicated that individuals often must sign documents in English without translation, leading to subsequent inconsistencies in asylum claims and consequent negative credibility inferences.¹¹⁴

Although the clear deficiencies in the application of the United States’ expedited removal procedures point to systemic problems in the United States’ refugee protection system, certain groups face heightened challenges, including non-Spanish speakers, some of whom have

¹⁰⁸ *Ibid* at 26.

¹⁰⁹ *Ibid* at 27.

¹¹⁰ UN Committee against Torture, Concluding observations on the third to fifth periodic reports of United States of America, UN Doc CAT/C/USA/CO/3-5 (20 November 2014) at para 18.

¹¹¹ Human Rights First, “Violations at the Border: The El Paso Sector”, February 2017 at 2, www.humanrightsfirst.org/sites/default/files/hrf-violations-at-el-paso-border-rep.pdf .

¹¹² Borderland Immigration Council, “Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the US-Mexico Border”, February 2017 at 12, http://media.wix.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf .

¹¹³ *Ibid* at 13.

¹¹⁴ *Ibid*.

reported not having access to interpretation services.¹¹⁵ Women and children from Central America are also at particular risk in expedited removal procedures. Many asylum-seekers from this region have fled domestic abuse or gang-related violence. Despite recognition by the American judiciary that violence from non-state actors can form the basis of an asylum claim, the findings of a UNHCR mission suggest that some border officials do not understand or accept this legal reality.¹¹⁶

The gaps in the United States' refugee protection for those fleeing violence in Central America have had fatal consequences for some returnees. Elizabeth Kennedy, a social scientist at San Diego State University, relied on local newspaper reports to identify 83 people who had died between January 2014 and September 2015 after being deported to El Salvador, Honduras, and Guatemala. Most of the deaths occurred within a year following deportation.¹¹⁷

ii. Overly Stringent Credible Fear Procedures

Credible fear determinations, which occur when individuals subject to expedited removal under INA § 235(b) express a fear of return to their home countries, are intended to guard against *refoulement*. These interviews, which gauge whether individuals have a credible fear of persecution or torture, were originally intended to require a relatively low threshold for applicants to meet to be allowed to present an asylum application before a judge. However, this procedure presents dramatic barriers to applicants. Shortcomings in credible fear determinations previously identified by civil society organizations include:

- Inadequate translation services, which are often provided through the phone or video technology, resulting in frequent mistranslations.¹¹⁸ Speakers of non-Spanish Indigenous languages appear to be particularly impacted, with the advisory committee of the DHS

¹¹⁵ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016 at 28, <https://www.uscirf.gov/sites/default/files/Barriers%20to%20Protection.pdf>.

¹¹⁶ UNHCR, *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexican Border* (June, 2014), at 25 (finding that “[a] significant number of officials ... stated that persecution is limited to harm inflicted directly by the government and that children who fear gangs or cartels do not therefore fear persecution”).

¹¹⁷ Jose Magaña-Salgado, Immigration Legal Res. Ctr., *Relief Not Raids: Temporary Protected Status for El Salvador, Guatemala, and Honduras* (2016), at 6.

¹¹⁸ Report of the DHS Advisory Committee on Family Residential Centers, 30 September 2016, pp. 96–97, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

having concluded that the department “systematically fails to provide appropriate language access.”¹¹⁹

- Asylum officers often fail to elicit relevant and useful information by primarily asking yes and no questions, or by failing to inquire about alternative grounds for refugee claims.¹²⁰
- Asylum officers often do not assess children’s refugee claims independently from their parents’, often deny requests for independent interviews, and sometimes fail to adopt a child-friendly approach to questioning.¹²¹ The presence of children in these interviews has impeded some women from speaking forthrightly out of fear of traumatizing them.¹²²
- Asylum officers’ written reasons often fail to provide adequate details as to why an applicant did not establish credible fear, and officers often simply check a box on a form as to which legal requirement was not met, thereby hindering the ability to contest a negative finding.¹²³
- Many negative credible fear findings result from asylum officers finding there was no “nexus” between harm experienced and a protected ground under the Refugee Convention, despite the evolving nature of jurisprudence interpreting this area of the law and the difficulty it poses for even immigration judges or experienced legal counsel.¹²⁴

¹¹⁹ *Ibid* at 79 & 99; see also American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 15, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹²⁰ Brief of Refugee and Human Rights Organizations and Scholars as *Amici Curiae* in Support of Petitioners in *Castro v. U.S. Department of Homeland Security*, SCOTUS No. 16-812 at p. 16.

¹²¹ Brief of Refugee and Human Rights Organizations and Scholars as *Amici Curiae* in Support of Petitioners in *Castro v. U.S. Department of Homeland Security*, SCOTUS No. 16-812 at 17, citing Letter from Am. Immigration Lawyers Ass’n, et al., to León Rodríguez, Dir., USCIS, and Sarah Saldaña, Dir., ICE 3, Dec. 24, 2015; American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 22, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹²² Human Rights Watch, “‘You Don’t Have Rights Here’: US Border Screening and Returns of Central Americans to Risk of Serious Harm”, ISBN: 978-1-6231-32002, October 2014 at 34, <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>; American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 21, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹²³ Brief of Refugee and Human Rights Organizations and Scholars as *Amici Curiae* in Support of Petitioners in *Castro v. U.S. Department of Homeland Security*, SCOTUS No. 16-812 at p. 18. The form is reproduced in Appendix D of the Appellant’s Petition for a Writ of Certiorari in *Castro v. U.S. Department of Homeland Security*, SCOTUS No. 16-812.

¹²⁴ American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 17, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

- The process for reviewing negative credible fear determinations before an Immigration Judge does not adequately provide for access to counsel. The US government considers that there is “no right to representation prior to, or during” the review,¹²⁵ and counsel are generally prohibited from speaking or presenting legal arguments.¹²⁶ Civil society organizations have found that in practice lawyers in detention facilities are sometimes alerted to review hearings only the night before or sometimes not at all and consequently are sometimes only able to meet with clients after the Immigration Judge has upheld a negative finding.¹²⁷
- Some asylum officers appear to apply a higher standard of proof than the “significant possibility” threshold required by law. A 2014 USCIS lesson plan for asylum officers equated this standard with that of a “substantial and realistic possibility” of success: a formulation that does not appear in statutes.¹²⁸ In addition, this lesson plan did not reiterate that Congress intended for the credible fear evidentiary standard to be less stringent than that of the “well-founded fear” standard. The lesson plan also suggested that the individual must provide evidence, in effect confounding the credible fear interview with a full asylum interview.¹²⁹ Six months after the introduction of the lesson plan, the percentage of credible fear interviewees permitted the chance to apply for asylum dropped from 83 to 63 percent.¹³⁰ The UN Committee against Torture noted its concern with the revised interpretation of credible fear and urged a return to “its original less restrictive application”.¹³¹

Instead of addressing the UN Committee against Torture’s concerns, the Trump administration’s Border Enforcement Order appears to usher in a new, even more stringent approach to credible

¹²⁵ US Dept. of Justice, Executive Office for Immigration Review, *Interim Operating Policy and Procedure Memorandum 97-3* (1997), p. 10, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-3.pdf>.

¹²⁶ American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 23, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹²⁷ Brief of Refugee and Human Rights Organizations and Scholars as *Amici Curiae* in Support of Petitioners in *Castro v. U.S. Department of Homeland Security*, SCOTUS No. 16-812 at p. 18.

¹²⁸ USCIS, Asylum Div. Officer Training Course, Lesson Plan Overview: Credible Fear 15 (2014)

¹²⁹ In addition, the lesson plan refers throughout to jurisprudence, regulations, and legislative history on adjudicating full asylum claims, further blurring the lines between the two procedures.

¹³⁰ Ana Campoy, “Illegal Immigrants Seeking Asylum Face a Higher Bar,” *Wall Street Journal*, 28 September 2014, <https://online.wsj.com/articles/illegal-immigrants-seeking-asylum-face-a-higher-bar-1411945370>.

