



How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources

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Executive Summary

Seeking asylum is a human right, enshrined in the Universal Declaration of Human Rights. The 1951 Convention relating to the Status of Refugees (“Refugee Convention”) and its 1967 Protocol relating to the Status of Refugees (“1967 Protocol”) prohibit the United States from returning refugees to persecution, and the 1980 Refugee Act set up a formal process for applying for asylum in the United States. However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a barrage of new barriers to asylum. These impediments have blocked many refugees from accessing asylum in the United States and inserted additional layers of technicalities, screening, and processing, undermining the effectiveness of the US asylum system.

The barriers imposed by IIRIRA are significant. They include a filing deadline on asylum applications, which prevents genuine refugees from receiving asylum if they cannot prove they have filed the application within one year of arriving in the United States. IIRIRA also established summary deportation procedures, including “expedited removal” and “reinstatement of removal,” which block asylum seekers from even applying for asylum or accessing an immigration court removal hearing, unless they first pass through a screening process. Finally, IIRIRA imposed “mandatory detention” on certain immigrants, including asylum seekers who are placed in expedited removal proceedings upon their arrival at a US port of entry.

Each of these provisions imposed new processes and procedures that have contributed to an increasingly ineffective immigration system. The current backlog in the immigration courts has reached a record high, surpassing

half a million cases, while the backlog of affirmative asylum cases before the Asylum Division of US Citizenship and Immigration Services (USCIS) has increased by a factor of six in just three years. Backlogs, which lead to long delays in adjudication, undermine system integrity as bona fide asylum seekers wait for years in legal limbo — some with families waiting abroad in dangerous and life-threatening situations — and individuals without meritorious claims may be encouraged to file applications to receive a work permit during the lengthy waiting period.

Twenty years later, as the world faces the largest global refugee crisis since World War II, the asylum barriers injected into the US system under IIRIRA have proven harmful to refugees, and detrimental to the US asylum system. This paper highlights recent research, litigation, and advocacy efforts that have further brought to light the rights violations and systemic inefficiencies generated by IIRIRA. It concludes with a series of recommendations, calling on the US government to eliminate these counterproductive barriers and to take steps to assure access to asylum.

I. IIRIRA has Undermined US Protection of Refugees and US Treaty Obligations

The Refugee Convention prohibits countries from returning refugees to places where their “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (the principle of *non-refoulement*), and bars countries from penalizing refugees who enter a country illegally in search of protection. The Convention also details the rights that countries should provide to refugees. When the United States chose to accede to the Convention’s Protocol relating to the Status of Refugees, it committed to comply with the substantive requirements of the 1951 Refugee Convention.¹ Yet various provisions of IIRIRA have led the United States to deport refugees at risk of persecution and to penalize them due to their manner of entry. Moreover, IIRIRA’s harsh detention policies and efforts to block access to immigration court hearings violate US legal obligations under the International Covenant on Civil and Political Rights (ICCPR). This section describes how three major changes to the US asylum and immigration system imposed by IIRIRA — the asylum filing deadline, the screening process used in summary removal proceedings, and the use of so-called “mandatory detention” — undermine both refugees’ access to protection in the United States and US treaty obligations.

A. Filing Deadline

The filing deadline is a procedural hurdle that can bar refugees — who by definition have suffered persecution or have well-founded fears of persecution if returned to their countries — from being eligible to access the asylum adjudication process in the United States if, subject to some exceptions, they do not file an application for asylum within

¹ Convention relating to the Status of Refugees, IV(B), arts. 31, 33, July 28, 1951, 189 U.N.T.S. 150.

one year of their last arrival in the United States. While the deadline was initially viewed by its proponents as a tool for weeding out fraudulent asylum cases, the US asylum and immigration system has many tools that are better tailored to identify and deny relief to fraudulent cases.² Indeed, the one-year deadline has failed to effectively identify fraud and has in fact served to block or delay protection to many legitimate asylum seekers.

Article 33 of the Refugee Convention prohibits the return of refugees to persecution, and Article 34 calls on signatories to facilitate the assimilation and naturalization of refugees. The UN High Commissioner for Refugees (UNHCR) Executive Committee, of which the United States is a member, has stated that the failure to comply with technical requirements such as filing deadlines “should not lead to an asylum request being excluded from consideration” (UNHCR 1979). In fact, António Guterres, former UN High Commissioner for Refugees, speaking at a March 2010 event marking the 30th anniversary of the US Refugee Act of 1980, described the filing deadline as “diverg[ing] from international standards” and noted that it “makes it more difficult for many asylum seekers to establish their need for protection” (Guterres 2010).

The deadline harms a range of refugees, who often have good reasons for not applying for asylum within one year of their arrival. Many refugees struggle to survive after arriving in this country, many do not speak English, and most have little to no familiarity with the complexities of the US immigration system. Some refugees do not know that they may be eligible for asylum status, and given the substantial gaps in legal representation for indigent asylum seekers, many cannot find legal representation to assist them with their applications (Human Rights First 2010; Pistone and Schrag 2001). Refugees who suffer additional challenges, such as social stigmas and fears of raising incidents of rape or persecution due to sexual or gender identity, often face additional difficulties accessing asylum due to the filing deadline bar. And some are not even aware that persecution for sexual orientation or gender identity can be a basis for asylum (Neilson and Morris 2005).

In a 2010 report, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency,” Human Rights First found that the filing deadline has barred refugees who face religious, political, and other forms of persecution from receiving asylum in the United States (Human Rights First 2010). Among these refugees were a Chinese woman who faced persecution due to her help to North Korean refugees, an Eritrean woman tortured due to her Christian religion, and a gay man tortured in Peru. An academic analysis of US Department of Homeland Security (DHS) data, published in 2010, found that the filing deadline prevented DHS from granting 15,000 asylum applications, corresponding to over 21,000 refugees, between 1998 and 2009 alone (Schrag et al. 2010, 651, 753-54). More recent figures from the USCIS Asylum Office indicate that 4,221 cases were referred by the Asylum Office to the immigration courts between January and December 2016 alone.³

2 See Acer (2015) on providing a list of mechanisms in the US asylum and immigration systems for identifying potential fraud and ensuring the integrity of the system, including for example mandatory biographical checks, mandatory biometric checks, fraud detection and national security teams, supervisory review, interpreter monitors, and legal penalties for applicants who file frivolous or fraudulent applications.

