

The Rise in Criminal Prosecutions of Asylum Seekers

On January 25, 2017, President Donald Trump issued an executive order calling on the Department of Justice (DOJ) to make criminal prosecution of immigration offenses a “high priority”¹—even though such prosecutions already made up more than half of all federal prosecutions nationwide. Secretary of Homeland Security John Kelly subsequently directed Customs and Border Protection (CBP) and other Department of Homeland Security (DHS) agencies to target people for offenses that included “illegal entry and reentry” and “unlawful possession or use of official documents.”² In April and May, Attorney General Jeff Sessions instructed federal prosecutors to make “immigration offenses higher priorities,” target “first-time improper entrants,” and “charge and pursue the most serious, readily provable offense” in all charging decisions.³

These directives failed to mention U.S. treaty obligations that prohibit the penalization of refugees for illegal entry or presence—protections created in the wake of World War II, after many nations had treated refugees who sought asylum in their countries or who had invalid travel documents as “illegal” entrants.⁴ In fact, the Department of Homeland Security’s Office of Inspector General warned in 2015 that the referral of asylum seekers for criminal prosecution may violate U.S. obligations under the Refugee Convention and its Protocol. The bipartisan U.S. Commission on International Religious Freedom (USCIRF) also expressed concern about this practice.⁵

The U.S. government is escalating these criminal prosecutions at a time when U.S. border authorities are attempting to deter and penalize a population

that is largely seeking refugee protection, and when the United States, Mexico, and Central American countries are struggling to respond to a regional refugee and displacement crisis.

Following the Trump Administration’s directives, the criminal prosecution of migrants and asylum seekers for immigration offenses has sharply increased. Also, in a major shift, the government is aggressively prosecuting first-time entrants. A Human Rights First researcher observed the prosecution and conviction of many asylum seekers and immigrants in April, May, and June 2017, and as detailed below, found that asylum seekers are regularly subjected to criminal prosecution for illegal re-entry and increasingly for illegal entry.

As a result, people coming to the United States to seek asylum—a legal act—are penalized, detained in federal prisons, and in some cases deported without a chance to have their asylum claims heard. In addition to violating the Refugee Convention and its Protocol, these criminal prosecutions set a poor example for the rest of the world, flout due process and fairness, disproportionately punish people for immigration violations, and are tremendously costly.

The U.S. government should end this harmful practice and focus its resources on prosecuting members of criminal enterprises engaged in smuggling and trafficking, and on migration enforcement measures that comport with U.S. human rights and refugee protection legal obligations. The United States has the capacity—and responsibility—both to protect the persecuted and effectively manage its borders.

The Rise in Criminal Prosecutions for Immigration Offenses

The criminal prosecution for illegal entry and illegal reentry has skyrocketed:

- Illegal reentry convictions increased 28-fold between 1992 and 2012, according to the Pew Research Center,⁶ largely due to the implementation of Operation Streamline, a joint initiative of DHS and DOJ, which allows for up to 100 individuals to be prosecuted in a group hearing.⁷
- Prosecutions for illegal entry, illegal reentry, and other immigration-related violations constituted 52 percent of all federal prosecutions in fiscal year 2016.⁸

In the wake of President Trump's executive order and the subsequent directives from Secretary Kelly and Attorney General Sessions, the number of asylum seekers and immigrants criminally prosecuted for immigration offenses has risen significantly and prosecutions of first-time entrants have sharply increased. For example:

- Immigration prosecutions increased by 27 percent from April to May 2017, according to the most recent U.S. government data obtained by Syracuse University's Transactional Records Access Clearinghouse (TRAC).⁹
- In May 2017, illegal entry and illegal reentry constituted 93 percent of charges brought by U.S. prosecutors in U.S. magistrate courts.¹⁰
- On May 22, 2017, federal prosecutors began criminally prosecuting first-time entrants with illegal entry through Tucson's Operation Streamline. This shift, from prosecuting only illegal reentry offenses, quickly triggered an increase in the number of immigrants prosecuted from about ten defendants a day to about 75 defendants per day.¹¹

Over the week of June 19, 2017, a Human Rights First researcher observed Tucson's Operation Streamline and found that charges for illegal entry made up 54 percent of cases.