¹³¹ UN Committee against Torture, Concluding observations on the third to fifth periodic reports of United States of America, UN Doc CAT/C/USA/CO/3-5 , 20 November 2014, at para 18.

fear, as well as reasonable fear¹³² determinations, for refugees seeking protection in the United States.¹³³ The DHS Memorandum on implementing the Border Enforcement Order directs asylum officers to make a positive credible fear finding “only after the officer has considered all relevant evidence and determined, based on credible evidence, that the alien has a significant possibility of establishing eligibility for asylum.”¹³⁴ According to this memorandum, officers must also “determine the credibility of the alien’s statement made in support of his or her claim.”¹³⁵

In February 2017, the DHS also released new lesson plans to train asylum officers on credible and reasonable fear interviews that introduces concrete changes to the already flawed approach in the 2014 credible fear lesson plan. US-based immigration practitioners have expressed concern that the new lesson plans will further blur distinctions between these determinations and full asylum interviews.¹³⁶ Changes include erasing the previous guidance that “[w]hen there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination” and substituting a note that reasonable doubt about the outcome may be considered.¹³⁷ As for the evidentiary standard used by asylum officers in credible fear determinations, a 13 February 2017 memorandum from John Lafferty, Chief of the Asylum Division on the release of the lesson plans notes that:

the showing required to meet the "significant possibility" standard is higher than the "not manifestly unfounded" screening standard favored by the Office of the United Nations High Commissioner for Refugees ("UNHCR") Executive Committee. A claim that has no

¹³² Reasonable fear screenings occur when an individual is subject to expedited removal under INA § 241(a)(5) for reinstatement of a prior removal order or INA § 238(b) for removal of individuals who are not Lawful Permanent Residents and who have been convicted of an aggravated felony. Such individuals are barred from presenting an asylum claim but can apply for withholding of removal or relief under the Convention against Torture before an immigration judge if they have passed a reasonable fear interview with an asylum officer.

¹³³ Border Enforcement Order, s. 11(b) (“The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.”)

¹³⁴ Dept. of Homeland Security, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies”, 20 February 2017 at 8, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf

¹³⁵ *Ibid.*

¹³⁶ American Immigration Lawyers Association, “AILA Quicktake #190: Revised Credible and Reasonable Fear Lesson Plans”, 28 February 2017, <https://www.youtube.com/watch?v=CgVJkysse2Y> .

¹³⁷ USCIS, “Executive Summary of Changes to the Credible Fear Lesson Plan”, 13 February 2017, <http://www.aila.org/infonet/uscis-executive-summary-of-changes-to-the-credible> .

possibility, or only a minimal or mere possibility, of success, would not meet the "significant possibility" standard.¹³⁸

In addition, the lesson plans reiterate the “substantial and realistic possibility of success” formulation from the 2014 credible fear lesson plan as a “helpful articulation” of the “significant possibility” standard.¹³⁹ The lesson plans also instruct asylum officers to directly assess the credibility of assertions, instead of assessing whether there is a significant possibility in the future that the individual would be found credible.¹⁴⁰ As a result of these lesson plans, the boundaries between these interviews and full asylum hearings has been further obfuscated, in effect transforming eligibility hearings into miniature refugee hearings despite the lack of access to counsel and supporting evidence.

VI. Detention of Asylum-Seekers

The US’s immigration detention regime fails to comply with the state’s obligations under international refugee law, as well as applicable norms of international human rights law, including obligations under the International Covenant on Civil and Political Rights¹⁴¹ and norms codified in the Convention on the Rights of the Child.¹⁴² Specifically, the US resorts to detention in a punitive, disproportionate and presumptive manner, fails to uphold adequate detention conditions, and places asylum-seekers at increased risk of *refoulement* due to restricted access to counsel in detention facilities.

A. Punitive Use of Detention

The US’s use of detention for deterrence contradicts the US’s obligation to not employ immigration detention for punitive reasons. Detaining asylum-seekers in a punitive manner

¹³⁸ Memorandum from John Lafferty, Chief, Asylum Division to All Asylum Office Personnel, re: “Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans, Credible Fear of Persecution and Torture Determinations, and Reasonable Fear of Persecution and Torture Determinations” at 15, https://drive.google.com/file/d/0B_6gbFPjVDoxYOFcCzROOFZ4SVk/edit .

¹³⁹ *Ibid* at 16.

¹⁴⁰ *Ibid* at 18.

¹⁴¹ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

¹⁴² *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990). Although the US is currently the only state on earth not party to the latter instrument, the US must respect its substantive norms, which arguably represent customary international law. In addition, as a signatory to the instrument, the US is “obliged to refrain from acts which would defeat the object and purpose of [the] treaty.” See *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980) at Art 18.

violates Article 31 of the Refugee Convention's prohibition on penalizing illegal entry or presence.¹⁴³ The use of detention for deterrence purposes also violates the prohibition on arbitrary detention, as enshrined in binding international instruments,¹⁴⁴ because such practices are not predicated on assessing individual circumstances.¹⁴⁵

US officials in both current and former administrations have described the US's detention policies as deterrence measures. In 2014, former US Homeland Security Secretary Jeh C. Johnson stated that "it will now be more likely that you will be detained and sent back" to those considering crossing the border irregularly,¹⁴⁶ and the DHS has also underscored the deterrent value of detention in multiple reports.¹⁴⁷ *Reuters* reported on 4 March 2017 that the DHS is considering a proposal to separate women and children who enter the US irregularly as a deterrence measure.¹⁴⁸ Although US Homeland Security Secretary John Kelly has since distanced himself from this proposal, claiming that families will be split up at the border "only if the situation at that point in time requires it,"¹⁴⁹ the deterrent goal of other detention policies is apparent from statements from other Trump administration officials. In a speech in which current US Attorney General Jeff Sessions announced the detention of "all adults who are apprehended at the border", he cited with approval figures on recent drops in irregular crossings

¹⁴³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 1, <http://www.refworld.org/pdfid/503489533b8.pdf>.

¹⁴⁴ e.g. ICCPR, Art. 9.

¹⁴⁵ Carl Takei, Michael Tan & Joanne Lin, *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, American Civil Liberties Union, 2016 at 22, https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

¹⁴⁶ Julia Preston, "Detention Center Presented as Deterrent to Border Crossings", *New York Times*, 15 December 2014, <https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

¹⁴⁷ DWN v. ICE, No. 14-cv-583 LGS (2013), DHS Bates No. 1825, 2047, 3477-3479, 8812, cited in Detention Watch Network, "Ending the Use of Immigration Detention to Deter Migration", April 2015 at 3, n. 15, <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Detention%20as%20a%20Deterrence%20Policy%20Brief.pdf>.

¹⁴⁸ Julia Edwards Ainsley, "Exclusive: Trump administration considering separating women, children at Mexico border", *Reuters*, 4 March 2017, <http://www.reuters.com/article/us-usa-immigration-children-idUSKBN16A2ES>.

¹⁴⁹ Elise Foley, "Trump Administration Won't Routinely Separate Families At The Border After All", *Huffington Post*, 05 April 2017, http://www.huffingtonpost.com/entry/dhs-separating-families-border_us_58e50d4fe4b0f4a923b448b7.

and stated that “[f]or those that continue to seek improper and illegal entry into this country, be forewarned: This is a new era. This is the Trump era.”¹⁵⁰

B. Arbitrary and Unlawful Use of Detention

US detention practices also fail to comport with the strict constraints under international law for non-punitive detention. Under Article 31(2) of the Refugee Convention, a state may restrict the movement of refugees only when necessary.¹⁵¹ According to the UNHCR 2012 *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, detention must be used only on a case-by-case basis, or else the detention may be considered arbitrary. Detention may be considered arbitrary if government officials have not considered less intrusive or less coercive means to monitor or control the whereabouts of the detainee.¹⁵²

Various human rights reports indicate that in practice the US does not consider detention to be a last resort, but instead employs it widely and often presumptively without an individualized assessment of the need in a given case.¹⁵³ Asylum-seekers have remained in detention for extended periods of time without any form of individualized review or assessment to determine if the detention is justified.¹⁵⁴ Arriving asylum-seekers are subject to mandatory detention until they pass a credible fear test.¹⁵⁵ In theory, a 2009 directive has required Immigration and

¹⁵⁰ US Dept. of Justice, “Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”, Nogales, Arizona, 11 April 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed> .

