

What does Asylum in the U.S. look like right now?

Over the past two years, there has been a systematic effort to implement policies meant to deter, punish, and harm individuals seeking protection in the United States. Under both domestic and international law, the U.S. has a legal responsibility to allow asylum seekers to present their claims in a fair and dignified manner. Congress explicitly laid out the laws governing the U.S. asylum system in the Immigration and Nationality Act (INA). Specifically, the INA states that asylum seekers are to be treated equally regardless of their country of origin or where they enter the United States, and that they have the legal right to come to the United States to seek protection. Outlined below are some of the challenges facing individuals seeking asylum in the U.S. today.

Remain in Mexico

In January 2019, the Trump Administration rolled out the 'Remain in Mexico' program that would force some asylum seekers who pass a credible fear screening with a U.S. asylum officer, to return to Mexico to wait for their asylum hearing in a U.S. immigration court.¹ **Known formally as the Migration Protection Protocols (MPP), this program has led to the return of more than 12,000 asylum seekers to Mexico.** In mid-June the program was expanded to all ports of entry along the U.S.-Mexico border. Not all asylum seekers arriving at the southern border are returned to Mexico. It remains unclear how and why officials select certain individuals to place in the program, because there are no set guidelines outlining MPP. Forcing asylum seekers to wait in Mexico directly contradicts both international law and domestic law under the INA, which expressly states that asylum seekers are able to remain in the U.S. while their cases are pending.²

Concerns about Asylum Seekers Returned to Mexico

The Remain in Mexico program undermines the due process rights of asylum seekers, limiting their access to legal counsel because attorneys cannot visit or communicate regularly with their clients, and have little time to prepare cases. For many, even finding an attorney to represent them is nearly impossible given their circumstances. Many people also miss their court date, likely due to issues crossing the border. When they do not show up for court, and the Government cannot account for their location, they are ordered removed from the U.S., which adds to concerns about lack of due process. When HIAS staff recently visited an El Paso, Texas court, they witnessed that attorneys are no longer able to perform Know Your Rights presentations or serve as a friend of the court to assist asylum seekers at their hearings.

Mexico's Northern border region is extremely dangerous and asylum seekers, with few resources and no support system, are prime targets for crime. The influx of asylum seekers forced to wait in Mexico has put shelters at capacity, leaving many asylum seekers to live on the streets while they wait. Under the program, individuals who have a fear of waiting in Mexico are able to seek protection from being returned, but many are not immediately given that opportunity and even when they are, many are returned back to Mexico because they cannot prove that they are at risk. Additionally, reports suggest

¹ <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>

² <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>

that Remain in Mexico is now being used to separate families, including the separation of children and parents, spouses, and siblings.

Metering at Ports-of-Entry

U.S. law makes it clear that an asylum seeker arriving at a U.S. port of entry can apply for asylum, and that the government is required to provide them with a credible fear interview. Despite this rule, metering, or the practice of turning asylum seekers away at ports of entry and forcing them to wait indefinite periods of time to apply for protection, is happening along the border. Asylum seekers who present themselves are put on a waiting list at the border and are only able to meet with a U.S. Customs and Border Protection (CBP) officer when it is their turn. While on the Mexico side of the border, asylum seekers are exposed to risks including exploitation or deportation and detention by Mexican immigration authorities. Only when their number comes up, are individuals able to speak with an asylum officer, who may then place them into the Remain in Mexico program, release them into the community, or place them in detention.

CBP is using these tactics to **reduce the number of asylum seekers that are allowed to seek protection in the U.S.**³ The Department of Homeland Security (DHS) and CBP have said that this is in response to increased arrivals and a lack of detention beds, but it appears that processing has dropped far below their existing capacity.⁴ Reductions in processing have led some asylum seekers to cross the U.S.-Mexico border between ports-of-entry - after trying to cross at checkpoints and being turned away by CBP. In October 2018, the DHS Office of the Inspector General (OIG) acknowledged that limiting the number of asylum seekers allowed to enter the country at ports would lead some to cross the border between ports, which can be extremely dangerous.

Safe Third Country Agreements and Transit Bars

In July 2019, the Administration released an Interim Final Rule (IFR) banning individuals at the southern border from seeking asylum if they fail to apply for asylum in at least one country they pass through while traveling to the United States. While the rule does allow exceptions for applicants who have been denied asylum in another country, or who are victims of severe forms of human trafficking, it bars the vast majority of individuals coming to the U.S. border, including unaccompanied children. This rule bars asylum seekers from around the world who reach the U.S. border. On July 16th, the ACLU filed a lawsuit against this rule.

Safe-third Country Agreements

Reports have suggested that the Administration is attempting to enter into a formal safe-third country agreement with Guatemala. A safe-third country agreement would allow the U.S. to deny entry and return asylum seekers to a “safe country” that they first passed through before arriving at the border. These agreements are meant to serve as recognition between two countries that they will protect asylum seekers. The INA codifies this, stating that in order for the United States to return asylum seekers to another country, that country must be able to guarantee that asylum seekers will not face

³ Human Rights First (2018). Refugee Blockade: The Trump Administration’s Obstruction of Asylum Claims at the Border. New York.

⁴ Ibid.

persecution and that they have access to a full and fair asylum adjudication process. A safe third country agreement with Guatemala would force asylum seekers from El Salvador and Honduras to seek safety there, despite the country's turmoil and dangerous conditions. Given that many of the asylum seekers arriving at the U.S. border are Guatemalan, it is clear that it does not meet the qualifications for a safe-third country agreement. Currently the U.S. only holds one safe-third country agreement with Canada, and both countries recognize that family reunification is a fundamental principle of that agreement.

Increased use of Detention

The use of immigration detention continues to increase, despite the availability of humane alternatives. Detention causes long-term trauma. Currently, Immigration and Customs Enforcement (ICE) detains nearly 52,000 people, and over the past year there have been numerous efforts by the government to increase detention capacity.⁵ Additionally, CBP is making inroads to increase detention beds in their facilities, even after evidence of overcrowding, deaths, inhumane conditions, and a clear lack of due process for asylum seekers.

Detaining asylum seekers impedes an individual's ability to secure legal counsel, undermining their access to due process. **Non-detained individuals are 52% more likely to have legal counsel than those who are detained and on average, only 14% of detained individuals are represented in immigration court.**⁶

Alternatives to Detention

Alternatives to detention (ATD), which have been proven successful, allows asylum seekers to live in communities with support systems, costs significantly less than detention, and allows greater access to legal counsel.⁷ Unfortunately, the Administration has largely ignored ATD's, instead choosing to detain asylum seekers – including those who meet the requirements for release.⁸ In April 2019, the Administration codified their efforts to detain asylum seekers when Attorney General Barr ordered immigration judges to no longer hold bond hearings for asylum seekers.⁹ A federal judge blocked the order, saying that asylum seekers in the U.S. have the right to a bond hearing and should not be indefinitely detained until their cases are complete – a process that can take years given an overburdened court system.

Immigration Court Backlog

According to Syracuse University's TRAC Immigration database, the backlog in U.S. immigration courts has reached an all-time high, with 850,000 pending cases as of November.¹⁰ This backlog is largely the

⁵ Detention Watch Network (2019). <https://www.detentionwatchnetwork.org/pressroom/releases/2019/52-000-people-detention-congressional-leadership-meets-over-dhs-funding>

⁶ Women's Refugee Commission (2017). *The Real Alternatives to Detention*. Washington, DC.

⁷ Women's Refugee Commission (2017). *The Real Alternatives to Detention*. Washington, DC.

⁸ https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf

⁹ United States Department of Justice (2019). *Matter of M-S-, Respondent*. <https://www.justice.gov/eoir/file/1154747/download>

¹⁰ TRAC Immigration, Syracuse University (2018). *Immigration Court Backlog Surpasses One Million Cases*. Syracuse, NY.

result of an overburdened immigration court system with less than 450 judges nationwide.¹¹ Last year, former Attorney General Jeff Sessions imposed quotas on immigration judges, requiring them to complete 700 cases a year in an effort to decrease the backlog.¹² A quota system undermines due process by putting pressure on immigration judges to expedite hearings and issue decisions without sufficient time to consider all of the complexities of a case, placing asylum seekers at a disadvantage as they move through the immigration court system.¹³ Immigration judges in asylum cases are making life-or-death decisions. Implementing quotas or deadlines on their judicial review strips asylum seekers of their due process.

Asylum Ban

In November 2018, President Trump issued an executive proclamation announcing an “asylum ban,” making ineligible for asylum any individual who crosses the U.S.-Mexico border between official ports of entry.¹⁴ While the ban does not entirely preclude people from seeking humanitarian protection, the options available to asylum seekers includes significantly stricter requirements.¹⁵ Under the asylum ban, it is very likely that asylum seekers who have well-founded fears of persecution will be sent back to their home countries.

Under U.S. and international laws, seeking asylum is legal, whether at a port-of-entry or not. Congressional directive dictates that individuals have up to one year to file an asylum claim after they have entered the U.S., whether at a port-of-entry or not.¹⁶ Additionally, as a signatory to the 1967 Protocol Relation to the Status of Refugees, the U.S. is obligated to comply with international rules pertaining to asylum, including prohibiting the penalization of refugees for illegal entry.¹⁷ The asylum ban was halted in December 2018 when a U.S. District Judge issued a preliminary injunction to block the ban, which was upheld by the U.S. Supreme Court and is not currently in effect.¹⁸ This is one of many attempts to cut off access to asylum at the U.S. – Mexico border.

Founded in the 1880s to help resettle Jews fleeing persecution, HIAS is the world’s oldest refugee agency. Today, guided by our Jewish values and history, we bring more than 130 years of expertise to our work providing services to all refugees in need of assistance, regardless of their national, ethnic, or religious background. To learn more about our work visit us at [HIAS.org](https://www.hias.org)

¹¹ National Public Radio (2019). American Bar Association Says Immigration Courts Are ‘On The Brink of Collapse.’

<https://www.npr.org/2019/06/04/729737514/american-bar-association-says-immigration-courts-are-on-the-brink-of-collapse>

¹² American Bar Association (2018). EOIR Performance Plan, Adjudicative Employees. Washington, DC.

¹³ <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>

¹⁴ <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/>

¹⁵ Human Rights First (2018). Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk. New York.

¹⁶ <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-1687.html>

¹⁷ UNHCR (1967). Convention and Protocol Relating to the Status of Refugees.

¹⁸ <https://www.lawfareblog.com/asylum-ban-litigation-supreme-court-declines-stay-injunction>