3 The Asylum Division publishes quarterly statistical information, including the number of affirmative asylum applications adjudicated, granted, referred to the immigration court, and referred due to a one-year filing deadline issue, on its website. See, for example USCIS (2016a).

Refugees who are unable to prove that they filed their asylum applications within one year of their arrival are either returned to their home countries, where they may face persecution, or may be eligible for another temporary form of protection called withholding of removal, which is less desirable than asylum for several reasons. Ironically, withholding of removal requires a higher burden of proof to qualify but fails to provide the same protections as asylum. For one, it does not provide a path to permanent residence, keeping refugees at risk of deportation, detention, and prolonged instability. Withholding of removal also does not allow refugees to petition for their spouse and children to join them in the United States, dividing refugee families and leaving many family members stranded in dangerous circumstances abroad. Article 23 of the ICCPR — to which the United States is party — states that “[t]he family is the fundamental and natural group unit of society and is entitled to protection by society and the State,”⁴ and the Executive Committee of the UNHCR has repeatedly emphasized the importance of ensuring the unity of refugee families and urged states to adopt legislation protecting family unity.⁵

While IIRIRA provided limited exceptions to the filing deadline for “changed circumstances” or “extraordinary circumstances,”⁶ Human Rights First found in its 2010 report that these exceptions have not prevented the denial of protection to genuine refugees (Human Rights First 2010, 29-39).⁷ Even DHS itself concluded and stated publicly at a Georgetown University Law Center symposium in 2011 that the filing deadline results in the denial of asylum to genuine refugees, does little to uncover or deter fraud, and makes the overall adjudication process more difficult. In connection with the 50th anniversary of the Refugee Convention in 2011, the United States government, under the Obama administration, pledged to work with Congress to eliminate the one-year filing deadline, though, as discussed below, the deadline remains and the United States continues to return genuine refugees to countries where they face persecution.

4 International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171. The United States ratified the ICCPR on June 8, 1992.

5 UNHCR Executive Committee, Establishment of the Sub-committee and General, Conclusion No. 1 (XXVI), ¶ f (1975); UNHCR Executive Committee, Family Reunion, Conclusion No. 9 (XXVIII) (1977); UNHCR Executive Committee, Refugees Without an Asylum Country, Conclusion No. 15 (XXX), ¶ e (1979); UNHCR Executive Committee, Family Reunification, Conclusion No. 24 (XXXII) (1981); UNHCR Executive Committee, Refugee Children, Conclusion No. 47 (XXXVIII), ¶ d (1987); UNHCR Executive Committee, Conclusion on Refugee Children and Adolescents, Conclusion No. 84 (XLVIII), ¶ b(i) (1997); UNHCR Executive Committee, Conclusion on International Protection, Conclusion No. 85 (XLIX), ¶¶ u-x (1998); UNHCR Executive Committee, Conclusion on the Protection of the Refugee’s Family, Conclusion No. 88 (L) (1999); UNHCR Executive Committee, Conclusion on Local Integration, Conclusion No. 104 (LVI), ¶ n(iv) (2005).

6 Immigration and Nationality Act § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D) (2000).

7 For example, Human Rights First (2010) found that “refugees who were denied exceptions to the filing deadline include: refugees who suffered from post-traumatic stress disorder (PTSD) or depression following their traumatic experiences; refugees whose cases involved gender, sexual orientation, or potential social stigma; refugees who were waiting for conditions to improve so that they could return home; refugees who lacked knowledge of asylum law; refugees who lacked effective representation; and refugees who otherwise qualified for an exception to the filing deadline but were considered to have not filed within a ‘reasonable period’ of time after that exception occurred.”

B. Summary Removal Procedures Fail to Effectively Screen for Protection Needs

IIRIRA included provisions allowing immigration enforcement officers — rather than judges — to order the removal of certain individuals through processes called “expedited removal” and “reinstatement of removal.” These summary removal orders carry severe consequences and penalties, including a minimum five-year bar to reentering the United States, with limited options for administrative review or appeal. Prior to the enactment of IIRIRA, only an immigration judge could order a person removed from the United States, with only some minor exceptions (ACLU 2014).

Expedited removal blocks individuals from even applying for asylum unless they first pass through a screening process. Congress created this screening process as it recognized the importance of assuring access to refugee protection — and *non-refoulement* — for asylum seekers who have credible fears of persecution. When an individual who is subjected to expedited removal indicates an intention to apply for asylum or a fear of persecution and/or torture, the immigration officer must refer that individual for a “credible fear interview,” an interview with an asylum officer within USCIS. In the credible fear interview, the individual must convince the asylum officer that a “significant possibility” exists that he or she will be able to demonstrate eligibility for asylum. If the asylum seeker receives a positive result from the credible fear interview, she or he will be referred to regular removal proceedings, a process under section 240 of the Immigration and Nationality Act (INA), and may present his or her asylum claim before an immigration judge (Siskin and Wasem 2015). Those who are not found to have a credible fear of persecution are subject to immediate removal. Individuals with prior removal orders, who are therefore subject to reinstatement of removal, are not eligible to seek asylum and must meet a higher standard by demonstrating a “reasonable fear” of persecution in the interview with the asylum officer. Upon a positive finding, the individual will be permitted to apply for withholding of removal under the Refugee Convention and/or the Convention Against Torture (CAT), as well as deferral of removal under CAT (ACLU 2014). During fiscal year (FY) 2016, in the midst of the refugee and displacement crisis stemming from the Northern Triangle countries of Central America — El Salvador, Guatemala, and Honduras — USCIS conducted 92,990 credible fear interviews and 9,446 reasonable fear interviews (USCIS 2016b).

Multiple reports have identified a range of due process and implementation concerns with respect to summary deportation (Kerwin 2015). For example, in a comprehensive report issued in 2005, the bipartisan US Commission on International Religious Freedom (USCIRF) identified a number of serious deficiencies in the implementation of expedited removal, including the failure to effectively follow procedures to identify and safeguard individuals expressing a fear of return. For example, in more than half of the 354 interviews observed by USCIRF researchers, officers failed to read required information relating to asking for protection and in 72 percent of cases, asylum seekers were not allowed to review and correct the form before signing it. In addition, the commission found that in 15 percent of cases observed involving an arriving alien who expressed fear of return to the inspector (12 out of 79), the individual was ordered removed without being referred for a credible fear interview. The commission recommended that DHS not expand expedited removal beyond its initial creation as a port of entry program before addressing the systemic

flaws that undermined protections for asylum seekers (USCIRF 2005; USCIRF 2007). Subsequent reports in 2007, 2013, and 2016 reinforced these findings and recommended further reforms to the expedited removal process (USCIRF 2007; USCIRF 2013; USCIRF 2016).

In its 2016 report on expedited removal, USCIRF found “continuing and new concerns about the processing and detention of asylum seekers in expedited removal” including concerns about CBP’s interviewing practices, inadequate quality assurance, and the skepticism or hostility of some officers towards asylum claims. USCIRF also found that most of its 2005 recommendations had not been implemented. USCIRF recommended a number of reforms including that DHS “reiterate to all agencies and officers implementing Expedited Removal that their law enforcement mandate includes fully implementing U.S. laws and regulations governing the protection of individuals seeking refuge from return to persecution or torture,” and that CBP “retrain all officers and agents on their role in the Expedited Removal process, the proper procedures for interviewing non-citizens, and the special needs and concerns of asylum seekers and other vulnerable populations” (USCIRF 2016).

USCIRF findings were confirmed by the American Civil Liberties Union (ACLU) in 2014. The ACLU found that 55 percent of the 89 individuals interviewed for its report, all of whom had received a summary removal order, indicated that they were never asked by immigration border officials whether they had a fear of persecution (ACLU 2014). Others who were asked and indicated a fear were, according to the report, nevertheless removed from the United States without being referred for a credible fear screening interview.

Research conducted by Human Rights Watch (HRW) similarly revealed that Central American asylum seekers had been deported during the expedited removal process — in some cases, multiple times — despite having expressed a fear of persecution to border officials and presented seemingly meritorious claims consistent with reports of violence in the region, which, if the rules were being followed, should have led authorities to refer their cases for closer scrutiny by an asylum officer (HRW 2014). HRW’s review of government data also showed that only 1.9 percent of Hondurans placed in summary proceedings were referred for credible fear interviews, despite growing recognition of a regional refugee crisis stemming from violence perpetrated by transnational criminal organizations and other forms of persecution, particularly in Honduras (ibid. 8; UNHCR 2015).

Among refugees who were wrongfully deported and deprived of their right to seek asylum were individuals like “Carla”,⁸ a transgender woman from a Central American country, who initially came to the United States in October 2014 after suffering rape and sexual violence in her home country. Due to US immigration officials’ failure to respond to Carla’s requests for asylum, she was removed to Honduras through the expedited removal process, without ever being permitted to apply for asylum before an immigration judge. Carla returned to the United States in June 2015, was apprehended upon entry, and prosecuted for illegal reentry. After serving her criminal sentence, she was transferred to the custody of US Immigration and Customs Enforcement (ICE) and placed in reinstatement of removal proceedings. Carla passed a reasonable fear interview, and while ineligible to apply for

⁸ Names of asylum seekers have been changed to protect privacy.

asylum due to her prior order of removal, she applied for and was granted withholding of removal with the assistance of pro bono counsel secured by Human Rights First.

Those who pass the initial border screening and are referred by immigration border officials to an asylum officer for a credible or reasonable fear screening can face further challenges as these interviews sometimes fail to identify individuals with refugee claims. At the time expedited removal was enacted, Senator Orrin Hatch (R-UT), who served on the Senate Judiciary Committee, noted that the credible fear screening was meant to be “a low screening standard for admission into the usual full asylum process.” (US Senate 1996). However, in early 2014, USCIS issued a new lesson plan for asylum officers on conducting fear screenings, which eliminated the above-mentioned language of Senator Hatch and, according to a report by USCIRF, reemphasized “the requirement that asylum seekers must show a nexus between their personal fear claims and a protected ground” (USCIRF 2016).

In interviews with asylum officers, USCIRF reported that while it found certain aspects of the revised lesson plan, such as a new checklist, to be helpful in increasing knowledge of an asylum seeker’s claim, it said that “the checklist leads them to develop a fuller analysis and record of the claim, bringing it close to the point of a full adjudication on the merits” (USCIRF 2016). In a 2014 report, Human Rights First expressed concern that the new plan, along with an accompanying memorandum, appeared to signal that asylum officers should apply a higher standard in credible fear interviews, treat credible fear interviews like full-blown asylum interviews and require production of evidence that would be difficult or impossible for a recently detained unrepresented asylum seeker to produce at credible fear interviews (Human Rights First 2014).

Notwithstanding the more stringent guidelines, there are many other reasons why asylum officers may incorrectly determine that an asylum seeker with a bona fide protection claim does not meet the relevant screening standards. US asylum law has become exceedingly complicated over the years, and many asylum cases involve legally complex and factually detailed histories. Yet, asylum officers are making these difficult determinations in a screening process with traumatized individuals who are overwhelmingly unrepresented. Many asylum seekers do not speak English, and have great difficulty communicating through interpreters, often in interviews that are conducted telephonically. Many are recovering from difficult journeys and still suffering from the effects of their persecution. The overwhelming majority of asylum seekers do not have legal representation during credible fear interviews, and have only limited access to legal information that can help them to prepare.⁹

For example, “Toni” was initially found to not meet the credible fear standard — a mistake that was only rectified because Toni, unlike the vast majority of asylum seekers subjected

9 There is no recent, publicly available data on representation rates for credible fear or reasonable fear interviews and, to the authors’ knowledge, no analysis has been conducted recently to ascertain such representation rates. However, based on Human Rights First’s interviews and interactions with nonprofit attorneys working with detained asylum seekers across the country, it is clear that the vast majority are unrepresented at this initial — but critical — stage in the process of seeking asylum. Moreover, overall rates of representation in detention — where the vast majority of fear interviews are conducted — are exceedingly low. A recent national study on access to counsel found that from 2007 to 2012, only 14 percent of detained immigrants had legal representation (Eagly and Shafer 2015).

to credible fear screenings, was able to secure pro bono legal representation. Toni is a gay man with a female gender identity from El Salvador who suffered severe physical and mental harm at the hands of the Salvadoran government and other persecutors. In El Salvador, Toni had worked with a human rights organization to improve the plight of the LGBT community. Toni was beaten by the police and eventually forced to flee El Salvador due to death threats. After seeking protection at the US southern border in 2014, Toni was put into immigration detention. Toni was nearly deported under expedited removal without being allowed to apply for asylum. The Asylum Office initially denied Toni's credible fear interview, without examining any of the country conditions evidence documenting the extreme violence perpetrated against the LGBT community in El Salvador. An immigration court failed to vacate this decision despite letters from LGBT human rights organizations explaining the risks Toni would face if returned. After the intervention of pro bono counsel and a reconsideration request, Toni was finally allowed to apply for asylum (Acer 2015).

The lack of sufficient safeguards on the use of expedited removal leaves genuine asylum seekers and refugees who meet US and international law refugee standards at risk of mistaken deportation. In pending federal litigation, 28 asylum-seeking mothers who have been in prolonged detention at the Berks County Residential Center — one of three family immigration detention facilities in the country — are seeking federal judicial review of their credible fear determinations.¹⁰ The mothers, whose claims include cases of severe physical and sexual abuse at the hands of persecutors, and threats of abductions and violence by members of international criminal gangs, were interviewed for credible fear while held in family detention with their children (ACLU 2016a).

Given the many deficiencies in the expedited removal process, including those outlined above, it is clear that refugees have been turned away from the United States in violation of the prohibition of *refoulement*. Indeed, over the years, various studies and media reports have documented cases of individuals who were mistakenly returned under expedited removal (Musalo et al. 2001; Schmitt 2001). Moreover, the nature of summary proceedings in itself may amount to a type of “penalty” which is imposed on asylum seekers due to their manner of entry. As James C. Hathaway (2005, 408) concluded: “The case is strong that the assignment of refugees who arrive without proper documentation to abbreviated procedures is in essence a penalty inflicted for irregular entry. When a summary procedure is resorted to not on the grounds of the substantive insufficiency of a claim, but rather to sanction a refugee for his or her mode of entry, such procedures take on a decidedly punitive character.”

C. Mandatory Detention and Other Policies Undermine Access to Asylum and Contravene US Treaty Obligations

The US government's detention of asylum seekers presents many barriers to asylum. Detention isolates asylum seekers, often in facilities that are distant from urban centers, where it is often exceedingly challenging to find legal counsel, particularly for indigent individuals given the limited availability of pro bono legal services. Moreover, expedited removal, as well as other US detention policies and practices, violate US human rights

¹⁰ *Castro v. U.S. Department of Homeland Security*, No. 16-1339, (3d Cir. 2016).

treaty obligations. Where asylum seekers are initially detained for a limited purpose — such as to verify identity — international standards require that detention be for the shortest time possible, with procedures in place to review custody decisions and to allow for release.¹¹ Detention beyond such a limited time frame often violates Article 31 of the Refugee Convention as well as Article 9 of the ICCPR, as it can be “arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security” (UNHRC 2014).

The passage of IIRIRA in 1996 marked the beginning of a massive expansion of immigration detention. IIRIRA imposed “mandatory detention” on certain broad categories of immigrants, including “arriving” asylum seekers, who were subject to “expedited removal” processing. From 1994 to 2013, the immigrant detention system grew more than five-fold, as the daily detention population grew from 6,785 to more than 34,000 (MRS/USCCB and CMS 2016, 162). According to reports from the *Wall Street Journal*, as the Obama administration neared the end of its term, the US immigrant detention system had reached a historic high, with an average daily population of approximately 45,000 (Barrett 2016).

The widespread use of expedited removal, which invokes initial “mandatory detention,” raises questions as to how immigration officers assess the need to detain to begin with. In 2015, the Inter-American Commission on Human Rights expressed its “deep concern that some of the responses” to the increased arrival of children and families seeking protection at the US border had included both the use of expedited removal against families and “the application of generalized and automatic detention” (IACHR 2015, 56). The broad nature of DHS’s application of expedited removal as a blanket policy at the border results in a similar blanket policy of detention, which violates Article 9 of the ICCPR as well as the prohibition against penalizing refugees for their manner of entry into a country. The Refugee Convention recognizes that asylum seekers often have no choice but to arrive at or enter a country of refuge without immigration documentation and should not be penalized as a result.¹²

Detention itself impedes access to asylum. As USCIRF noted in its most recent report on the barriers imposed by expedited removal, “[t]he rural locations of many of the facilities where asylum seekers are detained continue to make it very difficult, as a practical matter, for individuals to obtain legal advice” (USCIRF 2016, 52). A national study on access to counsel, which analyzed government data on over 1.2 million immigration removal proceedings over a six-year period from 2007 to 2012, found that while only 14 percent of detained immigrants were represented, 69 percent of those who had been released from detention obtained counsel (Eagly and Shafer 2015). This disparity has a tremendous impact on both access to the asylum system itself as well as the likelihood of a successful case outcome. Eagly and Shafer reported that the odds were 15 times greater that immigrants

11 Convention relating to the Status of Refugees, arts. 31, 26, July 28, 1951, 189 U.N.T.S. 150; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

12 A report developed during the drafting of the Convention stated, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge” (Goodwin-Gill 2001, 57; ECOSOC 1950, annex I-II).

with representation, as compared to those without, sought relief, and five-and-a-half times greater that they received it (Eagly and Shafer 2015). Finding medical experts to conduct evaluations to confirm torture or trauma may also be exceedingly challenging when detention centers are located in remote, rural areas (Human Rights First 2015a).

Once asylum seekers pass out of expedited removal processing (after passing their credible fear screening), and into regular removal proceedings under INA section 240, they are no longer subject to “mandatory detention.” However, the procedural and practical barriers to release often subject asylum seekers to prolonged detention. Those who have been placed into expedited removal proceedings after crossing the US border can request release through an immigration court bond hearing. But those who request protection at formal ports of entry are barred under current regulatory language from immigration court custody review. They can only potentially, if they meet the relevant criteria, be released on “parole” — a mechanism that allows DHS to release some noncitizens from detention while their removal proceedings are pending. Since the early 1990s, US immigration authorities have laid out criteria that should be followed in assessing whether to continue to detain an asylum seeker who requests protection at a US airport or other formal border entry point (referred to as an “arriving asylum seeker”) or whether to release that asylum seeker on parole after passing a screening interview. These criteria have generally included sufficiently establishing identity, demonstrating community ties or lack of flight risk, and posing no danger to the community. However, the criteria have been specified in a series of memoranda and policy directives, rather than in binding regulations.¹³ The former Immigration and Naturalization Service (INS) and the DHS have declined to put release safeguards for arriving asylum seekers into regulations despite repeated recommendations made in 2005, 2007, and 2013 by the bipartisan USCIRF, as well as others (USCIRF 2005, 8; USCIRF 2007; USCIRF 2013, 1-2, 10).

Through research conducted in 2016, Human Rights First found that many asylum seekers are held for the duration of their asylum cases, despite meeting criteria for release on parole upon a positive credible fear finding (Human Rights First 2016a). Asylum seekers who sought protection at a port of entry — known as “arriving” asylum seekers — are often held in detention for the duration of their cases despite meeting criteria for release detailed in a 2009 ICE memorandum entitled “Parole of Arriving Aliens Found to Have Credible Fear of Persecution or Torture” (ICE 2009). Nonprofit attorneys who assist arriving asylum seekers reported to Human Rights First that ICE often fails to properly apply the Asylum Parole Directive, with 91 percent stating that ICE denies parole in cases where asylum seekers appear to meet all the criteria for release. Only 47 percent of the 3,505 reported parole decisions were granted in the first nine months of 2015, according to data released by ICE in response to a Freedom of Information Act (FOIA) request by the ACLU and the Center for Gender and Refugee Studies. By contrast, 80 percent of arriving asylum seekers found to have a credible fear were granted parole from detention in FY 2012 (a period fairly soon after the directive went into effect in early 2010), according to government data provided to USCIRF (USCIRF 2013, 9).

In certain parts of the country, there appears to be a near moratorium on parole. For example, the Stewart Detention Center in Georgia, which is the largest immigration

13 See McNary (1992), Pearson (1998a), Pearson (1998b), Cerda (2004), and ICE (2007).

detention center in the United States, has become “a detention center for asylum seekers” according to a local nonprofit attorney (Human Rights First 2016b). According to one data source, there were zero grants of parole at both Stewart and the Irwin County Detention Center in Georgia in all of FY 2015 despite the fact that the Asylum Parole Directive requires automatic review of all arriving asylum seekers who have been found to have a credible fear, and immigrants held in Georgia detention centers are much less likely to be released on bond than immigrants who are detained elsewhere (Human Rights First 2016b; Southern Poverty Law Center 2016). The immigration court located at the Stewart Detention Center also has one of the lowest legal representation rates in the country, with a recent study finding that only six percent of 41,674 detained immigrants secured legal representation between 2007 and 2012 (Eagly and Shafer 2015). Similarly in New Jersey, Human Rights First found that arriving asylum seekers face tremendous challenges seeking parole and most appear to be detained for the duration of their proceedings. Among 80 arriving asylum seekers detained in New Jersey detention centers who were represented by American Friends Service Committee between February 2015 and September 2016, only three were granted parole. Of the 40 cases that had been resolved favorably at the time of the report, asylum seekers spent an average of six months in detention. All 40 of these individuals were forced to remain in detention for the duration of their immigration court cases (Human Rights First 2016c).

The Supreme Court heard arguments regarding the prolonged detention of asylum seekers and other immigrants who are barred from court custody review in November 2016 in *Jennings v. Rodriguez*.¹⁴ In that case, the Court is assessing whether it violates the Constitution and the immigration laws to subject immigrants in deportation proceedings to long-term detention without individualized bond hearings. The case challenges the government’s practice of detaining immigrants facing deportation proceedings for months or years without due process, including many long-term lawful permanent residents and asylum seekers. The US Court of Appeals for the Ninth Circuit had ruled that the government must provide individualized bond hearings to assess danger and flight risk when detention exceeds six months, and every six months thereafter. The court’s ruling could affect thousands of immigration detainees across the country.

Asylum seekers — like all individuals — have a right to a presumption of liberty and generally should not be placed in detention. Seeking asylum from persecution is a human right enshrined in the Universal Declaration of Human Rights. The Refugee Convention recognizes that asylum seekers often have no choice but to arrive at or enter a country of refuge without immigration documentation and should not be penalized as a result (Goodwin-Gill 2001).¹⁵ Where asylum seekers are initially detained for a limited purpose — such as to verify identity — international standards require that detention be for the shortest time possible, with procedures in place to review custody decisions and to allow for release (Acer 2010; International Detention Coalition 2011).¹⁶ Detention beyond such a

14 *Jennings v. Rodriguez*, No. 15-1204, (9th Cir., filed Oct. 17, 2016).

15 A report developed during the drafting of the Convention stated, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge” (Goodwin-Gill 2001; ECOSOC 1950).

16 Convention relating to the Status of Refugees, arts. 39, 26, July 28, 1951, 189 U.N.T.S. 150; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

limited time frame would be “arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security” (UNHRC 2014).

The US practice of detaining asylum seekers, often without access even to immigration court custody hearings and for prolonged periods, violates the ICCPR, a multilateral treaty that the United States has ratified. Article 9(1) of the ICCPR provides that every person “has the right to liberty” and “[n]o one shall be subjected to arbitrary arrest or detention.” Article 9(4) of the ICCPR provides that anyone deprived of liberty by arrest or detention “shall be entitled to take proceedings before a court.” In October 2016, the UN Working Group on Arbitrary Detention, in preliminary findings issued at the end of its visit to the United States, stated that “[m]andatory detention of migrants, especially asylum-seekers, is against international law standards, and detention should be the result of individual assessment and the reasons for detention duly notified to the migrant and given the opportunity to challenge the detention while the detention should remain reasonable in term of its length” (OHCHR 2016). Other human rights authorities, including the UN Special Rapporteur on the Human Rights of Migrants and the Inter-American Commission on Human Rights, have also concluded, after earlier missions to the United States, that the United States should provide immigration detainees with access to immigration court custody hearings (UNGA 2008; IACHR 2010).

The Refugee Convention provides that the United States “shall not impose penalties” on arriving refugees “on account of their illegal entry or presence” in the country or restrict “the movements of such refugees” unless such restriction is “necessary.”¹⁷ The Convention prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country (UNHCR 2012). Moreover, as refugee law scholar James C. Hathaway (2005, 421-23) has explained, Article 31(2) of the Refugee Convention prohibits “other than minimalist detention” to verify identity and circumstances of arrival and enjoins states “from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry.”

II. IIRIRA Has Created and Contributed to Systemic Inefficiencies

In addition to undermining access to asylum, the barriers imposed by IIRIRA — the filing deadline, summary removal proceedings and increased use of detention — have injected substantial inefficiencies into the US asylum and immigration system by inserting additional layers of technicalities and processing into the system and increasing the use of the costly tool of detention. As detailed below, these barriers have led to the waste, and diversion, of limited governmental staffing resources and the sharp escalation in detention expenditures despite the availability of more cost-efficient alternatives.

17 United Nations Convention relating to the Status of Refugees art. 31(1), (2), July 28, 1951, 189 U.N.T.S. 137. Articles 2 through 34 of the Refugee Convention became binding on the United States through our accession to the United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

A. The One-Year Filing Deadline Undermines Efficiency

The filing deadline undermines the efficiency of the asylum and immigration court adjudication systems in a number of ways. In its 2010 report, Human Rights First found that the deadline (1) delayed the resolution of asylum cases, (2) led thousands of cases that could have been resolved at the asylum office level to be shifted to the more costly, backlogged, and overburdened immigration court system, and (3) diverted time and resources at both the asylum office and the immigration courts, expending limited government resources litigating a technicality when those resources could instead be used to evaluate the actual merits of asylum cases or for other matters (Human Rights First 2010).

Likewise, an independent study conducted by academic experts found that the deadline caused many cases that could have been granted by the DHS-USCIS Asylum Division instead to be referred into the immigration court removal system. The study, which analyzed DHS's own data, concluded that the filing deadline bar prevented the Asylum Division from granting 15,000 asylum applications between 1998 and 2009 alone (Schrag et al. 2010, 753-55, 761). Instead, due to the deadline, additional litigation at the already overstretched immigration court level was required for these and other cases. The resulting staff time and resources used could have been directed to other cases or needs. More recent figures from the Asylum Office confirm that filing deadline cases make up a large percentage of those cases that are referred to the immigration court. From July to December 2016, 34 percent of all cases referred to the immigration courts were one-year filing deadline cases (USCIS 2016a). Data from the Executive Office for Immigration Review shows that once in immigration court, between 67 and 80 percent of cases referred by asylum officers were granted asylum from FY 2011 through FY 2015 (EOIR 2016, K3).

DHS ultimately concluded that the filing deadline makes the overall adjudication process more difficult, and a provision to eliminate the filing deadline was included in the Obama administration's January 2013 blueprint for immigration reform, a series of proposed statutory reforms to improve the efficiency of the immigration adjudication system (Acer and Magner 2013, 452). A provision to eliminate the filing deadline was also included in the 113th Congress' bipartisan Senate immigration reform bill (S. 744), though that bill was not ultimately enacted (Magner 2016), and in an earlier bipartisan bill, entitled The Refugee Protection Act of 2011, which was introduced in the US Senate in August 2001 by Senator Patrick Leahy (D-Vt) with a number of Republican and Democratic cosponsors (Acer and Magner 2013).

B. Expanded Use of Summary Removal Undermines Efficiency and Contributes to Growing Backlogs

The use of summary removal processes, including the expanded use of expedited removal, has injected multiple inefficiencies into the asylum adjudication system, creating an entire additional layer of preliminary screening in many cases. The decision to apply expedited removal to families who crossed the southern border after fleeing Central America also diverted asylum officers and contributed to the growth of a substantial backlog in affirmative asylum cases.

For many years after the enactment of IIRIRA, the use of expedited removal was limited to formal ports of entry. Beginning in 2002, the INS and then DHS began, step by step, to expand the use of this summary deportation tool. Now, expedited removal is used not only at formal ports of entry, but also by Border Patrol when migrants encountered within 100 miles of the border cannot establish physical presence in the United States during the 14-day period preceding the encounter (CBP 2004). The total number of expedited removals increased from 34,624 in 2002 to 193,032 in 2013 (Kerwin 2015, 217). In 2014, the Obama administration further expanded expedited removal by applying it to families who crossed the southern border and sought US protection with their children — a practice that DHS had avoided in prior years. Instead, DHS had typically placed families directly into regular (non--expedited) removal proceedings before an immigration judge (Human Rights First 2015a).

This massive increase in the use of expedited removal, along with an escalation in the numbers fleeing persecution and violence in the Northern Triangle, led to a sharp rise in the number of credible fear interviews, as well as the number of reasonable fear interviews stemming from the invocation of reinstatement of removal. From FY 2009 to FY 2016, the increasing number of credible fear and reasonable fear claims referred to USCIS created a significant burden on the Asylum Division, which is responsible for the protection components of expedited removal and reinstatement of removal. During FY 2012, the Asylum Division adjudicated 13,880 credible fear interviews and 5,053 reasonable fear interviews (USCIS 2016b). By FY 2016, those numbers rose to 92,990 credible fear and 9,446 reasonable fear interviews (*ibid.*).

The resulting need to devote Asylum Division staff to expedited removal and reinstatement of removal cases contributed to the significant backlog, and resulting delays, in affirmative asylum cases (USCIS Ombudsman 2015).¹⁸ The number of cases pending before the eight asylum offices increased by nearly a factor of six, from 32,560 in 2013 to 194,986 in September 2016 (Human Rights First 2016d). The growing backlog has led to delays in asylum adjudications across the country. As of September 2016, the asylum office in Los Angeles, California was scheduling interviews for asylum applications filed in August of 2011 — over five years ago. All the eight asylum offices across the country are scheduling interviews for applications filed over two years ago.¹⁹ For example, the Miami asylum office scheduled interviews in September 2016 for individuals who applied for asylum in May 2013 (Human Rights First 2016d). Therefore, all asylum officers are processing cases at a rate slower than the 180-day statutory period for full initial adjudication of an asylum claim and far beyond the requirement that an initial interview be scheduled within 45 days (Schrag et al. 2010, 651, 753-54).

18 Growth may also be attributed to a rise in the number of affirmative asylum cases filed. The number of new affirmative asylum applications grew from 44,446 in 2013 to nearly 57,000 in FY 2014 and 83,254 in 2015 (*ibid.*), which, according to the UNHCR, is part of a global trend that reflects the increase in displaced people fleeing persecution, war, and deteriorating security. The Asylum Division received more than 115,000 affirmative asylum applications in FY 2016 (USCIS 2016a).

19 USCIS, Affirmative Asylum Scheduling Bulletin. In April 2015, USCIS began publishing a monthly bulletin to report on the progress of scheduling interviews for affirmative asylum applications. For each asylum office the bulletin reports in which month and year the individuals currently being scheduled for interviews applied.

Moreover, as the Asylum Division has injected additional requirements and assessments into its credible fear screening process through its 2014 lesson plan and checklist. As a result, as discussed above, these screening interviews are approaching full-blown asylum interviews, albeit interviews where asylum seekers generally cannot obtain either legal counsel or evidence in support of their claims, given the short screening time frame. This increasingly duplicative expenditure of adjudicatory time is particularly wasteful given that expedited removal is now being used largely against a population that is fleeing severe persecution and brutal violence. As UNHCR has concluded, many of the women and children fleeing from the Northern Triangle have legitimate claims to protection (UNHCR 2015).

C. Over-Detention is Costly and Inefficient

In the years since the enactment of IIRIRA and its “mandatory detention” provisions, the use of immigration detention in the United States has skyrocketed. This escalation in immigration detention has led to a number of inefficiencies. For one, detention is not a cost-effective migration management tool. Alternative to detention (ATD) programs, which cost far less, have been proven effective in assuring immigrants’ compliance with court appearance obligations, making institutional detention, with its high costs, even more questionable — and less efficient — as a policy choice. Second, due to the lack of safeguards in the system and the increasing overreliance on detention as a default tool, ICE often wastes its existing detention space. Instead of releasing individuals who do not warrant continued detention, ICE often inefficiently holds many asylum seekers and other immigrants in costly detention facilities, and then asserts a lack of sufficient beds to detain other immigrants.

The costs of immigration detention have risen dramatically since 1996. Congress has annually appropriated the funds to sustain and expand the immigration detention system — from \$864 million in 2005 to over \$2 billion today. These dramatic increases have continued — and been maintained — even as criminal justice systems across the country are striving to transform the way they approach detention to reduce costs, improve efficiency and effectiveness, avoid detaining individuals unnecessarily, and make detention itself more humane.

The United States is now detaining a record number of immigrants, with an October 2016 media report indicating the average daily population would reach 45,000 — a historic high — in late 2016 (Barrett 2016). By the summer of 2017, ICE may be detaining as many as 47,000 immigrants daily. This unprecedented jump — more than 50 percent in less than a year — should cause concern even among fervent proponents of detention and certainly begs questions as to whom the government is detaining and why.

Much of the recent increase in detention appears to be fueled by a sharp increase in detention of asylum seekers since 2014, which corresponds to the expanded use of expedited removal in border areas and its application to Central Americans fleeing persecution and violence in the Northern Triangle. Human Rights First has documented this increase in US detention of asylum seekers in a series of reports (Human Rights First 2016a; Human Rights First 2016b; Human Rights First 2016c). The number of asylum seekers sent to and held in

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immigration detention increased nearly threefold in recent years, from 15,683 in 2010 to 44,228 in 2014. The number of asylum seekers to pass through immigration detention in 2016 is believed to be much higher, and exceed 100,000 for 2016 alone given USCIS protection screening statistics.²⁰ The exact numbers are unknown because, despite repeated requests for information and a statutory obligation to provide annual reports on asylum seekers in detention, DHS and ICE have failed to release more recent statistics on their detention of asylum seekers.

The growing population of incarcerated adults and children has made ICE the biggest federal client of the private prison industry. Approximately 73 percent of immigrants are held in detention facilities operated by private, for-profit prison corporations, despite evidence that private prison companies provide lower quality services and present higher safety and security risks than facilities run by the government (ACLU 2016b). At a cost of \$2.2 billion annually to maintain 31,000 beds, this system costs taxpayers on average \$194 per day to detain an immigrant.

In many cases, detention is not necessary to secure high rates of appearance by asylum seekers. Government data shows that 98 percent of 11,426 cases involving adults with children whose cases were initiated in 2014 and who had obtained legal counsel were still in compliance with their court appearance obligations two years later (Human Rights First 2015b). Another analysis of individuals who had been released from detention pursuant to an immigration judge's custody decision showed that 86 percent of 13,485 cases were in compliance with their appearance obligations in 2015 (TRAC 2016).

Much less costly ATDs have proven successful in ensuring appearance for immigration obligations. For example, the Vera Institute of Justice piloted a program funded by the former INS that provided services to over 500 noncitizens, and found that 93 percent of asylum seekers who received intensive supervision services appeared at all of their hearings (Golden et al. 1998). In 2015, Lutheran Immigration and Refugee Service and the US Conference of Catholic Bishops' Migration and Refugee Services piloted community-based case management models, which showed promising initial results, achieving compliance rates of 96 percent (44 out of 46 participants) and 97 percent (38 out of 39 participants) (Human Rights First 2015a). Case management-based programs may cost only about 20 percent the cost of detention (Root 2000). However, ICE devotes only a small fraction of its budget to alternative to detention programs and, within that budget allocation, case management programs have received modest, or no, government funding. Instead, ICE has relied almost entirely on technology-based ATD programs, which often involve placing GPS monitoring devices on individuals, and which have been criticized as an infringement on human dignity and liberty (MRS/USCCB and CMS 2016).

By contrast, in the criminal justice system, critical attention has been focused on reducing unnecessary detention costs. For instance, the Texas Public Policy Foundation, home to the criminal justice reform coalition Right on Crime, has advocated for expanded use of

²⁰ As noted in the previous section, in FY 2016, the Asylum Division conducted 92,990 credible fear interviews (USCIS 2016a). Since individuals in expedited removal are typically detained, one can assume that the vast majority of these interviews were related to a detained asylum seeker. In addition, ICE detains asylum seekers who are seeking asylum defensively in regular 240 removal proceedings, as well as a small number of affirmative asylum seekers.

alternatives like pretrial services for years, citing cost savings (Human Rights First 2014, 15). Various states, such as South Carolina, Kentucky, Alabama, Kentucky, and Washington have cut costs in recent years by providing increased community supervision, instead of prison time, for certain controlled-substance offenses (Henrichson and Delaney 2012).

The lack of safeguards in the US detention system, such as independent court review and the now systemic overreliance on detention, have led to an inefficient use of existing detention space. In many cases, as detailed in Human Rights First's reports, ICE officers continue to detain asylum seekers who do not need to be detained. In these cases, asylum seekers appear to merit release under existing ICE policy directives, for instance, because they have sufficiently established their identities and do not present a safety or flight risk (Human Rights First 2016a). As so many beds in detention facilities are filled with individuals who should not be detained, ICE then does not have sufficient space for others who should be higher enforcement priorities (Barrett 2016).

In some cases, DHS and ICE have overused detention based on assumptions that are not backed up by hard data or evidence-based practice. For instance, DHS officials have used detention with the expectation that broad detention practices would serve as a deterrent and discourage other asylum seekers from seeking US protection. For example, as DHS Secretary Jeh Johnson stated before the Senate Committee on Appropriations on July 10, 2014, "[O]ur message to this group [of adults who brought their children with them] is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated" (Johnson 2014). There is, however, little evidence that immigration detention is an effective deterrent to migration. In an amicus brief to the Ninth Circuit in *Flores v. Lynch*, 31 academics and social scientists — including several well-known scholars in the migration field — maintained that the detention of refugee families cannot be said to significantly impact any changes in future migration of families.²¹ Other experts on global migration have similarly documented the lack of evidence that detention deters asylum seekers (International Detention Coalition 2015). Therefore, not only does such an approach fail to comport with due process and US treaty obligations, it also is ineffective and inefficient in achieving its main objective of deterrence.

Ultimately, the expedited removal provisions of IIRIRA paved the way for blanket detention decisions that have contributed to the swelling of the US immigration detention system. Twenty years after the enactment of the law, the United States is detaining record numbers of immigrants, with little evidence that these policies promote immigration policy goals such as deterring unauthorized migration or ensuring appearances at court hearings.

IV. Conclusion and Recommendations

Ultimately legislative reform will be necessary to eliminate the onerous barriers that are undermining the efficiency of the US asylum system and leading refugees to be denied asylum or treated in ways that are inconsistent with US treaty commitments. The one year filing deadline bar should be eliminated given its counterproductive impact on the US asylum system and its harmful impact on refugees with well-founded fears of persecution.

21 Brief for Appellant, *Flores v. Lynch*, No. 15-56434 (9th Cir. 2016).

Expedited removal should be eliminated by statute, and its use limited in the meantime, in particular against families with children and in areas outside of formal US ports of entry. The use of immigration detention should always be subject to safeguards that protect liberty and limit arbitrary detention and the wasteful overuse of detention. These safeguards should include independent court review, and at the very least, access to immigration court custody hearings — both initially and after six months of detention — and reasonable bond levels that indigent asylum seekers can afford to pay.

Instead of erecting costly, wasteful, and ultimately counterproductive barriers that make the asylum system more complex and difficult for refugees to navigate, the executive branch and Congress should focus on investing in the necessary staff and resources to assure fair and timely adjudications by the Asylum Division and the immigration courts. There is bipartisan support for addressing the backlogs and delays plaguing the asylum and immigration court systems. An investment in timely decision-making will ultimately benefit the system overall, advancing its integrity as well as protecting the lives of refugees and their families.

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