¹⁵¹ See also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, <http://www.refworld.org/pdfid/503489533b8.pdf> (finding that detention “can only be exceptionally resorted to for a legitimate purpose”).

¹⁵² *Ibid*, Guideline 4.3.

¹⁵³ “The Math of Immigration Detention”, National Immigration Forum, 22 August 2013, <http://immigrationforum.org/blog/themathofimmigrationdetention/> ; Human Rights First, “US Detention of Asylum Seekers Seeking Protection, Finding Prison”, 2009, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>; Dominguez et al., “US Detention and Removal of Asylum Seekers: An International Human Rights Law Analysis”, Allard K. Lowenstein International Human Rights Clinic, Yale Law School at 31, https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf.

¹⁵⁴ Amnesty International USA, “Jailed Without Justice: Immigration Detention in the USA”, Amnesty International, 25 May 2009, <http://www.amnestyusa.org/research/reports/usa-jailed-without-justice?page=show>.

¹⁵⁵ Human Rights First, “US Detention of Asylum Seekers Seeking Protection, Finding Prison”, 2009 at 15, <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

Customs Enforcement officers to grant parole to asylum-seekers who have been found to have a credible fear, who manage to establish their identity and who are neither dangers to the community nor a flight risk.¹⁵⁶ However, in practice, many of these individuals' parole requests have been denied, even in cases of urgent and humanitarian requests.¹⁵⁷

The numbers of women and children in immigration detention in the US have increased significantly since 2014, when the Obama administration resorted increasingly to family detention as a deterrence measure against women and children fleeing Central America.¹⁵⁸ By spring 2015, DHS had 3,300 cribs and beds to accommodate mothers and minor children in detention.¹⁵⁹ Families are sometimes held for long periods of time, including over a year in certain cases,¹⁶⁰ contrary to international norms that generally prohibit the detention of minors.¹⁶¹ The Committee on the Rights of the Child has urged states to “expeditiously and completely cease the detention of children on the basis of their immigration status” and

¹⁵⁶ US Immigration and Customs Enforcement, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, issued 8 December 2009, effective 4 January 2010, https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf .

¹⁵⁷ Borderland Immigration Council, “Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the US-Mexico Border”, February 2017 at 20, http://media.wix.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf (this research relied on interviews in the El Paso sector with lawyers and advocates, one of whom indicated that less than 10 percent of her organization's parole requests in the prior had been granted, a much lower figure than previous years); see also US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016, at 40, <https://www.uscirf.gov/sites/default/files/Barriers%20to%20Protection.pdf> (describing how interviews conducted by the USCIRF between 2012 and 2015 also found that individuals sometimes continue to be subject to detention, in often inappropriate penal conditions, even after having been found to have a credible fear).

¹⁵⁸ *Family Detention: The unjust policy of locking up immigrant mothers with their children*, Detention Watch Network, <https://www.detentionwatchnetwork.org/issues/family-detention> .

¹⁵⁹ American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 7, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹⁶⁰ Human Rights First, “Long-Term Detention of Mothers and Children in Pennsylvania”, 15 August 2016 at 2, www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf.

¹⁶¹ In interpreting obligations under the Convention on the Rights of the Child in the immigration context, the UN Committee on the Rights of the Child has stated that “. . . unaccompanied or separated children should not, as a general rule, be detained.” See Committee on the Rights of the Child, *General Comment No. 6*, UN Doc CRC/GC/2005/6 (1 September 2005), para 61; see also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 at Guideline 9.2 <http://www.refworld.org/pdfid/503489533b8.pdf> (finding that children “should in principle not be detained at all”).

recommended that “primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s or their parents’ detention.”¹⁶²

Immigration and Customs Enforcement often splits apart family members or fails to reunite separated families, as the US has no comprehensive means of tracing family member location.¹⁶³ Policies of splitting family members apart are traumatic for the individuals concerned and contrary to international human rights norms.¹⁶⁴ The separation of family members can also have decisively detrimental impacts on the ability to put forward a successful claim for protection for both children and their parents, and can result in disparate results in applications.¹⁶⁵

The US’s immigration detention regime, already fraught with serious human rights concerns, is likely to be expanded in the coming months and years with predictably disastrous consequences for asylum-seekers. The Border Enforcement Order of 25 January 2017 calls for expanding immigration detention, constructing new detention facilities to accommodate new detainees, and terminating the practice known as “catch and release” that allows for the regular release of certain undocumented people before deportation hearings.¹⁶⁶ There are no exceptions specified

¹⁶² UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on The Rights of the Child in the Context of International Migration, 28 September 2012 at paras 72 & 78.

¹⁶³ Leigh Barrick, *Divided by Detention: Asylum-Seeking Families’ Experiences of Separation*, American Immigration Council, August 2016, https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf; Women’s Refugee Commission, Lutheran Immigration and Refugee Service & Kids in Need of Defense, “Betraying Family Values: How Immigration Policy at the United States Border is Separating Families”, 10 January 2017 at 4, <http://reliefweb.int/report/united-states-america/betraying-family-values-how-immigration-policy-united-states-border>; American Immigration Council, “The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers”, 9 May 2017 at 10-12, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

¹⁶⁴ Convention on the Rights of the Child, Art 9(1) (“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...”); see also *Tarakhel v. Switzerland*, ECHR App. No. 29217/12, 04 November 2014 at para 120 (finding that Swiss authorities should have obtained assurances from Italian authorities on family unity prior to transferring asylum-seekers).

¹⁶⁵ Women’s Refugee Commission, Lutheran Immigration and Refugee Service & Kids in Need of Defense, “Betraying Family Values: How Immigration Policy at the United States Border is Separating Families”, 10 January 2017 at 9 & 13-14.

¹⁶⁶ Border Enforcement Order, s. 5 (a) (“The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico”); s. 6 (“The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as ‘catch and release,’ whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law:); & s. 7 (“The Secretary shall

in the order for asylum-seekers. Under the order, individuals may be detained solely “on suspicion” of violating federal or state law, which includes unauthorized entry.¹⁶⁷ The Border Enforcement Order prioritizes for enforcement offences with a nexus to the southern border, such as unauthorized entry and re-entry into the US.¹⁶⁸ The DHS memo that provides guidance on implementing the Border Enforcement Order claims that detention is “the most efficient means” for enforcing immigration laws at the border prior to a final determination of whether a person should be deported or is eligible for protection.¹⁶⁹ With US Attorney General Jeff Sessions’ subsequent announcement that “we will now be detaining all adults who are apprehended at the border”, it appears that asylum-seekers at US borders will now be detained for the duration of their proceedings.¹⁷⁰

The Trump administration’s policies on detention appear to have already had a palpable impact, with lawyers and experts in non-profit organizations reporting an increase in apparently arbitrary decisions to deny parole for asylum seekers this year.¹⁷¹ An internal DHS assessment published by the *Washington Post* details some of the concrete steps the agency is taking in advance of an escalation of detention, including having already located 33,000 additional beds in detention facilities and considering proposals to accelerate the hiring of CBP officers.¹⁷²

immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law”).

¹⁶⁷ *Annotated Border Immigration Enforcement Executive Order*, National Immigrant Justice Center, 27 January 2017, s. 2(b), <https://immigrantjustice.org/research-items/annotated-border-immigration-enforcement-executive-order> .

¹⁶⁸ *Ibid* at s. 13.

¹⁶⁹ *Enforcement of the Immigration Laws to Serve the National Interest*, Dept. of Homeland Security, 20 February 2017, at 2, <https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest>.

¹⁷⁰ US Dept. of Justice, “Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”, Nogales, Arizona, 11 April 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.

