

The Impact of President Trump's Executive Orders on Asylum Seekers[□]

During his first week in office, President Donald Trump issued three executive orders on immigration. The first two orders, “Enhancing Public Safety in the Interior of the United States” (hereinafter “Interior Enforcement Order”) and “Border Security and Immigration Enforcement Improvements” (hereinafter “Border Enforcement Order”), were signed on January 25. The third order, “Protecting the Nation from Foreign Terrorist Entry into the United States” (hereinafter “Seven Country Ban”), was signed on January 27. Based on erroneous assumptions about the criminality and extremist tendency of the immigrant population, the orders represent a dramatic restriction of access to asylum and other immigration protections in the United States. The Trump administration’s policies prevent asylum seekers from meaningfully pursuing their claims and make an already deeply flawed system dramatically worse. The United States is not a “safe country of asylum” for those fleeing persecution and violence. The substance of President Trump’s recent executive orders highlights this administration’s hostility toward refugees and asylum seekers.

The main aspects of the prior system as well as the new administration’s policies that will most seriously impact asylum seekers are summarized below.

1. Large-scale detention of asylum seekers

(a) Prior policy

The number of asylum seekers in detention has grown exponentially in recent years as refugees and others fleeing violence in Central America confront policy changes in 2014 that prioritized family detention as a means of deterring asylum seekers. The policies also deemed undocumented individuals at ports of entry priorities for enforcement.¹ The United States is currently running “the largest project of detaining families since the mass incarceration of Japanese Americans during World War II.”² In Fiscal Year 2014, 44,228 asylum seekers were held in immigration detention, representing 77% of all asylum seekers in court proceedings.³ As of 2016, 73% of immigration detainees were held in private prison facilities, which have been condemned for human rights violations ranging from a lack of adequate medical services to sexual abuse.⁴

[□] The following Harvard Law School students assisted in the research and preparation of this report: Amy Volz, Nathan Mackenzie, Brianna Rennix, Isabel Macquarrie, Zoe Egelman.

¹ 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, 22 (2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

² *Id.*

³ Olga Byrne, Eleanor Acer & Robyn Barnard, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*, Human Rights First, 2 (2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf. The U.S. government’s fiscal year runs from October 1 through September 30.

⁴ *Shutting Down the Profiteers*, *supra* note 1, at 9, 12–13. See also *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Commission on Civil Rights (2015),

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The past two years have witnessed a sharp increase in the number of immigrant mothers and children subject to family detention—mainly asylum seekers from Central America.⁵ Families are kept in prison-like conditions in these facilities.⁶ Family members often either arrive separately or are split up by Immigration and Customs Enforcement (ICE) custody determinations upon reaching the United States.⁷ This separation during the process of seeking asylum causes severe psychological stress and exacerbates the trauma of being detained. Furthermore, it separates applicants who are part of the same case, making it very difficult to effectively present the evidence required for a successful asylum claim. This separation also increases the probability of inconsistent outcomes and case timelines among family members.⁸

The detention of asylum seekers also violates U.S. obligations under international law. Article 31(2) of the 1951 Refugee Convention states that a country may restrict the movement of refugees only when necessary.⁹ Detaining asylum seekers based on immigration law violations—entering without documentation—contradicts the Article 31 prohibition on penalizing illegal entry or presence.¹⁰ The International Covenant on Civil and Political Rights (ICCPR) guarantees individuals freedom from arbitrary detention. Detention programs intended to deter future migrants are inherently arbitrary as they are not based on an assessment of an individual’s circumstances.¹¹

(b) Under the new executive orders

The Border Enforcement Order calls for a massive expansion of the existing system, greatly increasing the number of refugees and other migrants subject to detention. There are no exceptions made in any of its provisions for asylum seekers. Individuals may now be detained merely “on suspicion” of violating federal or state law, which includes unauthorized entry.¹² The Border Enforcement Order mandates that offenses with a nexus to the southern border, such as unauthorized entry and reentry into the United States, be priorities for enforcement.¹³ The order

http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf; Eunice Hyunhye Cho, Paromita Shah, Southern Poverty Law Center et al., *Shadow Prisons: Immigrant Detention in the South*, 7 (2016), https://www.splcenter.org/sites/default/files/leg_ijp_shadow_prisons_immigrant_detention_report.pdf. See also *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. Commission on Civil Rights, 75–77 (2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

⁵ *Family Detention: The unjust policy of locking up immigrant mothers with their children*, Detention Watch Network, <https://www.detentionwatchnetwork.org/issues/family-detention> (last visited Feb. 6, 2017).

