

# The U.S. Asylum System Today

## January 2020



Welcome the stranger.  
Protect the refugee.

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

The last three years have seen 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 efficient manner – including at our borders.

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, and that they cannot be punished for seeking 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 Migration Protection Protocols (MPP), also known as the ‘Remain in Mexico’ program. Under MPP some Spanish speaking asylum seekers who have passed a credible fear interview – an initial screening where an asylum seekers story is evaluated – were returned to Mexico to wait for their asylum hearings in a U.S immigration court.<sup>1</sup> *Since its introduction, MPP has led to the return of nearly 56,000 asylum seekers to Mexico.*<sup>2</sup>

Currently, MPP is in effect at six ports-of-entry along the Southern border.<sup>3</sup> However, 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 explicit guidelines outlining the selection process. Once subject to MPP, it is nearly impossible to get out. It is important to note that 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.<sup>4</sup>

### Concerns about Asylum Seekers Returned to Mexico

**Legal Counsel** - The Remain in Mexico program severely undermines the due process rights of asylum seekers. Between January and November 2019, only 4% of asylum seekers that entered MPP had legal representation.<sup>5</sup> For those fortunate enough to find legal representation, attorneys are left with little

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

<sup>2</sup> Reuters (2020). ‘The U.S. Implements Plan to Send Mexican Asylum Seekers to Guatemala.’ <https://www.reuters.com/article/us-usa-immigration/us-implements-plan-to-send-mexican-asylum-seekers-to-guatemala-idUSKBN1Z51S4>

<sup>3</sup> Texas Tribune (2019). ‘Trump’s Remain in Mexico Immigration Policy Expands Texas Mexico Border.’ <https://www.texastribune.org/2019/10/28/trump-remain-mexico-immigration-policy-expands-texas-mexico-border/>

<sup>4</sup> <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/act.html>

<sup>5</sup> TRAC Immigration, Syracuse University (2019). Migrant Protection Protocols. Syracuse, NY. <https://trac.syr.edu/phptools/immigration/mpp/>

time and few resources with which to prepare a case. Even with legal representation, individuals in MPP are experiencing higher-than-average denial rates of around 63%.<sup>6</sup>

**Safety** - For many asylum seekers in MPP, their ability to move around is limited due to their fear of being kidnapped or attacked in dangerous border towns.<sup>7</sup> This makes working, taking care of a family, or accessing legal support challenging. The influx of asylum seekers forced to wait in Mexico has put shelters at capacity, leaving many asylum seekers to live on the streets without adequate access to water, food, or proper sanitation while they wait. Some migrants continue to be targeted by the same people that they fled. For example, in Ciudad Juarez, Mexico, women told HIAS staff members that they feared leaving the migrant shelter because they could see their persecutors standing outside of the gates. At their immigration hearings in the United States, asylum seekers can make a claim that they have a fear of returning to Mexico, however these claims are typically denied.<sup>8</sup>

### 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, at the border, asylum seekers are facing what is known as ‘metering,’ being turned away from ports of entry and forced to wait indefinite periods of time before approaching a border agent to make a claim for protection. U.S. Customs and Border Protection (CBP) is using metering to **reduce the number of asylum seekers that are allowed to seek protection in the U.S.**<sup>9</sup> Metering has led to decreased processing, far below CBP’s capacity.<sup>10</sup>

Only once 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 in the United States, or place them in detention. Similar to MPP, migrants who are waiting in Mexico because of metering are targets for kidnapping and crime.

### Safe Third Country Agreements

Historically, safe-third country agreements allow the U.S. to deny entry and return asylum seekers to a “safe country” that they first passed through before arriving at the U.S. border. These agreements are supposed to be reserved for countries that share a commitment to ensuring that asylum seekers will have access to a full and fair asylum adjudication process. Currently, the U.S. only holds one formal safe-third country agreement with Canada.

Recently the Administration entered into an “Asylum Cooperative Agreement” (ACA) with Guatemala. This agreement functions like a safe-third country agreement, but fails to meet any of the same

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<sup>6</sup> San Diego Union Tribune (2019). ‘Asylum Grant Rates Under Remain in Mexico are Below Historic Average.’