¹⁷¹ Human Rights First, “Parole Denials Lead to Increased Detention Under Trump’s Executive Order”, 10 April 2017, <http://www.humanrightsfirst.org/blog/parole-denials-lead-increased-detention-under-trump-s-executive-order> .

¹⁷² David Makamura, “Trump administration moving quickly to build up nationwide deportation force” *Washington Post*, 12 April 2017, https://www.washingtonpost.com/politics/trump-administration-moving-quickly-to-build-up-nationwide-deportation-force/2017/04/12/7a7f59c2-1f87-11e7-be2a-3a1fb24d4671_story.html?hpid=hp_rhp-top-table-main_immigration-240pm%3Ahomepage%2Fstory&utm_term=.381e6d7e777b .

C. Risk of Refoulement due to Lack of Meaningful Access to Counsel in Detention

Detainees generally lack access to counsel, contrary to international standards that provide for a right to counsel.¹⁷³ Counsel often play an essential role in supporting successful claims, and a lack of legal representation places asylum-seekers at increased risk of *refoulement*. A 2015 national study found that while only 14% of those detained had counsel, 69% of detainees who were released from detention prior to a decision on the merits of their case had counsel.¹⁷⁴ In the case of respondents seeking relief from removal, those with counsel had a five and half times greater chance of receiving relief, and those with counsel had a 15 times greater chance of merely seeking it.¹⁷⁵ A report by the American Immigration Lawyers Association reported that, in a study of roughly 29,000 cases, asylum seekers with counsel generally had a ten times higher chance of success in immigration court than those without a lawyer.¹⁷⁶ There are a number of reasons behind the difficulty to retain counsel:

- The 2016 USCIRF study indicated that the location of most detention centres in remote areas made it more complicated in practice for detainees to have access to counsel and that detainees in urban areas were more likely to be represented.¹⁷⁷ A national study found that only ten percent of detainees in facilities in small cities obtain counsel.¹⁷⁸
- The regime regulating lawyer-detainee access is highly varied with each facility operator setting up its own rules. In some facilities lawyers are allowed to bring laptops or access phones, while in other facilities they cannot.¹⁷⁹ Some facilities fail to provide adequately

¹⁷³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 at Guideline 7, <http://www.refworld.org/pdfid/503489533b8.pdf>;

¹⁷⁴ Ingrid Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court”, (2015) 164 University of Penn L R 1 at 32.

¹⁷⁵ *Ibid* at 9.

¹⁷⁶ American Immigration Lawyers Association, *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States* (16 June 2016) at 15.

¹⁷⁷ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016) at 52-53.

¹⁷⁸ Ingrid Eagly and Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, University of Penn L R (2015) Vol 164 No 1 at 40.

¹⁷⁹ Human Rights First, “Lifeline on Lockdown: Increased US Detention of Asylum Seekers”, July 2016, www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown.pdf.

confidential premises for meetings with counsel.¹⁸⁰ In some cases, counsel have reportedly been outright denied access to detention facilities.¹⁸¹

- The practice of transferring detainees between different locations has also restricted the ability of counsel to keep track of and properly represent applicants.¹⁸²

While Immigration and Customs Enforcement detention standards require group presentations on legal rights to be conducted, in practice these presentations are often lacking and in some cases are not conducted at all.¹⁸³

D. Conditions in Immigration Detention

The *New York Times* recently revealed that DHS officials have indicated unofficially that the Trump administration is looking to relax various rules in contracts with jails holding immigration detainees, including no longer requiring translation services or specifying details on protocols for medical procedures.¹⁸⁴ This development is particularly alarming, given that a number of different reports from government sources and NGOs show the already poor conditions for asylum-seekers in US detention centres. As discussed below, the records show that asylum-seekers are in many cases held for prolonged periods in inadequate holding cells before being detained in prisons and prison-like conditions. Detention conditions have traumatic psychological consequences, especially for marginalized groups, and medical resources are insufficient with sometimes deadly consequences.

¹⁸⁰ Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, “A Broken System: Confidential Reports Reveal Failures in US Immigrant Detention Centres”, National Immigration Law Centre at 14, <https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf>.

¹⁸¹ Jason Buch, “Two lawyers banned from detention center: Attorneys say immigrants’ rights violated”, San Antonio Express News, 29 August 2015, <http://www.expressnews.com/news/local/article/Two-lawyers-banned-from-detention-center-6469502.php>.

¹⁸² Human Rights Watch, “Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States”, 2 December 2009, <https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states> ; Dan Canon, “A System Designed to Make People Disappear: I tried to represent an undocumented man rounded up by ICE. I couldn’t even find him”, *Slate*, 2 April 2017, http://www.slate.com/articles/news_and_politics/cover_story/2017/04/ice_detainees_enter_an_unbelievably_cruel_system_designed_to_make_them_disappear.html .

¹⁸³ Karen Tumlin, Linton Joaquin, and Ranjana Natarajan, “A Broken System: Confidential Reports Reveal Failures in US Immigrant Detention Centres”, National Immigration Law Centre at 36, <https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf>.

¹⁸⁴ Caitlyn Dickerson, “Trump Plan Would Curtail Protections for Detained Immigrants”, *New York Times*, 13 April 2017, <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html?mtrref=undefined&gwh=FDA7665AED3B58F37988CA61E0968348&gwt=pay&r=0> .

i. Prolonged Confinement in Inadequate Holding Cells

CPB Officers routinely detain individuals for prolonged periods of time in small holding cells near the southern border of the United States. These holding cells, known informally as “*hieleras*” (the Spanish word for “iceboxes” or “freezers”) usually lack beds and are generally small concrete rooms containing concrete benches.¹⁸⁵ These cells are inadequate facilities for overnight detention, and they are often overcrowded and cold, and insufficient food, water, and medical care are made available.¹⁸⁶ According to a 2013 report by Americans for Immigrant Justice, detainees described cells that were so cold that their “fingers and toes turn blue and their lips chap and split” and that contained a single sink and toilet in plain view of other detainees.¹⁸⁷ A 2014 report by the Guatemala Acupuncture and Medical Aid Project interviewed 33 families of individuals who had been held in short-term detention and found that 94 per cent of them reported being held in “too cold” or “freezing” conditions and 91 per cent reported bright lights being left on 24 hours per day.¹⁸⁸

Following media coverage of the inhumane conditions of CBP holding cells,¹⁸⁹ in 2013 separate legislation was introduced in both the US Senate and House of Representatives to provide better legal protections to those held in short-term detention.¹⁹⁰ However, these initiatives were unsuccessful. The inadequate conditions of these holding facilities have also been the subject of multiple administrative complaints and ongoing federal court litigation.¹⁹¹

¹⁸⁵ American Immigration Council, “Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection along the Southwest Border”, August 2016 at 1.

¹⁸⁶ *Ibid.*

¹⁸⁷ Americans for Immigrant Justice, “The ‘Hieleras’: A Report On Human & Civil Rights Abuses Committed by U.S. Customs and Border Protection Agency”, August 2013, http://d3n8a8pro7vhmx.cloudfront.net/aijustice/pages/391/attachments/original/1398795271/The_Hieleras_A_Report.pdf?1398795271 .

¹⁸⁸ Guatemala Acupuncture and Medical Aid Project, “Deprivation Not Deterrence”, October 2014 at 12, <http://www.guamap.net/uploads/4a9c982ea3914.pdf> .

¹⁸⁹ See e.g. Rachael Bale, “Detained border crossers may find themselves sent to ‘the freezers’”, Center for Investigative Reporting, 18 November 2013, <http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574> .