⁶ Emily Gogolak, *What’s Next for Immigrant Families in Detention?*, *The New Yorker* (July 30, 2015), <http://www.newyorker.com/news/news-desk/whats-next-for-immigrant-families-in-detention>.

⁷ Leigh Barrick, *Divided by Detention: Asylum-Seeking Families’ Experiences of Separation*, American Immigration Council, 7 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/divided_by_detention.pdf.

⁸ *Id.* at 6, 19.

⁹ *Shutting Down the Profiteers*, *supra* note 1, at 21.

¹⁰ Convention Relating to the Status of Refugees, Art. 31(2). Guy Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection (Oct. 2001), <http://www.unhcr.org/3bcfdf164.pdf>.

¹¹ *Shutting Down the Profiteers*, *supra* note 1, at 22.

¹² *Annotated Border Immigration Enforcement Executive Order*, National Immigrant Justice Center, § 2(b) (Jan. 27, 2017), <https://immigrantjustice.org/research-items/annotated-border-immigration-enforcement-executive-order> [hereinafter “Border Enforcement Order”].

¹³ *Id.* at § 13.

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specifically contemplates the construction of new detention facilities near the southern border to accommodate the expansion in the detained population.¹⁴ This will in all likelihood result in an even larger population of prospective refugees being detained in deplorable conditions purely on the basis of suspicion, without significant procedural protections.

(c) Access to counsel

The difficulties of applying for asylum while detained are well documented.¹⁵ Access to counsel is of particular concern, as asylum seekers in detention are five times less likely to have legal counsel than those who are not detained.¹⁶

Asylum seekers without legal representation are almost five times less likely to win their cases than those with representation.¹⁷ Detained immigrants facing custody hearings were four times more likely to be released from detention when represented by counsel.¹⁸ They are eleven times more likely to seek relief such as asylum, and are twice as likely to obtain such protection as those without representation.¹⁹ Access to counsel is particularly important in the context of asylum because many individuals who arrive in the United States do not realize that they are required to adhere to a one-year filing deadline to apply for asylum. The problem is compounded when cases are transferred between courts or the large backlog of removal cases causes delays that unfairly prevent asylum seekers from filing asylum claims within one year of entry. Fifteen percent of asylum applicants between 1998 and 2009—53,400 people—were denied asylum based on the filing deadline.²⁰ Increased detention will greatly exacerbate this problem.

By significantly enlarging the range of individuals subject to detention—to embrace almost everyone present without authorization—the new orders expand an already deeply flawed system and will result in the removal of many more individuals with valid asylum claims. Concerns about access to counsel also will be exacerbated as a result of the recent reprioritization of dockets by the Executive Office for Immigration Review (EOIR), the office responsible for adjudicating immigration cases, to focus on expediting detained cases.²¹

¹⁴ *Id.* at § 5(a).

¹⁵ Byrne, Acer & Barnard, *supra* note 3, at 2.

¹⁶ Unlike in Canada, asylum seekers in the United States are not granted government-funded legal services. Although many organizations (such as the CARA Pro Bono Project in Dilley, Texas) are working to meet the desperate need for representation in detention centers, only fourteen percent of detained immigrants obtain legal representation. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

¹⁷ Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J. of Law Reform 1003 (2015), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1141&context=mjlr>.

¹⁸ Eagly & Shafer, *supra* note 16, at 2.

¹⁹ *Id.*

²⁰ Human Rights First, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, 2 (2010), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.

²¹ *Executive Office for Immigration Review to Revise Docketing Practices Relating to Certain Priority Cases*, Dept. of Justice (Feb. 4, 2016), <https://www.justice.gov/eoir/RevisedDocketingPractices02042016>.