The Criminal Prosecution of Asylum Seekers

In April, May, and June 2017, a Human Rights First researcher observed criminal trials of migrants and asylum seekers referred for prosecution for illegal entry and illegal reentry at the U.S. District Court for the District of Arizona in Tucson. Findings include:

Of over 300 prosecutions observed, in all but a few, people were criminally charged, convicted, and sentenced for illegal entry or reentry, even when defendants indicated they came to the United States to seek asylum or due to their fear of return to their home country. Those not convicted either had their cases postponed or moved from Streamline to an individual hearing.

- In one case, a Honduran asylum seeker was criminally prosecuted even though his attorney explained that he had crossed into the United States to seek asylum. Neither the federal prosecutor nor the judge stayed the criminal prosecution, and he was sentenced to for 30 days in prison, despite U.S. treaty prohibitions on penalizing asylum seekers for their manner of entry.¹²

Several Tucson criminal defense attorneys told Human Rights First that many of their clients report having a fear of return to their home countries or intend to seek asylum, but Streamline judges routinely tell attorneys that their clients must first be criminally prosecuted and serve their prison sentences. Two defense attorneys told Human Rights First that of the eight clients they had represented in one day alone, four expressed to them fears of return, yet the attorneys didn't mention this in the Streamline hearing, as they knew it would be futile.

- In June 2017, a Border Patrol representative told a Human Rights First researcher that the agency has moved to implement a “zero-tolerance” policy, meaning that everyone apprehended, with few exceptions (e.g., minors, family units), will be prosecuted—including asylum seekers.

Human Rights First and others have documented cases of asylum seekers who have been criminally prosecuted for illegal entry, illegal reentry, or document fraud. It is important to note that a subsequent referral to asylum or withholding proceedings—after referral for criminal prosecution—does not undo the treaty violation.

Examples include:

- **A Honduran asylum seeker was referred by CBP for criminal prosecution after requesting asylum at the El Paso, Texas port-of-entry in 2016.** After requesting asylum, along with his mother, the Honduran asylum seeker was referred for criminal prosecution by CBP for allegedly attempting to evade inspection at the port-of-entry—an allegation the asylum seeker denied. He was subsequently convicted of “illegal entry.” After the criminal conviction, he was moved from criminal detention to immigration detention. While his mother was paroled into the United States to reside with her U.S. legal permanent resident daughter, ICE denied his request for parole, claiming that he was a “flight risk” and that he attempted to “elude inspection.” His attorneys report that their client did not elude inspection, noting that he requested asylum at the official port of entry.¹³
- **A torture survivor from Eritrea was criminally prosecuted for “illegal entry.”** This torture survivor fled Eritrea to other African countries only to be attacked, targeted, and threatened with return to Eritrea. In search of protection, he entered the United States via the southern border and presented himself to Border Patrol agents, explaining his experiences in Eritrea, his fear of torture if returned, and his desire to seek asylum. Border agents nevertheless referred him to prosecution for “illegal entry,” and he was criminally convicted. After serving his sentence in a federal prison, he was transferred to immigration custody, and obtained pro bono counsel. His eligibility for asylum was so clear that the immigration judge granted asylum mid-hearing. Yet the United States had already penalized this refugee for “illegal entry.”¹⁴
- **A transgender woman from Honduras, who had been raped and subjected to other sexual violence, was criminally prosecuted for “illegal reentry.”** This asylum seeker initially fled to the United States in 2014, but U.S. immigration officials failed to respond to her requests for asylum and she was deported back to Honduras through expedited removal without ever seeing an immigration judge. She fled to the United States again in 2015, and was apprehended upon entry. U.S. border agents referred her for criminal prosecution, and she was convicted of “illegal reentry.” After she was transferred back to immigration custody, she was found to be a refugee who qualified for withholding of removal. Yet the United States had already penalized her for “illegal reentry.”¹⁵
- **An asylum seeker from Nigeria, who fled extensive persecution due to his Christian religion, was criminally prosecuted for visa fraud.** When he arrived at a New York airport, border agents questioned him in secondary inspection, but—according to the asylum seeker—never asked if he feared return to Nigeria. Instead, they referred him for criminal prosecution for visa fraud under 18 U.S.C. §1546(a). He was jailed in a New York criminal detention center for approximately two months until he pled guilty. After he was transferred to an immigration detention facility, he passed a credible fear interview and was found to be a refugee who qualified for asylum. Yet the United States had already penalized this refugee based on his manner of entry.¹⁶

Immigration Prosecutions Impede the Asylum Process

Criminal prosecutions can also lead to violations of U.S. non-refoulement obligations by forcing asylum seekers to return to countries where they may be persecuted. Immigrants sent to serve out criminal sentences in U.S. prisons “are almost always deported” upon completion of their sentences and are then subject to statutory bars to re-entering the United States.¹⁷ Since plea bargaining often results in shorter sentences—including “time-served”—defendants are often returned immediately to the custody of DHS after sentencing, and are then returned to their home country.¹⁸ This rapid process has returned asylum seekers to countries where they fear persecution.

Moreover, the experience of criminal prosecution may prevent traumatized asylum seekers from pursuing their claims altogether. The criminal process and incarceration in federal prisons delay the opportunity to seek asylum, and can exacerbate trauma and other mental health conditions.¹⁹

Examples of asylum seekers unable to seek protection after completing a criminal sentence include:

- **Mexican family referred for criminal prosecution despite expressed fears, and immediately deported after criminal conviction in April 2017.** A Mexican family of three—a husband, wife, and their 25-year old nephew—were apprehended near the border in Texas in April 2017 and told by a border officer that they could not seek asylum in the United States. The family told the border officer that they had been extorted, beaten, kidnapped, and shot by members of a cartel that had also targeted other members of their family. Nonetheless, the family was referred for criminal prosecution, transferred to U.S. Marshals Service custody at Val Verde Correctional Facility, and charged with “illegal entry.” Prior to

the hearing, the court interpreter told the defendants that they were to accept their sentence and were not allowed to say anything about asylum or the reasons why they came to the United States. The three family members were brought up to the judge in a group of 18 defendants, convicted of “illegal entry,” sentenced to time-served, and then swiftly returned to Mexico. The family attempted to seek asylum again a few weeks later and were finally processed and allowed to pursue their protection claims.²⁰

- **A Mexican asylum seeker was convicted of “illegal entry” in May 2017 and apparently deported immediately.** A man from Guerrero, Mexico had tried to seek asylum in October 2016 but was turned away by CBP officers at a California port of entry and told that judges were “sick of these claims.” When he again attempted entry near Nogales, Arizona he was apprehended and referred for criminal prosecution for “illegal entry.” Even though he stated his fear of return in federal court in May 2017, the judge convicted him of “illegal entry” and sentenced him to time-served. Advocates were unable to locate him—he was not found in the “ICE Detainee Locator”—and therefore believe he was deported to Mexico.²¹

Prosecutions for Migration Offenses Raise Substantial Due Process Concerns

The criminal prosecution of asylum seekers and migrants for immigration offenses and the widespread use of Operation Streamline violate basic American due process standards. For example:

- Streamline prosecutions are characterized by group court appearances, which process up to 100 individuals in the span of only one to three hours. The judge combines each defendant’s “initial appearance, arraignment, plea, and

sentencing” into one hearing.²² A 2009 Ninth Circuit Court of Appeals case held that taking pleas *en masse* violated Federal Rule of Criminal Procedure 11,²³ so pleas are now taken individually. However the rest of the procedure remains the same, and each prosecution can take as little as 25 seconds to complete.²⁴

- In the Tucson version of Streamline, shackled asylum seekers and migrants are shuffled up to a row of microphones in groups of five to seven, and each is tried, convicted, and sentenced in mini-hearings that take less than a minute.²⁵ One judge claimed a personal record of sentencing 70 individuals in 30 minutes.²⁶
- In this extraordinarily rushed process, the judge speeds through five binary questions with each defendant (“yes/no”; “guilty/not guilty”), followed by a prison sentence ranging from time-served to 180 days,²⁷ before they are immediately ushered out of the courtroom and the next group is hustled to the front to repeat the process.
- Defendants at the Tucson courthouse are bound by chains that interlock their ankles, waists, and wrists—a treatment that persists despite a May 2017 Ninth Circuit opinion clarifying that the Fifth Amendment right to be free of unwarranted restraints requires the court to “make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom” and that courts cannot “institute routine shackling policies reflecting a presumption that shackles are necessary in every case.”²⁸ According to Tucson judges, shackling in Streamline is necessary for safety, despite the presence of the bailiff and multiple officers of Border Patrol and U.S. Marshals.²⁹
- Defendants usually meet with their defense attorneys for the first time on the same day they appear in court.³⁰ In Del Rio, Texas, each lawyer is assigned as many as 80 clients in one day.³¹

In one brief meeting that may last only minutes, the attorney explains the charges, the plea agreement, and the rights and consequences of the plea, and advises on whether to accept the plea. Due to the lengthy maximum sentences for “illegal entry” and “illegal reentry,” which can carry a sentence of up to two or twenty years in prison, respectively,³² defense attorneys have estimated that 99 percent of their clients plead guilty in return for promises of shorter sentences.³³

- Asylum seekers and migrants subjected to these criminal proceedings often have trouble understanding the contents of proceedings due to their speed and language barriers.³⁴ Nearly all defendants receive Spanish translation through headset, leaving little or no opportunity to question remarks they did not understand, and many speak indigenous languages or lack the education level to understand complex words and syntax.

Prosecuting Migration Offenses is Costly and Not Proven to be Effective

The financial cost of these criminal prosecutions is enormous and will continue to grow as the Trump Administration ramps them up:

- In addition to the costs associated with prosecuting and hearing cases, nearly all people charged with illegal entry or reentry are held in federal prisons under the custody of the U.S. Marshals Service (USMS) until their trial. In fact, in 2016, 35 percent of all individuals in USMS pre-trial custody were charged with immigration offenses.³⁵ After the hearing, many remain in custody to serve out the remainder of their sentences. The average sentence for migrants convicted of illegal reentry—whom judges often penalize more severely for multiple unauthorized crossings—was 14 months in 2016.³⁶

- The United States is estimated to have spent at least \$7 billion on these prosecutions between 2005 and 2015.³⁷

The DOJ FY 2018 Budget Request included \$7.2 million to fund 70 additional Assistant United States Attorneys “to address illegal immigration and border enforcement.”³⁸

The USMS requested \$50 million in anticipation of “an increase in the detention population” on account of “enhancements to border security and immigration enforcement.” The cost of current services for this initiative stand at \$381 million. USMS also requested \$8.8 million to fund an additional 40 Deputy U.S. Marshals who “apprehend and transport criminal aliens,” with funding for this initiative standing at \$229 million.³⁹

Despite these high costs, criminally prosecuting individuals for illegal entry and illegal reentry may not even be effective. The stated objective of criminally prosecuting immigration offenses is to deter illegal migration.⁴⁰ However, the DHS Office of Inspector General (OIG) concluded in a 2015 report that CBP did not have an adequate system in place to measure whether or not Operation Streamline—or any criminal prosecutions—have succeeded in deterring individuals from migrating to the United States without authorization.⁴¹

Moreover, the number and makeup of migrants coming to the United States via the southern border with Mexico has changed significantly since the early 2000s when criminal prosecutions of immigration offenses began to increase. In fact, in 2015, illegal migration to the United States reached a 40-year low.⁴² Instead, a higher proportion of the people coming to the United States today via the southern border are seeking protection from human rights violations, violence, and other forms of persecution in the Northern Triangle of Central America. Asylum requests from the Northern Triangle have risen in other countries in the region as well, with claims rising by 285 percent from 2015

to 2016 in Belize, Costa Rica, Mexico, Nicaragua, and Panama.⁴³

Criminal Prosecutions for Migration Offenses Violate U.S. Human Rights and Refugee Treaty Obligations

Article 31 of the 1951 Convention Relating to the Status of Refugees prohibits states from imposing “penalties” on refugees “on account of their illegal entry or presence.”⁴⁴ The prohibited penalties include “being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily detained purely on the basis of seeking asylum,” as the U.N. High Commissioner for Refugees has confirmed.⁴⁵ Article 31’s prohibition on penalization applies to refugees coming from a country where they have a well-founded fear of persecution or from which they are in danger of return to their country of persecution. U.S. regulations, for instance, make clear that immigration authorities shall not generally fine asylum seekers for document fraud related to their flight from a country where they have a well-founded fear of persecution or where they would be in danger of return to that country.⁴⁶

In a 2015 report, the DHS OIG found that CBP was referring asylum seekers to Operation Streamline for “illegal reentry” even after they expressed a fear of return to their home country, and doing so prior to determining their refugee status. The OIG warned the agencies that referring for criminal prosecution asylum seekers “expressing fear of persecution, prior to determining their refugee status, may violate U.S. obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States ratified in 1968.”⁴⁷ USCIRF raised similar concerns in a 2016 report.⁴⁸

The criminal prosecution of immigration offenses may also violate the human rights of migrants. The U.N. High Commissioner for Human Rights stated,

“Seeking asylum is not a crime, and neither is entering a country irregularly.”⁴⁹ Many other U.N. bodies have criticized Operation Streamline and the prosecution of immigration offenses generally. The U.N. Committee on the Elimination of Racial Discrimination has called on the United States to abolish Operation Streamline and address “any breaches of immigration law through the civil, rather than criminal immigration system.”⁵⁰ The U.N. Special Rapporteur on the human rights of migrants has stated, “irregular entry or stay should never be considered criminal offences,”⁵¹ and the U.N. Working Group on Arbitrary Detention specified that “criminalizing illegal entry...exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention.”⁵²

Recommendations

- Given the large proportion of asylum seekers arriving at the southern border to seek protection in the United States, the Trump Administration should roll back plans to increase criminal prosecutions for illegal entry, illegal reentry, or other document offenses, and instead put resources toward evidence-based migration management practices, such as community-based alternative-to-detention programs that have been proven to ensure appearance for immigration hearings and appointments. Prosecutions of members of criminal enterprises engaged in smuggling or trafficking should be prioritized.
- DHS should cease the practice of referring asylum seekers for criminal prosecution on matters relating to their illegal entry or presence, as such prosecutions generally constitute a violation of Article 31 of the Refugee Convention. Instead, agents should refer them to appropriate protection screening interviews.
- DOJ should end prosecutions of individuals seeking protection in the United States for illegal entry, illegal reentry, or their use of invalid or false documents to cross borders to seek asylum, and implement more effective legal oversight of immigration enforcement matters to ensure compliance with U.S. treaty obligations. In addition, DHS and DOJ should interpret statutes defining immigration offenses consistent with U.S. obligations under the Refugee Convention.
- DOJ should immediately discontinue Operation Streamline, as asylum claims and due process are not adequately safeguarded.■

Endnotes

- ¹ Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements (Jan. 25, 2017).
- ² Department of Homeland Security, Memorandum: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017).
- ³ U.S. Department of Justice, Memorandum: Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017); U.S. Department of Justice, Memorandum: Department Charging and Sentencing Policy (May 10, 2017).
- ⁴ Article 31(1) of the 1951 Convention Relating to the Status of Refugees requires that refugees not be penalized solely due to their unlawful entry or presence in a country. These protections extend to asylum seekers (i.e. individuals whose refugee claims have not yet been determined by an authority with jurisdiction). See UN High Commissioner for Refugees (UNHCR), Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees (revised, 2001).
- ⁵ U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM 56 (2016).
- ⁶ Pew Research Center, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth* (March 28, 2014).
- ⁷ U.S. DEPARTMENT OF HOMELAND SECURITY OFFICE OF INSPECTOR GENERAL, STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING, OIG-15-95, 36 (May 15, 2015).
- ⁸ Transactional Records Access Clearinghouse (TRAC), *Immigration Now 52 Percent of All Federal Criminal Prosecutions* (Nov. 28, 2016).
- ⁸ Department of Homeland Security, Memorandum: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017).
- ⁹ TRAC, *Immigration Prosecutions for May 2017*, <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay17/fil/>.
- ¹⁰ *Id.*
- ¹¹ Observations and documentation by Natasha Arnpriester, Rule of Law and Human Rights Fellow, Human Rights First, Tucson, Arizona (April, May, and June 2017). Interviews with, and observations by, the End Streamline Coalition, Tucson, Arizona (2014-2017).
- ¹² Observation by Natasha Arnpriester, Rule of Law and Human Rights Fellow, Human Rights First, Tucson, Arizona, May 11, 2017.
- ¹³ BORDERLAND IMMIGRATION COUNCIL, DISCRETION TO DENY: FAMILY SEPARATION, PROLONGED DETENTION, AND DETERRENCE OF ASYLUM SEEKERS AT THE HANDS OF IMMIGRATION AUTHORITIES ALONG THE US-MEXICO BORDER (February 2017).
- ¹⁴ Case on file with Human Rights First.
- ¹⁵ Case on file with Human Rights First.
- ¹⁶ Case on file with Human Rights First.
- ¹⁷ American Civil Liberties Union, *Fact sheet: Criminal Prosecutions for Unauthorized Border Crossing 1*, available at <https://www.aclu.org/other/operation-streamline-issue-brief>.
- ¹⁸ The U.S. Marshals Service (USMS) transports and takes custody of defendants during their sentences. After defendants have served their sentences, ICE Enforcement and Removal Operations (ERO) or Border Patrol takes custody from USMS and processes defendants for removal. See DHS OIG, *supra* note 7 at 4.
- ¹⁹ HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS (May 2013); see also Daniel E. Martinez and Jeremy Slack, *What Part of 'Illegal' Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, SOC. & LEGAL STUD. 22(4) (2013).
- ²⁰ Case on file with Human Rights First.
- ²¹ Email correspondence with Joanna Williams, Advocacy Director, Kino Border Initiative, Nogales, Arizona (June 2, 2017).
- ²² Joanna Lydgate, *Policy Brief: Assembly-Line Justice: A Review of Operation Streamline*, Berkeley Law: Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity 4 (Jan. 2010).
- ²³ *U.S. v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009).
- ²⁴ Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, NY TIMES (Feb. 11, 2014).
- ²⁵ Observations by Natasha Arnpriester, Rule of Law and Human Rights Fellow, Human Rights First, Tucson, Arizona (April, May, and June 2017).
- ²⁶ Santos, *supra* note 24.
- ²⁷ Observations by Natasha Arnpriester, Rule of Law and Human Rights Fellow, Human Rights First, Tucson, Arizona (April, May, and June 2017). Those sentenced to "time-served" have been charged with illegal entry and plead guilty. Those with sentences ranging from 30-180

days have been charge with “illegal reentry” and then plead down to “illegal entry.” The time of the sentence is determined according to prior entry records as well as other criminal convictions.

²⁸ *United States v. Sanchez-Gomez*, 2017 WL 2346995 (9th Cir. May 31, 2017) (en banc).

²⁹ Conversation with Magistrate Judge Eric J. Markovich, Natasha Arnpriester, Rule of Law and Human Rights Fellow, (June 20, 2017). According to defense attorneys interviewed by Human Rights First, other magistrate judges have stated similar justifications related to shackling in Streamline proceedings.

³⁰ ACLU, *supra* note 17.

³¹ Lydgate, *supra* note 22 at 14.

³² Defendants can be sentenced up to six months for illegal entry, and up to two years for a subsequent illegal entry offense (8 U.S. C. § 1325(a)). Defendants can be sentenced up to two years for illegal reentry, and up to ten years if the defendant’s prior removal occurred after a felony conviction, or up to twenty years if the defendant’s prior removal occurred after an aggravated felony conviction (8 U.S. C. § 1326(a-b)).

³³ Human Rights First interviews with Tucson Streamline defense attorneys (April-June 2017); *see also* Lydgate, *supra* note 22 at 3-4.

³⁴ *Id.*

³⁵ FOIA data from USMS reported by Hanna Kozłowska, *The Private Prison Industry Has One Big Client that No One Talks About*, Quartz, Jun. 13, 2017.

³⁶ UNITED STATES SENTENCING COMMISSION, QUICK FACTS: ILLEGAL REENTRY OFFENSES (2016), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY16.pdf.

³⁷ JUDITH A. GREENE, BETHANY CARSON, AND ANDREA BLACK, INDEFENSIBLE: A DECADE OF MASS INCARCERATION OF MIGRANTS PROSECUTED FOR CROSSING THE BORDER, *Grassroots Leadership* viii (July 2016).

³⁸ U.S. ATTORNEYS (USA), FY 2018 BUDGET REQUEST AT A GLANCE, *available at* <https://www.justice.gov/jmd/page/file/968226/download>.

³⁹ U.S. MARSHALS SERVICE (USMS), FY 2018 BUDGET REQUEST AT A GLANCE, *available at* <https://www.justice.gov/jmd/page/file/968241/download>.

⁴⁰ DHS OIG, *supra* note 7 at 4.

⁴¹ *Id.* at 8.

⁴² U.S. Department of Homeland Security, Press Release, *DHS Releases End of Fiscal Year 2015 Statistics* (Dec. 22, 2015).

⁴³ U.N. High Commissioner for Human Rights (UNHCR), Regional Response to the Northern Triangle of Central America Situation (Sept. 2016).

⁴⁴ The Refugee Convention protects all refugees, not only those recognized as refugees through a state’s domestic procedure. This means that article 31 applies to individuals seeking asylum, even if the United States has not yet officially recognized the person’s status as a refugee. Recognition of one’s asylum status is not what make the person a “refugee,” it only declares the person as one—instead the person is a refugee as soon as she meets the definition. UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, at ¶28, *available at* <http://www.unhcr.org/4d93528a9.pdf>.

⁴⁵ *See Introductory Note by the Office of the United Nations High Commissioner for Refugees*, in CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2, 3 (Dec. 2010).

⁴⁶ *See e.g.*, 8 C.F.R. § 270.2(j), 57 FR 33866, July 31, 1992, as amended at 76 FR 53796, Aug. 29, 2011.

⁴⁷ DHS OIG, *supra* note 7 at 16.

⁴⁸ USCIRF, *supra* note 5.

⁴⁹ OHCHR Hungary violating international law in response to migration crisis: Zeid (Sept. 17, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449>.

⁵⁰ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America 9, CERD/C/USA/CO/7-9, Sept. 25 2014, *available at* <https://www.state.gov/documents/organization/235644.pdf>.

⁵¹ Statement by the UN Special Rapporteur on the human rights of migrants, François Crépeau, PGA Plenary Session: Criminalization of Migrants, New York (Oct. 2, 2013), *available at* <http://www.ohchr.org/Documents/Issues/SRMigrants/Speech/StatementPGAPlenaryCriminalization.doc>.

⁵² REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION, A/HRC/7/4 20 (Jan. 10, 2008), *available at* <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/7/4&Lang=E>.