¹⁹⁰ H.R.3130 – Protect Family Values at the Border Act, CONGRESS.GOV, available at <http://1.usa.gov/1Tq7Sai> ; Rachael Bale, “Senator’s new bill would set detention standards at US border facilities”, 12 December 2013, The Center for Investigative Reporting,

¹⁹¹ See e.g. *Alba Quinonez Flores v. United States of America*, No. 1:14-cv-03166 (E.D.N.Y. Filed May 20, 2014); Law Office of R. Andrew Free, Administrative Notice of Federal Tort Claims Act Claims, 10 August 2015, <https://cbpabusestest2.files.wordpress.com/2015/09/10m-ftca-complaint-on-behalf-of-5-mothers-andrew-free.pdf>; National Immigration Project of the National Lawyers Guild, Programa de

According to CBP data analyzed by the American Immigration Council, CBP routinely detains people in these holding cells for periods far longer than its official 12-hour limit. Between 1 September 2014 and 31 August 2015, 217,485 or 67 per cent of the total of 326,728 individuals held in CBP facilities were confined in these facilities for 24 or more hours, 93,566 (29 per cent) for 48 hours or more hours, and 44,202 (14 per cent) for 72 hours or longer.¹⁹² The data revealed that in each sector an individual had been held for seven months or longer, with one individual in Laredo being held for 13 months and 13 days.¹⁹³

ii. Prison-Like Conditions of Detainees in Detention Facilities

The majority of asylum-seekers are detained in prisons or prison-like conditions, and in some cases asylum-seekers and regular domestic prisoners sleep in the same cells.¹⁹⁴ Approximately two-thirds of immigration detainees are held in a network of state and county criminal jails across the country. The “contracting out” to government prisons and private detention centres has occurred against a backdrop of a dramatic increase in the use of immigration detention since 1996 when the US introduced expedited removal.¹⁹⁵ Immigration detainees are also often made to wear prison uniforms and are subject to the wearing of restraints (shackles) during transportation.¹⁹⁶ Even after an asylum seeker passes a credible fear interview, he or she remains in prison-like conditions. Where children are involved in such detention conditions, it is a violation of international norms prioritizing the best interests of the child, as well as the 1997 *Flores* settlement agreement which imposes an obligation on US immigration officials to house children in the “least restrictive” setting in consideration of their age and any special needs.¹⁹⁷

Defensa e Incidencia Binacional & the American Civil Liberties Union, Letter to John Roth, Inspector General of Homeland Security & Megan Mack, Officer for Civil Rights and Civil Liberties, Homeland Security Re: Extreme temperatures in short-term U.S. Customs and Border Patrol detention facilities along the U.S. – Mexico border, 2 February 2016, https://cbpabusestest2.files.wordpress.com/2016/02/icebox_complaint_-2_feb_2016.pdf; *John Doe and Jane Roe v. United States*, 3:16-cv-856 (Mid. Dis. Nash. Filed May 12, 2016)

¹⁹² American Immigration Council, “Detained Beyond the Limit: Prolonged Confinement by U.S. Customs and Border Protection along the Southwest Border”, August 2016 at 5.

¹⁹³ *Ibid* at 10.

¹⁹⁴ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016) at 92-95.

¹⁹⁵ *Amnesty International USA*, “Jailed Without Justice: Immigration Detention in the USA”, Amnesty International, 25 March 2009 at 3, <http://www.amnestyusa.org/research/reports/usa-jailed-without-justice>.

¹⁹⁶ *Ibid* at 3 & 39.

¹⁹⁷ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016) at 60.

Even when detainees are housed in what are not in fact prisons, the detention centres that have been set up by Immigration and Customs Enforcement still retain a prison-like quality. A 2016 study by the U.S Commission on International Religious Freedom noted that Immigration and Customs Enforcement relied on correctional incarceration standards to detain asylum seekers.¹⁹⁸ The authors of this report found that all adult detention facilities had perimeters secured with razor wire and 92% of the facilities had searches of living quarters.¹⁹⁹ The USCIRF subsequently noted its concern that the:

vast majority of asylum seekers in Expedited Removal continue to be detained in immigrant detention centers with high degrees of external and internal security, no freedom of movement, and no privacy. This contradicts not only USCIRF's 2005 recommendations but ICE's own 2009 policies that asylum seekers should be held in civil detention facilities which are externally secure but allow for internal freedom of movement, broad-based and accessible indoor and outdoor recreation opportunities, contact visits, privacy, and the ability to wear non-institutional clothing.²⁰⁰

The Office of Detention Policy and Planning, the body responsible for developing regulations on immigration detention, is set to be closed, suggesting that the detention of migrants and refugees will be officially subject to the standards of criminal inmates.²⁰¹ In reaction to this closure, Kevin Landy, the director of this office under the Obama administration, reportedly stated that “[a] decision to simultaneously abandon detention standards could have disastrous consequences for the health and safety of these individuals.”²⁰²

iii. The Psychological Impacts of Detention

A number of reports document the psychological impact of immigration detention. Many of the detainees have overcome severe hardship to make their way to the United States, only to be subjected to an experience that can force them to relive their trauma. According to the USCIRF, the prolonged detention of torture victims can cause “dangerous and physically damaging levels of stress, depression and suicide, and post-traumatic stress disorder.” The USCIRF observed that some children experienced depression, PTSD, bed wetting, weight loss and developmental

¹⁹⁸ *Ibid* at 39.

¹⁹⁹ *Ibid* at 40.

²⁰⁰ *Ibid* at 40.

²⁰¹ Caitlyn Dickerson, “Trump Plan Would Curtail Protections for Detained Immigrants”, *New York Times*, 13 April 2017, <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html?mtrref=undefined&gwh=FDA7665AED3B58F37988CA61E0968348&gwt=pay&r=0> ..

²⁰² *Ibid*.

regressions stemming from their detention.²⁰³ A research mission from Human Rights First to the Berks County Residential Center, one of the facilities the US uses to detain families, found that “prolonged detention has had serious negative consequences for children, including suicidal gestures and ideation, anxiety, sleeplessness, behavioral regressions, and lack of appetite” and that inadequate health and mental care had been made available to children and their mothers.²⁰⁴ The psychological impact on mothers is also significant as it can exacerbate PTSD from trauma they suffered in their home country, and it can obstruct their ability to raise their children.²⁰⁵ Detention conditions are particularly insensitive and dangerous to members of the LGBT community. LGBT persons are at special risk of abuse or harassment by other detainees, with evidence of a lack of necessary care by detention officials to ensure their safety.²⁰⁶

Civil society organizations have reported widespread sexual violence in immigration detention.²⁰⁷ These abuses have been met with virtual impunity. According to a complaint filed by Community Initiatives for Visiting Immigrants in Confinement on behalf of eight people who experienced or witnessed sexual abuse in immigration detention, between January 2010 and July 2016 the DHS received 33,126 complaints of sexual and physical abuse against its component agencies²⁰⁸ but only opened investigations into 247 of them (i.e. only .07 per cent).²⁰⁹

²⁰³ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016 at 61, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

²⁰⁴ Human Rights First, “Long-Term Detention of Mothers and Children in Pennsylvania”, 15 August 2016 at 1, www.humanrightsfirst.org/sites/default/files/HRF-Long-Term-Detention-Brief.pdf.

²⁰⁵ US Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 2016 at 61-62, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

²⁰⁶ Centre for American Progress, “Living in Dual Shadows: LGBT Undocumented Immigrants”, March 2013 at 19, <https://www.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-5.pdf>.

²⁰⁷ Mexican American Legal Defense and Education Fund. “RE: Complaints Regarding Sexual Abuse of Women in DHS Custody at Karnes County Residential Center”, September 2014, http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city/; Human Rights Watch. “‘Do You See How Much I’m Suffering Here?’ Abuse against Transgender Women in US Immigration Detention”, March 2016, https://www.hrw.org/sites/default/files/report_pdf/us0316_web.pdf.

²⁰⁸ These include ICE, Citizenship & Immigration Services, CBP, Border Patrol, Transportation Security Administration, Coast Guard, Federal Emergency Management Agency, Federal Protective Service, and the Secret Service.