<https://www.sandiegouniontribune.com/news/immigration/story/2019-12-26/asylum-grant-rates-under-remain-in-mexico-are-far-below-historic-average>

<sup>7</sup> Human Rights First (2020). A Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico. New York. <https://www.humanrightsfirst.org/sites/default/files/AYearofHorrors-MPP.pdf>

<sup>8</sup> Human Rights First (2018). Refugee Blockade: The Trump Administration’s Obstruction of Asylum Claims at the Border. New York.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

standards, and permits the U.S. to force asylum seekers from Honduras, El Salvador, and according to department guidance Mexico, to Guatemala to seek protection. Many of the asylum seekers arriving at the U.S. border are fleeing violence and persecution in these countries, making it clear that asylum systems sent back will not be offered the necessary access to protection required by such an agreement.

Since signing the first ACA, the Trump administration has announced efforts to sign similar agreements with other Central American countries including Honduras and El Salvador.<sup>11</sup>

### Increased use of Detention

The use of immigration detention continues to increase, despite the availability of humane alternatives. 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.<sup>12</sup> 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. It is critical to note that **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.**<sup>13</sup>

The current Administration has ended nearly all Alternatives to Detention (ATD) programs. These successful alternatives allow asylum seekers to live in communities with support systems, cost the taxpayer significantly less than conventional detention, and allow for greater access to legal counsel for immigrants.<sup>14</sup>

### 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 1,071,036 pending cases as of November 2019.<sup>15</sup> On average, pending cases wait an average of 1,450 days or more – four years – before a hearing is scheduled.<sup>16</sup> This backlog is largely the result of an overburdened immigration court system.<sup>17</sup>

In 2018, 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.<sup>18</sup> However, a quota system is not

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<sup>11</sup> New York Times (2020). Asylum Agreements with Central American Nations Challenged.'

<https://www.nytimes.com/aponline/2020/01/15/us/politics/ap-us-immigration-asylum-agreements-lawsuit.html>

<sup>12</sup> Detention Watch Network (2019). <https://www.detentionwatchnetwork.org/pressroom/releases/2019/52-000-people-detention-congressional-leadership-meets-over-dhs-funding>

<sup>13</sup> Women's Refugee Commission (2017). The Real Alternatives to Detention. Washington, DC.

<sup>14</sup> Women's Refugee Commission (2017). The Real Alternatives to Detention. Washington, DC.

<sup>15</sup> TRAC Immigration, Syracuse University (2018). Immigration Court Backlog Surpasses One Million Cases. Syracuse, NY.

<sup>16</sup> TRAC Immigration, Syracuse University (2019). Crushing Immigration Judge Caseloads and Lengthening Hearing Wait times. Syracuse, NY.

<sup>17</sup> 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>

<sup>18</sup> American Bar Association (2018). EOIR Performance Plan, Adjudicative Employees. Washington, DC.

the right way to address this growing backlog. Quotas 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.<sup>19</sup>

## Asylum Ban 2.0

In July 2019, the Administration released an Interim Final Rule (IFR) banning individuals at the Southern border from seeking asylum if they had failed to apply for asylum in at least one country they passed through on their way to the United States. While the rule does allow for some exceptions for applicants who have been denied asylum in another country, or 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 is among the first that targets asylum seekers from around the world who reach the U.S. border, and not just Spanish speakers. On September 12, 2019, the Supreme Court allowed the “third country transit asylum ban” to go into effect. The Supreme Court did not rule on the merits of the case, and legal challenges to the administration’s policy continue as the case works its way through the lower courts. Most recently, the court ruled that individuals who were on the metering list or had presented themselves prior to the July 15, 2019 implementation date would still be eligible for asylum.

The policies above come in addition to countless efforts by the Administration to make significant regulatory changes to asylum. There has been a number of Notices of Proposed Rulemaking (NPRMs) that would make accessing and eligibility for Employment Authorization Documents (EAD)<sup>20</sup> more challenging for asylum seekers as well as proposed new criminal eligibility bars for asylum protections.<sup>21</sup>

Not all of the efforts to limit asylum are discussed in this document. If you have questions about these additional changes, please reach out to the HIAS Policy Officer, Meggie Weiler at [meggie.weiler@hias.org](mailto:meggie.weiler@hias.org).

*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)*

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<sup>19</sup> <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas>

<sup>20</sup> <https://www.federalregister.gov/documents/2019/11/14/2019-24293/asylum-application-interview-and-employment-authorization-for-applicants>

<sup>21</sup> <https://www.federalregister.gov/documents/2019/12/19/2019-27055/procedures-for-asylum-and-bars-to-asylum-eligibility>