2. Parole

A vaguely worded provision of the Border Enforcement Order threatens the use of parole as a critical humanitarian mechanism in the asylum application process.

(a) Prior policy

Although the U.S. government generally mandates that asylum seekers remain detained for consideration of their credible fear screening applications, individuals found to have a credible fear may be paroled on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit,” as long as they do not present a security risk or a risk of absconding.²² Regulations list five categories of noncitizens who may meet standards for parole: individuals with serious medical conditions, pregnant women, certain minors, noncitizens who will be witnesses in proceedings in the United States, and noncitizens whose continued detention is “not in the public interest.”²³ The last of these categories is relatively broad. The regulations list factors that should be considered in the decision to grant release based on the “public interest,” such as community and family ties, stability of residence, and ability to post bond.²⁴

Many asylum seekers are denied parole and are needlessly held in detention by ICE for extensive periods of time, despite meeting the release criteria.²⁵ In 2012, 80 percent of arriving asylum seekers found to have a credible fear were granted parole; in 2015 only 47 percent were granted parole.²⁶ This has naturally led to an increase in the number of asylum seekers in detention.²⁷

(b) Under the new executive orders

Section 11(d) of the Border Enforcement Order mandates restrictions on the authority to grant parole to the “plain language of the statute,” with parole only granted on a case-by-case basis for humanitarian reasons or public benefit. However, as we have seen, parole is already denied to many asylum seekers despite the regulations’ release criteria. It remains to be seen whether there will be a difference in practice between the way immigration officials currently interpret the regulations on parole and the interpretation under the new administration. In any case, a stricter application of the parole regulations, apparently contemplated by the Border Enforcement Order, will only increase the number of asylum seekers who are likely to be held in detention under the new regime described above.

3. Discrimination against asylum seekers on the basis of religion and/or national origin

The right to equal protection of the law is enshrined in the U.S. Constitution. The principle of non-discrimination and equal protection of the law is also embodied in Article 3 of the Refugee

²² *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. Immigration and Customs Enforcement, 2 (2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliases_found_credible_fear.pdf.

²³ *Id.* 8 C.F.R. § 212.5(b).

²⁴ *Id.* at 7.

²⁵ Byrne, Acer & Barnard, *supra* note 3, at 13.

²⁶ *Id.*

²⁷ *Id.* at 2.

Convention, and other international human rights treaties.²⁸ It is well-known that President Trump originally intended the Seven Country Ban to be a “Muslim ban” and that references to Islam were removed in an attempt to make the order appear legal.²⁹ He has indicated that the terms of the ban will be applied in a discriminatory manner to favor the Christian minority in Muslim-majority countries for entry to the United States.³⁰ There is also concern that the Seven Country Ban will be applied to “sanction discriminatory questioning, profiling, and treatment of Muslim, South Asian, and Arab citizens and noncitizens at airports and elsewhere.”³¹ Reportedly, DHS is no longer enforcing the travel ban and revocation of visas for noncitizens of the seven banned countries. Additionally, several U.S. district courts have enjoined parts of the executive order related to the travel ban, visa revocation, and refugee admissions. However, the situation remains in flux; the Trump administration could change DHS policy and has already vowed to appeal the judicial orders.

4. Expedited deportation of asylum seekers, possibly without a right of appeal

(a) Prior policy

Under prior policy, expedited removal applied to noncitizens without proper documentation who were encountered at a port of entry or within 100 miles of the border, and who were within two weeks of having entered the United States.³² Expedited removal provides for immediate removal upon an encounter with an immigration official, without the opportunity to appear before an immigration judge in an administrative hearing. The problems that this expedited process poses to asylum seekers are documented in a 2016 report by the U.S. Commission on Religious Freedom (USCRF).³³ Although individuals who express fear are in principle referred by immigration officials for a “credible fear” interview, changes in how these interviews are conducted (before the impact of the three Executive Orders) have caused a sharp decline in access to asylum; in other words, far fewer persons are able to pass the screening and pursue their claims.³⁴ All asylum seekers are required to be detained until the credible fear interview,

²⁸ See Convention Relating to the Status of Refugee, Art.3. This principle is contained in other international human rights instruments as well. See, e.g., International Covenant on Civil and Political Rights, Art. 26; American Convention on Human Rights, Art. 24; International Covenant on Economic, Social and Cultural Rights, Art. 2(2); Convention on the Rights of the Child, Art. 2.

²⁹ See Amy Wang, *Trump asked for a ‘Muslim ban,’ Giuliani says – and ordered a commission to do it “legally,”* Washington Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.e8dc130824f1. See also Abby Phillip & Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: “You know my plans,”* Washington Post (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.e98a13585623; Donald J. Trump *Statement on Preventing Muslim Immigration*, Donald J. Trump (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

³⁰ Jamil Dakwar, *All international laws Trump’s Muslim ban is breaking*, Al Jazeera (Feb. 2, 2017), <http://www.aljazeera.com/indepth/opinion/2017/02/international-laws-trump-muslim-ban-breaking-170202135132664.html>.

³¹ *Id.*

³² Elizabeth Cassidy & Tiffany Lynch, U.S. Comm’n on Int’l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 8 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

³³ *Id.*

³⁴ *Id.* at 36.

and some remain detained after a finding of credible fear at the discretion of Immigration Customs Enforcement (ICE) officers. Between 2012 and 2015, USCRF found that asylum seekers were detained in “inappropriately penal conditions,” often in prisons, contrary to official ICE policy that these individuals should be held in civil detention facilities.³⁵ In 67% of the facilities surveyed, detainees wore prison jumpsuits color-coded to their “risk level.”³⁶ The facilities re-traumatize asylum seekers and other victims of trauma.³⁷

(b) Under the new executive orders

The Border Enforcement Order directs the Department of Homeland Security (DHS) to expand “expedited removal” to the maximum extent possible. The order would apply expedited removal throughout the country, including the northern border with Canada, to individuals who entered the United States without documents and cannot prove that they have been continuously present for the previous two years.³⁸ Since Customs and Border Protection (CBP) has consistently failed to refer asylum seekers for a credible fear screening,³⁹ potential refugees are returned, without consideration of their claims, in violation of the fundamental obligation of *non-refoulement*, contained in Article 33 of the Convention, also a protection mandatory under U.S. law. Expansion of expedited removal will exponentially increase the chances for *refoulement*.

The Border Enforcement Order also targets “credible fear” determinations and “reasonable fear” determinations for refugees seeking protection.⁴⁰ The order requires DHS to ensure that these processes are not “exploited” to allow individuals to remain in the United States who are otherwise removable.⁴¹ The implied heightening of the credible fear standard could make it even harder for asylum seekers with meritorious cases to present their claims for protection.

5. Sending asylum seekers entering the United States through Mexico back to their countries of origin: *Refoulement*

As noted, the principle of *non-refoulement* arises out of Article 33 of the 1951 Refugee Convention which states, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

³⁵ *Id.* at 40.

³⁶ *Id.* at 41.

³⁷ *Id.* at 44.

³⁸ Border Enforcement Order, *supra* note 12, at § 11(c) (“Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).”).

³⁹ *Id.* at § 11(b).

⁴⁰ *Id.* (“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.”).

⁴¹ *Id.* at § 11(a). Credible fear determinations are conducted when a recently arrived individual who is inadmissible under INA § 212 and subject to Expedited Removal under INA § 235(b) and 69 FR 48877 “expresses an intention to apply for asylum, expresses a fear of persecution or torture, or expresses a fear of return to his or her country.” *See* INA § 235(b). Reasonable fear screenings are conducted when an individual is subject to expedited removal under INA § 241(a)(5) for reinstatement of a prior removal order or 238(b) for the removal of aliens who are not Lawful Permanent Residents (LPRs) and have been convicted of an aggravated felony. These screenings are intended to prevent *refoulement* of individuals to countries where they will be persecuted or tortured.

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threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

(a) Prior policy

Under expedited removal, unless they establish a credible fear of persecution or torture, foreign nationals arriving in the United States from Mexico without proper documentation can be returned to their countries of origin, without immigration court removal hearings. If United States Citizenship and Immigration Services (USCIS) finds a credible fear of persecution or torture, the noncitizen will be placed in removal proceedings before an immigration judge, where he or she may apply for asylum or other protection from removal. If neither USCIS nor, upon review, an immigration judge finds credible fear, the noncitizen is removed promptly thereafter.

It is well documented that officials fail to adequately screen asylum seekers for fear of return before ordering them deported⁴²—violating the *non-refoulement* principle of Article 33 of the Refugee Convention.

(b) Under the new executive orders

Section 2 of the Border Enforcement Order calls for the construction of a wall on the southern border of the United States, which would greatly restrict the entry of refugees and their ability to access humanitarian protection.⁴³ Section 7 of the order also instructs the DHS to ensure that applicants for admission arriving on land from Mexico and Canada are returned to those countries to await their removal proceeding in the United States.⁴⁴ It is unclear how this policy will be implemented, and implementation would require cooperation from Mexico and Canada. Sending asylum seekers back to Mexico for any length of time would violate U.S. domestic and international obligations.⁴⁵

If the United States sends asylum seekers back to Mexico pending a formal removal proceeding, there is a significant likelihood that Mexico would send those asylum seekers back to their countries of origin. Reports show that Mexico has increasingly been deporting asylum seekers to their countries of origin without an opportunity to present their claims to protection. For

⁴² *American Exile: Rapid Deportations that Bypass the Courtroom*, American Civil Liberties Union, 4 (Dec. 4, 2014), https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf (“Of the 89 individuals interviewed by the ACLU who received a summary removal order ... within the broad U.S. border zone, 55 percent said they were never asked about their fear of persecution or that they were not asked anything in a language they understood. Only 28 percent said they were asked about their fear of returning to their country of origin by a border officer or agent; 40 percent of those asked about fear said they told the agent they were afraid of returning to their country but were nevertheless *not* referred to an asylum officer before being summarily deported.”).

⁴³ Border Enforcement Order, *supra* note 12, at § 2(a).

⁴⁴ *Id.* at § 7 (“Return to Territory. The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.”). INA §235(b)(2)(C) refers to INA §240 proceedings and excludes people subjected to expedited removal per INA §235(b)(2)(B)(ii). If the administration’s intentions are to apply this to asylum seekers, they would have to affirmatively decide to not place each individual asylum seeker in expedited removal and instead issue Notices to Appear (NTAs).

⁴⁵ American Immigration Lawyers Association, *Council Summary and Analysis of Trump Executive Order on Border Security and Enforcement*, 5 (Jan. 25, 2017), <http://www.aila.org/infonet/analysis-trump-executive-order-on-border-security>.

example, according to data from CBP and Mexico's National Institute for Migration, Mexico deported 79% more people to Central America's northern triangle countries of El Salvador, Guatemala, and Honduras in the first four months of 2015 than it did during the same period a year earlier.⁴⁶ In 2014, after an increase in arrival of unaccompanied minors from Central America crossing into the United States, the United States turned to the governments in Mexico and Central America to try to stem this flight, leading Mexico to send 5,000 federal police gendarmes to a Mexican state bordering Guatemala, open more border checkpoints, and increase raids on migrants.⁴⁷ In 2014, Mexico deported about six times as many unaccompanied children as did the United States.⁴⁸ Mexico's response to the influx of asylum seekers and pressure from the United States may result in an increase in persecution and violence against migrants.⁴⁹ Lawyers have noted multiple violations of due process for asylum seekers in Mexico; crime against migrants (including human trafficking, kidnapping, and rape) is widespread and largely goes unprosecuted.⁵⁰ Further, operations along traditional migration routes "may simply be pushing migrants to more treacherous overland and maritime routes."⁵¹

6. Denial of family reunification

The Executive Order denies visas for anyone affected by the Seven Country Ban, including the family members of refugees who are already in the United States.⁵² The American Civil Liberties Union of Pennsylvania filed a lawsuit on January 31 on behalf of three families whose approved family follow-to-join petitions were revoked at the Philadelphia Airport on January 28 prior to their deportation.⁵³ One of the families had waited for thirteen years to reunite with family in the United States.⁵⁴ The CBP website reports that I-730 petitions for family members to join a refugee in the United States "will be evaluated on a case-by-case basis."⁵⁵ Of course these petitions will be affected by the suspension of the refugee admission program and/or the Seven Country Ban, depending on the type of family reunification filed. In either situation, family members unable to enter the United States are often left in countries plagued by horrific violence and rife with severe human rights violations.

⁴⁶ *Deportations in Mexico up 79% in first four months of 2015*, The Guardian (Jun. 11, 2015), <https://www.theguardian.com/world/2015/jun/11/deportations-mexico-central-america>.

⁴⁷ *Id.*

⁴⁸ Deborah Bonello, *Mexico's deportations of Central American migrants are rising*, Los Angeles Times (Sept. 5, 2015), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-migrants-20150905-story.html>.

⁴⁹ *Id.*

⁵⁰ Washington Office on Latin America, *Mexico Now Detains More Central American Migrants than the United States*, Washington Office on Latin America (Jun. 11, 2015), <https://www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/> (last visited Feb. 6, 2017).

⁵¹ *Id.*

⁵² There is conflicting USCIS and DHS internal guidance on whether visa petitions or applications for immigrant benefits are being processed for noncitizens from the seven banned countries.

⁵³ *Families Denied Entry at the Philadelphia Airport File Federal Litigation Against the Trump Administration*, ACLU of Pennsylvania (Jan. 30, 2017), <https://www.aclupa.org/news/2017/01/31/families-denied-entry-philadelphia-airport-file-federal-liti> (last visited Feb. 6, 2017).

⁵⁴ *Id.*

⁵⁵ *Protecting the Nation from Foreign Terrorist Entry into the United States*, U.S. Customs and Border Protection (Feb. 2, 2017), <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states>.

The right to reunification of minor children and parents is codified in the Convention on the Rights of the Child.⁵⁶ No exception is made in the Seven Country Ban for such circumstances.⁵⁷

7. Delays in adjudication

(a) Prior policy

The U.S. immigration system already suffers from a shortage of immigration judges and a significant backlog of cases, resulting from a decade of increased spending on immigration enforcement that is disproportionate to the increase in court funding.⁵⁸ In FY 2014, each immigration judge handled over 1,400 “matters” per year.⁵⁹ As of April 2015, the average removal case was pending for one year and eight months.⁶⁰ The problem was exacerbated by new guidelines in 2014 that prioritized the cases of unaccompanied children and families (“rocket dockets”), increasing the backlog for other cases. The procedure for conducting hearings has been criticized for giving vulnerable applicants insufficient time to find counsel and prepare their cases.⁶¹

The guidelines have also negatively impacted certain applicants not on the “rocket docket” who must wait even longer for a hearing, often while in detention. Increased delays and uncertainty also cause psychological harm for asylum seekers fleeing violence, torture, and abuse. During this process many applicants are separated from their families and may not be authorized to work, leading to severe financial hardship.⁶² Asylum applicants also suffer when immigration judges facing overwhelming caseloads are forced to make decisions quickly; some reports suggest the average case is decided in seven minutes.⁶³ Rushed decisions increase the likelihood of error—and improper removals of refugees violating U.S. *non-refoulement* obligations.

(b) Under the new executive orders

The orders call for massive increases in the prosecution of immigrants and in the probability of detention for asylum seekers. Prolonged detention will result in even greater hardship for applicants who already experience the burden of substantial delays in the adjudication of their claims.

⁵⁶ *Convention on the Rights of the Child*, Art. 22(2). According to the UNHCR, the right to admit a refugee’s close family members to the country of asylum is “generally accepted in state practice.” *Refugee Protection in International Law*, UNHCR (2003), <http://www.unhcr.org/en-us/protection/globalconsult/4a1ba1aa6/refugee-protection-international-law.html>.

⁵⁷ At the time of this writing the Seven Country Ban has been enjoined while litigation concerning its legality goes forward.

⁵⁸ American Immigration Council, *Empty Benches: Underfunding of Immigration Courts Undermines Justice* (June 17, 2016), <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Jayashri Srikantiah & Lisa Weissman-Ward, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, Stanford Law School (Aug. 15, 2014), <https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications/>.

⁶² American Immigration Council, *supra* note 58.

⁶³ *Id.*

8. Unfounded increase in the criminal prosecution of asylum seekers

(a) Prior policy

For the duration of the Obama administration, civil immigration enforcement used the resources of the state and local criminal system to identify removable immigrants. Notably, DHS administered the Secure Communities program from 2008 to 2014, pursuant to which arrestees' fingerprints were run against immigration databases as they were booked into jails to screen for deportability.⁶⁴ During Obama's first five years in office, the program resulted in the deportation of 193,000 people who had committed only minor infractions or who had no criminal record at all.⁶⁵ Secure Communities was discontinued in 2014 due to various issues with its legality and constitutionality in addition to wide recognition that it did not accomplish its goal of making communities safer.

The successor to Secure Communities, the Priority Enforcement Program (PEP), continued the sharing of biometric data between state and local jails and immigration authorities. PEP claimed to subject fewer individuals to immigration enforcement, as ICE could only request a transfer of immigrants convicted of certain crimes.⁶⁶ However, like its predecessor, PEP incentivizes racial profiling and infringes upon the constitutional and civil rights of immigrants, including asylum seekers.⁶⁷ Other federal and regional programs, such as the Criminal Alien Program (CAP), similarly provide information to ICE to track and apprehend immigrants.⁶⁸

Many refugees seeking protection from persecution are charged with the federal crime of illegal entry or illegal reentry. In fact, in 2015, 27% of all criminal defendant filings in federal courts were defendants charged with entry-related offenses defined as crimes that are now being fully prosecuted.⁶⁹ Thus, legitimate asylum seekers are being criminally prosecuted and incarcerated in violation of Article 31's prohibition on criminalizing unauthorized entry and removed in violation of Article 33's *non-refoulement* obligation.

⁶⁴ Walter Ewing, Daniel Martinez & Rubén Rumbaut, *The Criminalization of Immigration in the United States* (July 13, 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf.

⁶⁵ Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, New York Times (April 6, 2014), <https://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html>.

⁶⁶ American Civil Liberties Union, *DHS Secretary Johnson Discontinues Secure Communities "As We Know It,"* 1 (2014), https://www.aclu.org/files/assets/2014_12_18_-_aclu_summary_of_dhs_scomm_and_detainer_reforms_final.pdf.

⁶⁷ National Immigration Law Center, *Why 'PEP' Doesn't Fix S-Comm's Failings*, 2–3 (June 2015), <https://www.nilc.org/issues/immigration-enforcement/pepnotafix/>.

⁶⁸ American Immigration Council, *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, 4–5 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf.

⁶⁹ *Federal Judicial Caseload Statistics 2015*, United States Courts (2016), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (last visited Feb. 6, 2016).

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(b) Under the new executive orders

The Interior Enforcement and Border Enforcement Orders both include sweeping expansions of the criminalization of immigrants. No exception is made for asylum seekers in any of the orders' provisions related to criminal prosecution.

First, the new policies significantly expand the range of immigrants targeted as “priorities for removal.” Section 5 of the Interior Enforcement Order directs the Attorney General to prioritize removal of a broad range of noncitizens, including those who have been convicted or charged of any criminal offense, those who have committed acts that constitute a chargeable criminal offense, and those who immigration officers decide “pose a risk to public safety or national security.”⁷⁰ The provisions relating to criminal offenses apparently encompass even minor offenses such as traffic violations, and immigration-related offenses such as undocumented entry.⁷¹

The second issue relates to authority for enforcement. In a particularly troubling development, Section 8 of the Border Enforcement Order allows state and local officials to apprehend and detain immigrants, functions usually reserved for immigration officers.⁷² It also revives the Secure Communities program and expands the section of the Immigration and Nationality Act (INA) that permits local law enforcement bodies to deputize police officers to enforce federal immigration laws. Governmental investigations have revealed that these agreements result in racial profiling and other civil rights abuses.⁷³ These agreements also have a chilling effect in immigrant communities whereby victims of crimes, such as domestic violence, are reluctant to seek assistance because they are afraid of getting caught up in the immigration enforcement system.⁷⁴

The criminal penalties espoused in the new policies violate international law and fail to protect refugees' basic rights. Article 31 of the 1951 Refugee Convention prohibits the imposition of penalties for refugees based on unauthorized entry or presence in a country.⁷⁵ A policy of prosecuting or otherwise penalizing undocumented entrants without regard to their circumstances of flight and without considering the merits of an applicant's claim represents a breach of international obligations.⁷⁶ Indeed, the United States is incarcerating and deporting recent entrants en masse simply because they crossed the southwest border without authorization and,

⁷⁰ Executive Order, “Enhancing Public Safety in the Interior of the United States,” § 5 (Jan. 25, 2017) at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> [hereinafter “Interior Enforcement Order”].

⁷¹ Border Enforcement Order, *supra* note 12.

⁷² *Id.* at 8.

⁷³ *Id.* Also noteworthy here is § 9, which blocks federal funds to jurisdictions that refuse to comply with applicable federal law (i.e. “sanctuary cities”)—although the constitutionality of forcing localities to cooperate with federal law is questionable. *Id.*

⁷⁴ See National Immigration Forum, *Secure Communities* (Jul. 11, 2011), <http://immigrationforum.org/blog/secure-communities-2/> (last visited Feb. 6, 2017).

⁷⁵ 1951 Refugee Convention, *supra* note 28, at Art. 31. Though the article uses the term “refugee,” it also applies to asylum seekers and “presumptive refugees.” See United Nations High Commissioner for Refugees, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection*, 219 (2003), <http://www.unhcr.org/3bcfdf164.pdf>.

⁷⁶ *Id.* at 219.

in some cases, without regard to whether these individuals have asylum claims.⁷⁷ According to the United Nations High Commissioner for Refugees (UNHCR), such a penalty “will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.”⁷⁸

9. Gender-based asylum cases

The executive orders will likely have particularly harmful effects on individuals with gender-based claims. Women and girls seeking protection in the United States because of rape, torture, domestic abuse, and other forms of gender-based violence will be subjected to prolonged detention while they wait for their claims to be adjudicated. Survivors may fall into the categories of individuals subject to detention for criminal activity due to their abuse or exploitation: many stay on expired visas because an abusive spouse failed to file papers, or enter on invalid visas prepared by a trafficker.⁷⁹ Access to adequate medical care and mental health services in detention is particularly important for these applicants.

The changes to provisions regarding deportation priorities are also detrimental to victims of abuse, who may fear calling for help if they believe their abuser will press charges against them that would result in deportation.⁸⁰ Applicants for U nonimmigrant status (victims of crime) and Violence Against Women Act (VAWA) protection will also be subjected to unnecessary interviews that could impact their ability to apply for relief.⁸¹ For more information on this topic, Tahirih Justice Center has prepared an analysis of the potential impact of the three executive orders on survivors of domestic and sexual violence.⁸²

⁷⁷ This program is aptly named “Operation Streamline” and it results in the criminal prosecution, detention, and removal of tens of thousands of migrants per year. See Office of Inspector General, *Streamline: Measuring its Effect on Illegal Border Crossing OIG-15-95*, DHS, 6 (May 15, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf. A study by the Inspector General recently found that “Border Patrol agents sometimes use Streamline to refer aliens expressing [] fear [of return] 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 [Protocol].” *Id.* at 16.

⁷⁸ *Id.* at 187, quoting 1966 ICCPR, Art. 2(1) and 1969 American Convention on Human Rights, Art. 1.

⁷⁹ Tahirih Justice Center, *New Executive Orders Will Keep Immigrant Women and Children from Accessing Legal Protection*, (Jan. 25, 2017), <http://www.tahirih.org/news/new-executive-orders-will-keep-immigrant-women-and-children-from-accessing-legal-protection/> (last visited Feb. 6, 2017).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*