²⁰⁹ Community Initiatives for Visiting Immigrants in Confinement, Letter to Thomas Horman, Director of U.S. Immigration and Customs Enforcement et. al Re: Sexual Abuse, Assault, and Harassment in U.S. Immigration Detention Facilities, 11 April 2017, http://www.endisolation.org/wp-content/uploads/2017/04/CIVIC_SexualAssault_Complaint.pdf

Immigration and Customs Enforcement was the component agency that received the largest number of sexual abuse complaints. Over 97 percent of the between 1,016 and 2,573²¹⁰ complaints received during this time period from people in DHS detention were not investigated.²¹¹ The five immigration detention facilities that receive the most sexual and physical assault complaints are all privately-run.²¹²

The resort to solitary confinement or isolated detention in US detention facilities induces or exacerbates trauma for detainees. The *New York Times* reported in 2013 that at any given day, about 300 immigrants are held in solitary confinement, with nearly half of them being isolated for 15 days or more.²¹³ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment considers that “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances.”²¹⁴

iv. Inadequate Medical Care

Reports show that the medical infrastructure of Immigration and Customs Enforcement (ICE) or ICE-contracted detention facilities is often inadequate and puts the lives of detainees at serious risk, especially if they have pre-existing or chronic conditions. A 2016 report from the American Civil Liberties Union (ACLU), the Detention Watch Network, and the National Immigrant Justice Center examined egregious violations of ICE’s medical standards that the Office of Detention Oversight had indicated to be an important factor in the deaths of eight detainees from 2010 to 2012. In one incident, Amra Miletic died in 2011 from complications from chronic bowel inflammation and heart arrhythmia after two months of rectal bleeding and other symptoms while detained in the Weber County Correctional Facility in Utah. She did not see a physician for 37

²¹⁰ This statistical range reflects flaws in data collection. The Office of the Inspector General (OIG) received 1,016 reports of sexual abuse or assault from 28 May 2014 to 12 July 2016. The OIG did not use the category “Detainee reported sexual abuse/assault” prior to 28 May 2014. However, an additional 1,557 complaints earlier complaints were submitted against ICE and CBP under the categories “coerced sexual contact,” “sexual harassment,” and “physical or sexual abuse”, leading the authors of the complaint to conclude that “it is plausible that there were a total of 2,573 sexual abuse or assault complaints from people in detention between January 2010 and July 2016”. *Ibid* at 6.

²¹¹ *Ibid* at 5.

²¹² *Ibid* at 7.

²¹³ Carl Takei, “New limits announced on ICE's solitary confinement of immigrants”, American Civil Liberties Union, 6 September 2013, <https://www.aclu.org/blog/new-limits-announced-ices-solitary-confinement-immigrants> .

²¹⁴ *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/66/268, 5 August 2011 at para 76.

days and lab tests were only ordered 11 days before her death.²¹⁵ In another case, Pablo Garcida-Conte, died in 2011 from cardiomyopathy, a treatable heart disease, after 142 days in detention during which he reported health problems including vomiting after each meal. The Eloy Detention Center, a Corrections Corporation of America-run private detention facility in Arizona, did not provide him with an interpreter during this time. The report notes that “Mr. Gracida’s long list of sick call requests reads as a desperate, repeated cry for help that was ignored until it was too late.”²¹⁶

Six out of eight of the deaths examined in the ACLU/Detention Watch Network/National Immigration Justice Center joint report occurred in private detention facilities, which advocacy organizations and government agencies have often criticized for various failings including inadequate medical care and violence.²¹⁷ The report found that despite the findings in the Office of Detention Oversight’s death reviews of significant violations of ICE medical standards as contributing factors to fatalities, in ICE inspections occurring before and following would refuse to recognize or would dismiss the findings of the reviews.²¹⁸ The authors of the report made a number of detailed recommendations to reduce immigration detention, improve medical care in detention, and ensure meaningful oversight through revamped and more transparent inspection processes.²¹⁹

A 2016 Human Rights Watch report relied on two medical experts to analyze the results of the ICE Office of Detention Oversight’s review of 18 out of 31 detainee deaths that ICE had acknowledged as having occurred after May 2012. In seven of the 18 deaths surveyed, the experts concluded that substandard care likely contributed to their deaths. These experts pointed to substandard care in detention facilities, including failure to follow up on symptoms that required attention, medical personnel practicing beyond the scope of their qualifications, and slow emergency responses.²²⁰ Detention centres also often lack the necessary services for HIV-

²¹⁵ American Civil Liberties Union, the Detention Watch Network & the National Immigrant Justice Center, “Fatal Neglect: How ICE Ignores Deaths in Detention”, February 2016 at 8-9, <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention> .

²¹⁶ *Ibid* at 10.

²¹⁷ See e.g. ACLU, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, Jun. 2014, available at: <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>; Jerry Mitchell, *Private Prisons Face Suits, Federal Probes*, The Clarion-Ledger, Oct. 15, 2014, available at: <http://www.clarionledger.com/story/news/2014/10/11/private-prisonsface-suits-federal-probes/17122977> .

²¹⁸ American Civil Liberties Union, the Detention Watch Network & the National Immigrant Justice Center, “Fatal Neglect: How ICE Ignores Deaths in Detention”, February 2016 at 3 & 5-6, <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention> .

²¹⁹ *Ibid* at 22.

²²⁰ Human Rights Watch, “US: Deaths in Immigration Detention: Newly Released Records Suggest Dangerous Lapses in Medical Care”, 26 July 2016, <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>

positive detainees with numerous cases showing that HIV-positive detainees have been denied life-saving treatments.²²¹ Medical conditions of asylum-seekers, which are often aggravated in detention, can harm the ability to focus and clearly express key parts of their protection claims.²²²

The inadequate medical care in US detention facilities is likely to worsen in view of the reported plan to replace specific standards in jail contracts with more open-ended conditions. For example, according to DHS officials interviewed by the *New York Times*, the current rule that detainees be given medical evaluations within 24 hours of first being detained is to be replaced by a general obligation to have protocols on medical care, and although new jail contracts will necessitate having policies on suicide prevention and solitary confinement, the contents of the policies will no longer be stipulated.²²³

VII. Operation Streamline and the Criminalization of Asylum-Seekers

Current US practices of prosecuting individuals who have irregularly entered the US fail to contain adequate safeguards to ensure asylum-seekers are exempted, with the result that asylum-seekers have been prosecuted for crimes related to their irregular entry.²²⁴ This practice is inconsistent with Article 31 of the Refugee Convention, which prohibits imposing on refugees penalties for irregular entry or presence. With the Trump administration's push for increased criminalization of irregular migration, more asylum-seekers are likely to be placed at risk of prosecution. Already, current US Attorney General Jeff Sessions announced that federal prosecutors now must consider a number of offences for prosecution

Operation Streamline is a collaboration between the Department of Homeland Security and the Department of Justice to prosecute migrants crossing the Southern US border irregularly. According to 2011 written testimony by Michael J Fisher, former chief of US Border Patrol, the Streamline initiative is part of a "Consequence Delivery System" to deter irregular border

²²¹ Center for American Progress, "Living in Dual Shadows: LGBT Undocumented Immigrants", March 2013 at 21-22, <https://www.americanprogress.org/wp-content/uploads/2013/03/LGBTUndocumentedReport-5.pdf>.

²²² American Immigration Council, "The Perils of Expedited Removal: How Fast-Track Deportations Jeopardize Asylum Seekers", 9 May 2017 at 13, <https://www.americanimmigrationcouncil.org/research/expedited-removal-asylum-seekers>.

²²³ Caitlyn Dickerson, "Trump Plan Would Curtail Protections for Detained Immigrants", *New York Times*, 13 April 2017, <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html?mtrref=undefined&gwh=FDA7665AED3B58F37988CA61E0968348&gwt=pay&r=0> .

²²⁴ For case studies, see Emily Puhl, "Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol", (2015) 25 Berkeley La Raza L J 87 at 88-90.

crossings.²²⁵ In the same testimony, Fisher adds that with regards to Operation Streamline, “consequences are imposed through consistent application of criminal sanctions to reduce illicit cross-border activity.”²²⁶ The operation has affected hundreds of thousands of people, with more than 250,000 people being referred to prosecution since the program’s inception.²²⁷

The former US Attorney General, Eric Holder, ordered U.S attorneys to no longer include first time border crossers in prosecutions. However, the current Attorney General under the Trump administration, Jeff Sessions, has voiced his admiration for the program and laments what he called the previous administration’s “undermining” of it.²²⁸ Without specifying measures to ensure asylum-seekers will not be penalized, in an 11 April 2017 speech, Sessions announced that federal prosecutors now must consider a number of offences for prosecution, including:

- “unlawful” entry or re-entry;
- document fraud and identity theft; and
- transporting or harbouring non-citizens.²²⁹

Although not specifically geared towards asylum-seekers, Operation Streamline does not contain adequate safeguards to ensure that asylum-seekers are not subjected to prosecution and *refoulement* prior to being afforded the chance to claim protection. A May 15, 2015 report from the Office of the Inspector General of Homeland Security stated the following:

Border Patrol does not have guidance on whether to refer to Streamline prosecution aliens who express fear of persecution or fear of return to their home countries. As a result, Border Patrol agents sometimes use Streamline to refer aliens expressing such fear to DOJ for prosecution. Using Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968. Border Patrol does not have guidance on whether to refer to Streamline prosecution aliens who express fear of persecution or fear of return to their home countries. As a result, Border Patrol agents sometimes use Streamline to refer aliens

²²⁵ Michael J Fisher, U.S Customs and Border Protection, House Committee on Homeland Security (October 2011): <https://www.dhs.gov/news/2011/10/04/written-testimony-cbp-house-homeland-security-subcommittee-border-and-maritime>

²²⁶ *Ibid.*

²²⁷ Office of Inspector General, “Streamline: Measuring its Effect on Illegal Border Crossing”, May 2015, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf

²²⁸ CNN Transcripts, “Durbin and Sessions Disagree on Immigration”, 10 January 2017, <http://www.cnn.com/TRANSCRIPTS/170110/wolf.01.html>

²²⁹ US Dept. of Justice, “Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”, Nogalez, Arizona, 11 April 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.

expressing such fear to DOJ for prosecution. Using Streamline to refer aliens expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.²³⁰

The same report indicated that CBP Officials had estimated that a guidance including information on claims of fear of persecution would be produced by 30 September 2015.²³¹ However, it appears that no such guidance has been made publically available to date. Once referred for prosecution, there are no guarantees against prosecution of asylum-seekers, and current procedures in fact preclude federal courts from directly considering whether defendants should avoid prosecution because of a fear of return.²³² Because the United States has not incorporated asylum claims as a direct defence to immigration offences, asylum-seekers can be charged and convicted for irregular entry or related offences, such as “[f]raud and misuse of visas, permits, and other documents.”²³³ The recognized criminal law defence of duress fails to protect asylum-seekers because evidentiary, procedural, and cultural barriers preclude asylum claims from forming a consistent basis for successful defences of duress at trial.²³⁴

The lack of adequate safeguards to ensure that asylum-seekers are not caught up in Operation Streamline are particularly troubling in view of the procedurally unfair nature of prosecutions under the program, which often rely upon mass prosecutions and sentencing hearings. Human Rights Watch reported in 2013 that defendants may appear in court in as little as one day after their apprehension and can often be prosecuted in groups of more than 100.²³⁵ Although this group hearing style has been declared by the Ninth Circuit Court of Appeal in 2009 to violate US Federal Criminal Procedure, the ruling is not binding outside of the circuit.²³⁶ In such proceedings, defendants are often encouraged to accept a plea bargain by their own defence

²³⁰ Homeland Security, Office of the Inspector General, “Streamline: Measuring Its Effect on Illegal Border Crossing”, OIG-1595, 15 May 2015, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf at 16.

²³¹ *Ibid* at 18.

²³² Emily Puhl, “Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol”, (2015) 25 Berkeley La Raza L J 87 at 101.

²³³ *Ibid* at 99 & 101.

²³⁴ *Ibid* at 101-104.

²³⁵ Human Rights Watch, “Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions”, May 2013 at 36, <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions> .

²³⁶ The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, Berkley Law School, “Assembly Line Justice: a Review of Operation Streamline”, January 2010, at 14, https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf

attorneys,²³⁷ and thus significant defences are often not raised.²³⁸ Furthermore, defendants may see their appointed lawyer for as little as 5-10 minutes prior to a hearing. Prosecutors in Streamline proceedings are not regular US attorneys but are rather ICE or Customs and Border Protection attorneys who have been deputized as “special assistant US attorneys.”²³⁹ All of this adds to an unfair process interested in speed and not justice. One magistrate judge who has presided over 17,000 cases describes his role as “a factory putting out a mold.”²⁴⁰ This system truncates into a single day what would otherwise be federal court cases lasting months.²⁴¹

President Trump’s executive orders lay the groundwork for escalating the kind of punitive approach to immigration enforcement exemplified by Operation Streamline. The Interior Enforcement Order orders the development and implementation of “a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States.”²⁴² The Border Enforcement Order also resurrects the Secure Communities program that allows police officers to be deputized to enforce immigration laws, and the DHS Memorandum on implementing this order calls upon the Director of ICE and the Commissioner of CBP “to engage immediately with all willing and qualified law enforcement jurisdictions” in order to enter into enforcement agreements with the DHS.²⁴³ The Memorandum also calls for the “the proper enforcement of our immigration laws against any individual who-directly or indirectly facilitates the illegal smuggling or trafficking of an alien child into the United States.”²⁴⁴ This policy may have a chilling effect on individuals who bring their children to the US to seek asylum and may discourage their parents from claiming asylum themselves.

²³⁷ The Center for Latin American Studies, University of Arizona, “In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security” at 29:

https://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013print.pdf

²³⁸ Joshua Partlow, “Under Operation Streamline, fast-track proceedings for illegal immigrants” *Washington Post*, February 2014, https://www.washingtonpost.com/world/the_americas/under-operation-streamline-fast-track-proceedings-for-illegal-immigrants/2014/02/10/87529d24-919d-11e3-97d3-f7da321f6f33_story.html?utm_term=.6d5a2803c52c

²³⁹ Human Rights Watch, “Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions”, May 2013 at 38, <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions> .

²⁴⁰ *Ibid* at 35

²⁴¹ *Ibid* at 37.

²⁴² Interior Enforcement Order at s. 11.

²⁴³ Dept. of Homeland Security, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies”, 20 February 2017 at 4, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf

²⁴⁴ *Ibid* at 11.

VIII. Protection Gaps for Gender-Based Persecution Claims:

The US's approach to gender-based persecution claims fails to consistently provide protection to female asylum-seekers with a well-founded fear of persecution, as required under the Refugee Convention. In 2007, Phelan J considered that the considerable uncertainty in US law surrounding gender-based persecution claims placed individuals at a real risk of *refoulement*.²⁴⁵ US law has subsequently undergone a positive development with the rendering of the 2014 Board of Immigration Appeals decision of *Matter of A-R-C-G-*, which recognized that women escaping domestic violence could potentially qualify for refugee status due to persecution on the ground of a particular social group.²⁴⁶ However, the decision has not fully rectified protection gaps for asylum-seekers with gender-based claims, and subsequent inconsistent jurisprudence has indicated that the decision has failed to provide adequate guidance to immigration judges.²⁴⁷

The decision's narrow holding is often construed to be limited to married women, and the decision failed to alter the high evidentiary standards and confusing legal test applied by the US for establishing a particular social group within the meaning of the Refugee Convention.²⁴⁸ As summarized in the decision, under the Board of Immigration Appeals's test, particular social groups must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.²⁴⁹ While the Board of Immigration Appeals recognized in this decision that "married women in Guatemala who are unable to leave their relationship" constituted a particular social group, this classification does not necessarily extend to non-married women, and some subsequent jurisprudence has failed to grant protection in cases where women were in long-term relationships, had children, or even represented themselves to be married within their communities in keeping with certain cultural norms.²⁵⁰ In addition, assessing whether a woman is "unable to leave" a relationship has proven confusing, leading to inconsistent outcomes in subsequent decisions.²⁵¹

Matter of A-R-C-G- failed to rectify other problematic aspects of the US treatment of gender-based claims. The decision failed to elucidate how women should demonstrate that their membership in the particular social group was the motivation for the persecutor, and subsequent

²⁴⁵ *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 FCR 606 at paras 205-206.

²⁴⁶ 26 I&N Dec. 388 (BIA 2014).

²⁴⁷ Blaine Bookey, "Gender-based Asylum Post-*Matter of A-R-C-G-*: Evolving standards and Fair application of the law" 22 *Southwestern J Int'l L* 1 at 19.

²⁴⁸ *Ibid* at 9.

²⁴⁹ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) at 392.

²⁵⁰ Blaine Bookey, "Gender-based Asylum Post-*Matter of A-R-C-G-*: Evolving standards and Fair application of the law" 22 *Southwestern J Int'l L* 1 at 14.

²⁵¹ *Ibid* at 14-15.

decisions have proven inconsistent in this regard.²⁵² Certain US immigration judges have adopted strict criteria for meeting the “unwilling or unable” test for state protection, which must be met in most gender-based claims, which usually involve private actors. For example, certain judges have relied on the successful issuance of protective orders to find that a government was willing and able to protect women, despite their having been repeated and unpunished violations of the orders.²⁵³

IX. Inconsistent Adjudication of Claims and “Asylum-Free Zones”

Multiple empirical studies have documented that rates of success for similar asylum applications vary widely among US immigration judges.²⁵⁴ Such significant variation has led the authors of one study to liken the US asylum process to a “Refugee Roulette”, whereby asylum-seekers’ chances of success hinge in large measure on which asylum officer or immigration judge has been assigned to the case.²⁵⁵

The US asylum system also suffers from alarming regional variations in acceptance rates with certain areas having even come to be described as “asylum-free zones” in reference to the almost insurmountable odds against successful asylum applications. Low rates of success in certain regions point to significant failings in the US refugee protection system and may be an indicator that the US is not a safe country and is placing individuals at risk of *refoulement*.²⁵⁶ In

²⁵² *Ibid* at 10.

²⁵³ *Ibid* at 17-18.

²⁵⁴ Transactional Records Access Clearinghouse, *Immigration Judges: Asylum Seekers and the Role of the Immigration Court*, Syracuse University, July 31, 2006, <http://trac.syr.edu/immigration/reports/160/>; Transactional Records Access Clearinghouse, *Asylum Disparities Persist, Regardless of Court Location and Nationality*, Syracuse University, September 24, 2007, <http://trac.syr.edu/immigration/reports/183/>; Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, (2007) 60 Stan. L. Rev. 295 Transactional Records Access Clearinghouse, *Immigration Courts: Still A Troubled Institution*, Syracuse University, June 30, 2009, <http://trac.syr.edu/immigration/reports/210/>; Transactional Records Access Clearinghouse, *The Persistence of Disparity: Did Recent Reforms Help?*, Syracuse University, September 2, 2010, <http://trac.syr.edu/immigration/reports/240/>.

²⁵⁵ Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, (2007) 60 Stan. L. Rev. 295 at 373.

²⁵⁶ The Grand Chamber of the European Court of Human Rights has taken note of statistically low chances of success of claims for protection in deciding the safety of third countries. See *M.S.S. v Belgium and Greece*, Grand Chamber, ECHR App No. 30696/09, 21 January 2011, paras 126 & 313 (wherein the Court noted that the UNHCR had found that for 2008 in Greece only .04 per cent of decisions on refugee status and .06 per cent of decisions for humanitarian reasons or subsidiary protection were positive. The Court considered that these statistics “tend here to strengthen the applicant’s argument concerning his loss of faith in the asylum procedure”).

Houston, Dallas, Charlotte, and Las Vegas asylum-seekers are denied asylum at rates far exceeding the 52% average country-wide denial rate.²⁵⁷ In 2015, Atlanta immigration judges denied an astonishing 98 per cent of asylum applications, and in Houston and Dallas, 91 per cent of asylum applications were denied that year.²⁵⁸ In many places, this trend towards rejecting asylum applications has grown steadily and considerably in recent years. For example, approval rates of asylum applications in the Charlotte Immigration Court have dropped from 29 per cent in 2012 to 18 per cent in 2013, 16 per cent in 2014 and 13 per cent in 2015.²⁵⁹ Refugee advocates in the United States have pointed to a number of potential contributing factors behind the emergence of “asylum-free zones”, including restrictive “subregulatory” rules, antagonistic and abusive behaviour by judges fostered by inadequate federal oversight, pressures from high volume of case work, and a wariness of counsel to represent clients in areas where judges appear hostile to asylum claims.²⁶⁰

X. Conclusion

As outlined in this submission, the deficiencies in the US’s refugee protection system expose asylum-seekers to a real risk of *refoulement* and to other rights abuses. The US’s systemic violations of international norms on the protection of asylum-seekers, including provisions of the

²⁵⁷ Jeanne Atkinson and Michelle Mendez, Catholic Legal Immigration Network, Inc. et. al., Submission presented to the Inter-American Commission on Human Rights for a special hearing on the human rights of asylum seekers in the US, https://cgrs.uchastings.edu/sites/default/files/Human%20Rights%20of%20Asylum%20Seekers%20in%20US%20%5bPetitioners%5d_1.pdf .

²⁵⁸ Office of Planning, Analysis, & Statistics, FY 2015 Statistics Yearbook, Prepared April 2016, K2, <https://www.justice.gov/eoir/page/file/fysb15/download> ; Elise Foley, “Here’s Why Atlanta Is One Of The Worst Places To Be An Undocumented Immigrant”, *Huffington Post*, 25 May 2016, http://www.huffingtonpost.com/entry/deportation-raids-immigration-courts_us_574378d9e4b0613b512b0f37; Ted Hesson, “Why It’s Almost Impossible to Get Asylum in Atlanta”, *Vice News*, 8 June 2016, https://www.vice.com/en_us/article/why-its-almost-impossible-to-get-asylum-in-atlanta .

²⁵⁹ *Ibid* at 9.

²⁶⁰ Jacqueline Stevens, *Lawless Courts: Immigration judges who flagrantly disregard the law are sheltered by a secretive system*, 20 October 2010, <https://www.thenation.com/article/lawless-courts/> ; Jeanne Atkinson and Michelle Mendez, Catholic Legal Immigration Network, Inc. et. al., Submission presented to the Inter-American Commission on Human Rights for a special hearing on the human rights of asylum seekers in the US, 2 December 2016 at 7-10, https://cgrs.uchastings.edu/sites/default/files/Human%20Rights%20of%20Asylum%20Seekers%20in%20US%20%5bPetitioners%5d_1.pdf ; Letter from Professor Hallie Ludsin of Emory Law School; Lisa Graybill, Deputy Director of the Southern Poverty Law Center & Eunice Cho, Staff Attorney of the Southern Poverty Law Center to Juan P. Osuna, Director of the Executive Office for Immigration Review, US Dept. of Justice re: Observations of Atlanta Immigration Court, 2 March 2017 at 7, https://www.splcenter.org/sites/default/files/2017-atl_complaint_letter_final.pdf

Refugee Convention, require the Government of Canada to immediately suspend operation of the STCA and consider its abrogation. Although certain significant protection gaps in the US's asylum system have existed for years, recent policies championed by the Trump administration make it more urgent than ever for Canada to take action and end the return of asylum-seekers to US authorities.

The serious risks to which the STCA exposes refugees who cross into Canada should further compel Canada to end transfers of asylum-seekers to US authorities for humanitarian and public policy reasons. The ongoing operation of the STCA places asylum-seekers in harm's way by forcing them to cross irregularly into Canada to avoid the agreement's application. In addition, the STCA is encouraging exploitation by smugglers and contributing to a hostile media narrative that erodes public support for refugee protection. At a time of growing support for political movements hostile to refugees and immigration in North America and globally, Canada should assume a principled stance and follow through on Prime Minister Trudeau's bold promise to welcome "those fleeing persecution, terror & war."²⁶¹

²⁶¹ Twitter, @JustinTrudeau, 28 January 2017, <https://twitter.com/justintrudeau/status/825438460265762816?lang=en> ("To those fleeing persecution, terror & war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada")