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Punishing Refugees and Migrants

The Trump Administration's Misuse of Criminal Prosecutions

January 2018

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American ideals. Universal values.

ON HUMAN RIGHTS, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

Human Rights First is a nonprofit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

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ACKNOWLEDGEMENTS

This report was written by Natasha Arnpriester and Olga Byrne. Field research was conducted by Arnpriester, Byrne, and Laura Gault. Arnpriester was the principal field researcher, as well as a principal author of the report. Additional drafting and editing was contributed by Eleanor Acer. Gault, Patricia Stottlemyer, Caroline Wengeler, and Michael Li provided additional research and editing support. Corinne Duffy and Meredith Kucherov edited and Emma Stein designed the report. Human Rights First also thanks the Oak Foundation, the Libra Foundation, the Heising-Simons Foundation, the Open Society Policy Center, and the Simmons Sisters Fund of The Dallas Foundation for their support of the organization's research and advocacy on access to asylum. We are also grateful to the sponsors of the University of Pennsylvania School of Law Chubb Rule of Law Fellowship program. Human Right First expresses its appreciation to all nonprofit and pro bono lawyers, current and former government officials, asylum seekers, and experts who provided information and insights during our research. We also wish to thank the law firm of Wilmer Hale for its pro bono support.

Table of Contents

Executive Summary

As the world continues to face the largest displacement crisis since World War II, President Trump's first year in office has been marked by xenophobic, anti-immigrant rhetoric and increasingly punitive policies that effectively criminalize the act of seeking asylum. The Trump Administration is expanding prosecutions for unauthorized border crossing by targeting refugees legally seeking the protection of the United States. In so doing, it is violating both U.S. and international law.

On January 25, 2017, President Trump issued an executive order calling on the Department of Justice (DOJ) to make criminal prosecution of immigration offenses a "high priority"—even though such cases already made up more than half of all federal prosecutions nationwide. Then-Secretary of Homeland Security John Kelly then 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." 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.

These directives subvert U.S. treaty obligations that prohibit the penalization of refugees for unauthorized entry or presence—protections created in the wake of World War II after many nations treated refugees seeking asylum in their countries as "illegal" entrants. As a result, asylum seekers are subjected to a deeply dehumanizing system that punishes them for seeking protection and threatens to return them to countries where they will face persecution—a violation of the Refugee Convention.

Some examples of asylum seekers wrongfully penalized by DHS and DOJ after President Trump's direction to prioritize the criminal prosecution of immigration offenses:

- A Mexican woman who crossed the border in search of protection and immediately sought assistance from border agents, was referred for criminal prosecution by CBP, convicted of illegal entry in November 2017 in Tucson, Arizona, and then deported back to Mexico despite her request to be interviewed by a U.S. asylum officer.
- A Honduran woman who fled death threats called U.S. authorities after she safely crossed the border but was referred for criminal prosecution and convicted of illegal entry in a group hearing in December 2017 even though she told U.S. border officers she wanted to seek asylum.
- Border patrol officers referred a mother and father fleeing government threats in Venezuela for criminal prosecution for illegal entry and separated them from their fifteen-year-old daughter, who was sent into federal foster custody.
- An asylum seeker severely persecuted in Mexico due to his sexual orientation was referred for criminal prosecution by CBP; during criminal proceedings, DOJ told his lawyers it would increase the recommended criminal sentence if he refused to waive his right to seek asylum.

From April 2017 to January 2018, Human Rights First conducted in-depth research on the prosecution of asylum seekers and migrants for illegal entry and reentry. We visited eight federal courts, including two in Arizona (Yuma and Tucson), one in New Mexico (Las Cruces), and five in Texas (El Paso, Del Rio, Laredo, McAllen, and Brownsville.) We observed more than 700 prosecutions of migrants charged with illegal entry

or illegal reentry. We also met with numerous stakeholders: federal district court and magistrate judges, assistant and special assistant U.S. attorneys, criminal defense attorneys—including federal public defenders, Criminal Justice Act (CJA) panel attorneys, private and nonprofit immigration attorneys—investigators, current and former border patrol agents and representatives, and community activists and organizers.

Our findings include:

- **Criminal prosecutions of vulnerable migrants and asylum seekers are increasing.** While prosecutions of illegal entry and reentry soared under the Bush and Obama Administrations, the Trump Administration is targeting the most vulnerable immigrants. Federal criminal defense attorneys noted a marked shift, including an increase in prosecutions of first-time entrants, people with no criminal history, and people with children—with asylum seekers heavily present among these groups. After implementing Sessions' memos, the federal court in Tucson, Arizona went from hearing between 10 and 40 cases a day to regularly hearing 75 per day—an increase fueled by prosecutions of first-time entrants. In November 2017 prosecutions for illegal entry and illegal reentry made up over 51 percent of all federal cases, including 69 percent of cases in U.S. magistrate courts.
- **CBP is separating children from their parents in order to refer the parents for criminal prosecution.** The Trump Administration is regularly separating children from their parents and caretakers for the purpose of prosecuting the adults. Numerous federal criminal defense attorneys reported an increase in family separations and helped desperate parents locate their children—often after going days to weeks not knowing where they were being held.
- **Asylum seekers make up a significant portion of cases prosecuted for illegal entry or illegal reentry.** Forty-eight percent of defense attorneys surveyed by Human Rights First who practice along the southern border said that more than half of their clients are asylum seekers, and 66.7 percent said that asylum seekers make up more than 25 percent of their caseloads. All defense attorneys working near the southern border said that they had represented an asylum seeker prosecuted for illegal entry or illegal reentry. Human Rights First observed numerous criminal prosecutions of people who expressed a fear of return or intent to seek asylum, even though their attorneys—believing it futile—often urge them not to express their intent to seek refugee protection during proceedings in criminal court.
- **CBP officers refer, and DOJ often prosecutes, asylum seekers for illegal entry into or presence in the United States regardless of their intention to seek protection, and no federal district along the border has a policy of exempting asylum seekers from criminal prosecution.** CBP agents in sectors along the border indicated that they refer people for prosecution irrespective of their intention to seek asylum. It appears that prosecutors and judges do not take asylum into account when determining the charges or sentences for illegal entry or illegal reentry. In the four federal court districts Human Rights First visited, not one U.S. Attorney's Office had a policy of exempting asylum seekers from charges of illegal entry or illegal reentry, and only one was found to have dismissed cases because defendants intended to seek asylum, though this appeared to have occurred on an ad hoc basis, not as policy. As one defense attorney said, "Most of the time, the prosecutors don't seem to believe or care that a client came to seek asylum." In a federal

court in Yuma, a Border Patrol agent prosecutes defendants even though the agent is not an attorney and therefore may be engaged in unauthorized practice of law. During court observations of over 700 cases, no CBP agents, DOJ prosecutors, or federal judges showed deference of the prohibition, under Article 31 of the Refugee Convention, on penalizing asylum seekers for illegal entry—even though DHS's Office of Inspector General (OIG) raised a concern about DHS referring asylum seekers for prosecution in a 2015 report.

- **Some plea agreements force asylum seekers to forego their claims for refugee protection, violating not only Article 31 of the Refugee Convention, but also Article 33's prohibitions against return to countries of persecution.** Defense attorneys estimated that 99 percent of their clients charged with illegal entry or reentry plead guilty in return for shorter sentences—avoiding the risk of a longer sentence if the case went to trial. In some cases, plea agreements for illegal reentry contain immigration "waivers" that require people to relinquish asylum and other protection claims, or not to contest deportation.
- **Criminal prosecutions thwart access to asylum, sending asylum seekers back to countries where they face persecution, in violation of treaty obligations.** Numerous defense and immigration attorneys, as well as humanitarian organizations, reported instances when ICE and CBP failed to refer asylum seekers for credible fear interviews after they completed their criminal sentence. Instead, they return them to their countries of origin, where they may face persecution. The risk of removal without the opportunity to seek asylum appears particularly high for citizens of Mexico, where gangs regularly abduct deportees and hold them for ransom.
- ***En masse*, fast-track prosecutions for illegal entry and reentry violate due process and other constitutional protections.** Operation Streamline combines each defendant's initial appearance, preliminary hearing, plea, and sentencing into one hearing that can last less than one minute. The speed of the trial, lack of access to counsel, and insufficient efforts to overcome language barriers threaten the right to a fair trial and to effective counsel. While the Ninth Circuit ruled against a blanket shackling policy, in most federal courthouses along the border defendants are restrained in five-point shackles, even when they are ill or disabled.
- **DHS fails to track cost and other statistics related to illegal entry and reentry prosecutions.** In its 2015 report, the OIG found that DHS did not track the precise costs of Operation Streamline and recommended that officials generate cost estimates. DOJ requested an additional $66.3 million in FY 2018 to hire more prosecutors at the border and increase U.S. Marshal services and personnel in border courts, adding to the current cost of $788.9 million for these services, which do not include other expenses, such as defense attorneys, judicial fees, or court interpreters. Nonprofit groups have estimated that Operation Streamline has cost taxpayers at least $7 billion in detention costs alone over a 10-year period. Experts have emphasized that prosecuting immigration offenses imposes broader social costs by diverting scarce judicial and prosecutorial resources away from prosecutions of more serious crimes, and by separating families and forcing children into foster care. Moreover, DHS provides misleading statistics, claiming that criminal prosecutions have reduced recidivism in unauthorized border crossings by analyzing data only within a fiscal year, rather than by tracking people over time.

Numerous experts, including U.N. bodies, have stated that governments should deal with immigration infractions of illegal entry and illegal reentry exclusively through civil or administrative processes—not the criminal justice system.

But the increased prosecution of asylum seekers is part of broader effort by the Trump Administration to depict immigrants as criminals. Many asylum seekers—with a newly acquired criminal record—will now be counted in DHS and ICE statistics and reported to the public as so-called "criminal aliens."

Moreover, this rise in criminal prosecutions of asylum seekers and migrants also comes at a time when both the executive and legislative branches are trying to curb access to asylum. For example, as Human Rights First reported in early 2017, CBP officers are regularly denying refugees access to the U.S. asylum system at ports of entry—in violation of U.S. law and treaty obligations. Various legislative demands issued by the White House contemplate dangerous cutbacks to a U.S. asylum system that already contains unnecessary and harmful hurdles.

These trends and potential changes to law and policy will leave even more asylum seekers without the international protection they need to avoid persecution and, in some cases, death. Immediate action is needed to safeguard the rights of asylum seekers.

Recommendations

To the U.S. Department of Homeland Security:

- End 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.
- Cease plans to increase referrals of asylum seekers and migrants for criminal prosecution for illegal entry, illegal reentry, or document offenses. Article 31 of the Refugee Convention protects asylum seekers who often have no choice but to rely on false documentation to flee persecution.
- The DHS OIG should investigate and follow up on its recommendation that Border Patrol "develop and implement processing and referral guidance for noncitizens who express a fear of persecution or return to their country of origin at any time during their Border Patrol processing" as a step toward ensuring that DHS complies with U.S. treaty obligations.

To the U.S. Department of Justice:

- End prosecutions of people 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.
- End the use of plea agreements that require people to forgo seeking U.S. protection from persecution or torture and violate U.S. obligations under Article 33 of the Refugee Convention prohibitions against return to countries of persecution.
- Collect and publish disaggregated data that reflects the number of people prosecuted for illegal entry and illegal reentry, by nationality, gender, race, age as well as the type of proceeding (i.e. U.S. magistrate court (noting if processed through Operation Streamline/CCI) or U.S. district courts).
- The DOJ OIG should investigate U.S. Attorney's Offices' prosecution of asylum seekers for illegal entry and illegal reentry and make recommendations

To the U.S. Departments of Homeland Security and Justice jointly:

- Immediately discontinue Operation Streamline as it violates defendants' due process and constitutional rights, is costly, and shows no reliable evidence of meeting its goal of deterrence.
- Comply with requirements under the Haitian Refugee Immigration Fairness Act of 1990 and publish annual data on the number of individuals who have sought asylum and have been sent to federal prisons or detention centers.
- Publicize whether Operation Streamline/CCI will be expanded in the future, and if so, how this expansion will function.

To the United States Congress:

- Repeal 8 U.S.C. 1325 (illegal entry) and 8 U.S.C. 1326 (illegal reentry), allowing immigration infractions to be handled in the civil system, in accordance with recommendations from human rights bodies. At the very least, these statutes should be amended to align with our treaty obligations, to ensure that asylum seekers are not prosecuted and to protect vulnerable migrants from human rights abuses.
- Do not provide funding for U.S. Attorneys to be used for criminal prosecutions of asylum seekers in violation of U.S. treaty obligations, and prevent funding for DHS and DOJ from being used to process, prosecute and imprison asylum seekers for criminal proceedings in violation of U.S. treaty obligations.
- Reject proposals to further criminalize asylum seekers and migrants, including proposals that increase sentences or expand the scope of the crimes of illegal entry or illegal reentry.

Background

In 1929—amid an immigration boom from Mexico—Senator Coleman Livingstone Blease, a pro-lynching white supremacist,[1] proposed a bill that made entering the United States without first obtaining immigration authorization a misdemeanor (*i.e.*, illegal entry) and returning to the United States after deportation a felony (*i.e.*, illegal reentry).[2]

Prosecutions for these crimes remained relatively low until the Bush Administration. Under the Homeland Security Act of 2002, the administration restructured the functions of the former Immigration and Naturalization Service under the newly created Department of Homeland Security (DHS), whose mission was to prevent terrorist attacks in the United States.

DHS then implemented policies intensifying the criminalization of immigration.[3] An initiative that began in Del Rio, Texas in 2005 called "Operation Streamline"—a partnership between DHS and DOJ to prosecute hundreds of border crossers a day through a fast-track, mass hearing—dramatically increased prosecutions for illegal entry and reentry.[4] In 2016, Operation Streamline was renamed the Criminal Consequence Initiative (CCI).[5]

Operation Streamline reached its height in 2008, operating in eight federal district courts along the southwest border.[6] In one year, criminal prosecutions for immigration offenses doubled from nearly 40,000 in FY 2007 to 80,000 in FY 2008, peaking at nearly 98,000 in FY 2013 under the Obama Administration. This was a 367 percent increase from a decade earlier.[7]

Trump Administration is Expanding Criminal Prosecutions and Targeting Asylum Seekers

During his first week in office, President Trump signed an executive order calling on the DOJ to make the criminal prosecution of immigration offenses a "high priority."[8] In February 2017 then-Secretary of Homeland Security John Kelly directed CBP and other DHS agencies to target people for offenses that included "illegal entry and reentry."[9]

Following these orders, Attorney General Sessions issued memoranda in April and May, instructing all federal prosecutors to make "immigration offenses higher priorities," target "first-time improper entrants,"[10] and "charge and pursue the most serious, readily provable offense" in all charging decisions.[11]

In the month following Sessions' April memorandum, immigration charges increased by 27 percent.[12] The next month, these prosecutions had increased another 18 percent.[13] By November 2017, illegal entry and reentry prosecutions had increased by 53 percent and 26 percent respectively, as compared to April.[14]

In November 2017 alone, DOJ brought 1,703 illegal entry and reentry charges in federal district court and 3,846 charges in federal magistrate courts, representing 69 percent of all magistrate charges brought nationally. The 5,549-total illegal entry and illegal reentry charges made up over 51 percent of the 9,996 prosecutions filed in federal courts nationally.[15]

According to defense attorneys surveyed by Human Rights First, the administration has had to expand its reach to some of the most vulnerable individuals and families to implement its policy of making these prosecutions "higher priorities." In

Tucson, DOJ had rarely prosecuted illegal entry in recent years.

As of May 22, 2017, however, illegal entry charges routinely made up the majority of the Operation Streamline calendar each day. In Las Cruces, federal defenders told Human Rights First that the court has been overflowing with defendants charged with illegal entry and reentry since implementation of the Sessions memos. Their previous agreement with the prosecutor's office to cap illegal reentry charges at 150 per month had disappeared.[16]

Asylum Seekers are Routinely Convicted of Illegal Entry and Reentry

Human Rights First researchers have observed many prosecutions of asylum seekers who, despite coming to the United States to seek asylum—a legal act—were referred by DHS for prosecution instead of being referred to protection screening interviews or the immigration court process in accordance with U.S. and international law.

Once in criminal court, federal prosecutors—whether Assistant U.S. Attorneys or detailed staff from CBP—fail to drop charges or stay prosecutions involving asylum seekers. When defendants or their attorneys raise issues related to asylum, judges routinely respond that they lack authority on immigration matters and that defendants must serve their prison sentences before they can seek protection.

While deciding an asylum claim in the first instance is beyond the jurisdiction of federal district and magistrate courts, Human Rights First did not observe a single case in which a federal judge hesitated to convict and sentence asylum seekers—other than occasionally offering brief words of sympathy—despite U.S. treaty obligations prohibiting penalization of asylum seekers.

Some examples of defendants and their attorneys attempting to make their protection claims known in federal court include:

- In Del Rio federal district court on November 8, 2017, the Criminal Justice Act (CJA) attorney appointed to represent all defendants in Operation Streamline proceedings told the judge and prosecutor the following: a young man from El Salvador told Border Patrol that he needed asylum as he was fleeing death threats; another man attacked in Honduras was prevented from securing work due to threats; a father was trying to secure release for his kidnapped child in Mexico; a man experienced death threats in Honduras; and another man told Border Patrol he was fleeing death threats and was fearful of return to El Salvador.

  In each of these cases, the magistrate judge stated there was nothing he could do, but "hopefully someone down the road can help." All defendants were convicted of illegal entry and sentenced from 5 to 25 days in prison.[17]

- In El Paso federal district court on September 7, 2017, three women from El Salvador and one man from Nicaragua explained to their CJA attorneys that they did not want to plead guilty, as they had come to the U.S. to seek asylum. The women were crying and pleading with their attorneys, who nevertheless advised them to plead guilty, as they would likely receive a time-served sentence and be released from criminal custody faster than if they contested the charges.

  All four were visibly confused, but eventually plead guilty. The judge noted, "none of you are criminals." Nevertheless, the three women and the man from Nicaragua were all convicted of illegal entry and received time-served sentences.[18]

- In Yuma federal district court on November 6, 2017, a meek 25-year-old man from Guatemala, who was wearing an American flag t-shirt, pleaded with the judge not to deport him. He explained that his father was recently murdered, his home and property had been taken over, and he was forced out.

  The judge explained, "if you have fear of return, make that known to the authorities after this case is over." The prosecutor laughed, stating "this isn't immigration court," and requested a sentence of 45 days. The man was convicted of illegal entry and received a ten-day sentence.[19]

- In Las Cruces on September 6, 2017, the federal district court gave neither the defendants nor their attorneys the opportunity to make any statements during the *en masse,* fast-track proceeding. The judge asked only binary questions ("yes"/"no"; "guilty"/"not guilty").[20]

  However, during sentencing for illegal reentry (a felony, which a federal district judge must handle), an attorney explained that his client had been beaten badly in El Salvador due to his political opinion and had come to the United States with a letter requesting asylum.

  The defendant begged the judge not to send him back to El Salvador. The judge responded, "this is terrible; I cannot imagine the fear for my life just to go home."[21] The court then sentenced the man to time-served, the 57 days he had already spent in jail.

  In another reentry sentencing that day, the judge tried to explain to a defendant, who was steadfast that he wanted to seek asylum, that "this is not the place to adjudicate asylum, but I hope you are not sent to a dangerous, deadly situation. I wish you and your family the best of luck." The court sentenced the man to timed-served, the 28 days he had already spent in jail.[22]

- In Tucson, some criminal defense attorneys told Human Rights First that they do not mention asylum in federal court because it will not change the result—their client will be convicted. Despite this, Human Rights First witnessed numerous instances in which asylum seekers or their attorneys mentioned their fear of return or intent to seek asylum in Operation Streamline. In all of these cases, prosecutors continued to pursue these charges, and judges convicted and sentenced the asylum seekers nevertheless. For example:[23]

  - In April 2017, the attorney for a Guatemalan man charged with illegal reentry expressed his client's need to seek protection in the United States. The man pled guilty to illegal entry through a "flip-flop" plea (in which an individual charged with illegal reentry "pleads down" to the misdemeanor of illegal entry) and received a 75-day prison sentence. The judge's records reflect that "defense counsel states his client has a credible fear for return to his home country. Defendant will notify personnel he is seeking assistance for asylum claim."

  - In August 2017, a young Honduran man charged with illegal entry repeatedly told the judge that he wanted to seek asylum and was scared to return home. The judge responded, "No matter how many times you ask, I can't do that here," and suggested he speak with immigration agents after being transferred from criminal custody. He received a time-served sentence.

  - In September 2017, despite an attorney telling the judge his client feared return to Guatemala, the asylum seeker was convicted of illegal entry and sentenced to time-served. The judge told the man, "tell immigration not to deport you until you

have had a credible fear interview," and noted for the record that "defense counsel states his client claims credible fear for return to his country of origin and will take measure to seek asylum."

- In October 2017, a man from Honduras told Border Patrol that he feared for his life. After handing down a sentence of time-served for illegal entry, the judge stated, "it will be up to you [to tell immigration agents you want to seek asylum]." In another case that month, a Salvadoran man stated that he received death threats and could not return. The court sentenced him to time-served.
- In November 2017, a man and woman from Ecuador each expressed their wish to seek asylum, but were told by the judge that there was nothing he could do. The judge did note for the record that "defendant states he has a credible fear of persecution if he returns to Equador (sic)." Both were convicted of illegal entry and sentenced to time-served.
- In another case later that month, a man from Guatemala asked for asylum, but the judge told him that he must raise the issue with immigration. He was sentenced to 105 days in prison after accepting a "flip-flop" plea.
- In December 2017, an 18-year-old girl from Guatemala charged with illegal entry told the judge she wanted to seek asylum. The judge explained she would need to raise that with immigration authorities. She was sentenced to time-served.
- In another case, the attorney for an asylum seeker from Peru explained that his client feared for his life if returned. He was convicted of illegal entry and sentenced to time-served.

Human Rights First communicated with CBP officials from four sectors along the border. While some mentioned exceptions for "overriding humanitarian concerns," such as serious medical issues, none made exceptions for asylum seekers when determining whom to refer for prosecution.[24]

A border patrol attorney, who was deputized by DOJ to prosecute in Tucson's Operation Streamline, told Human Rights First that "the government's position is if you cross away from the port of entry, you've committed a crime… and you are outside the Protocol."[25] But Article 31 of the U.N. Convention Relating to the Status of Refugees protects asylum seekers who cross outside of formal ports of entry.

Moreover, while some CBP officers appear to believe that protection claims relating to persecution by criminal gangs do not render an individual eligible for asylum, this is simply not true. Asylum law is exceedingly complex and many individuals, who meet criteria, have been granted asylum by U.S. immigration judges and asylum officers in cases involving violence perpetrated by non-state actors, including gangs, and members of an asylum seeker's family. The bottom line is that under U.S. laws, regulations, and treaty obligations, CBP officers are required to refer an individual who indicates fear of return to his or her home country for proceedings before an immigration judge or an asylum officer.

Criminal Prosecutions for Illegal Entry and Reentry Violate U.S. Treaty Obligations

The 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention"), adopted after World War II's refugee crisis, protects refugees from return to persecution, prohibits states from penalizing them for illegal entry or presence, and requires that states provide refugees with certain minimum protections and rights. The United States helped lead efforts

to draft the Convention and ratified its Protocol, legally binding itself to the Convention's provisions.[26]

Article 31 of the Convention addressed the reality that "[a] refugee whose departure from his country of origin is usually in flight, is rarely in a position to comply with the requirements for legal entry"[1] and "that the seeking of asylum can require refugees to breach immigration rules."[27] Article 31(1) states that parties to the treaty "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Asylum seekers who transit through another country are protected by Article 31—unless they have secured asylum elsewhere.[28] The prohibition on penalties applies to asylum seekers who are present after crossing a border without authorization, including those who are detained or apprehended before they are reasonably able to make a claim for asylum and, for example, receive legal advice.[29]

In 2015, the DHS Office of Inspector General (OIG) raised concerns with CBP's practice of referring asylum seekers for criminal prosecution, noting treaty obligations to refrain from penalizing asylum seekers for their manner of entry or presence. The U.S. Commission on International Religious Freedom flagged similar concerns in a 2016 report on the treatment of asylum seekers in expedited removal. The OIG recommended that Border Patrol develop and implement guidance with respect to individuals who express a fear of persecution during their Border Patrol processing for Streamline.

Even when all parties—Border Patrol, CBP, prosecutors, judges—are on notice that the person's reason for crossing into the United States was to seek asylum, the overwhelming majority of cases are referred for prosecution. Only in one court—Laredo, in the Southern District of Texas—was Human Rights First told that when defense attorneys raise asylum with the prosecutor, the prosecutor may dismiss the charges.

According to the Supervisory Assistant Federal Public Defender Branch Chief, "Individuals who have arguably meritorious asylum claims will typically not be prosecuted criminally," but noted that there is "no bright line rule on this, we handle each case on its facts and hope for the best."[30]

In some courts, attorneys counsel their clients that raising concerns related to asylum will be futile in federal court. For instance, one day after Operation Streamline proceedings in Tucson, two defenders told Human Rights First that of the eight clients they represented that day, four expressed to them fears of return. Neither attorney, however, had mentioned this in the Streamline hearing. One defense attorney recounted to Human Rights First an interaction he had with a client who was seeking asylum:

> *His questions were more about why he couldn't make the asylum claim then and there in Streamline. I explained as I normally do that he couldn't address those issues until after the criminal case was resolved, and that once he got into ICE custody he needed to repeatedly request an asylum interview. I tried to keep the conversation focused on the criminal issues at hand. After that he wasn't much interested in talking, and I realized in the afternoon hearing that he still thought he could get the judge to address the asylum issues. She made it clear that she couldn't, and that's where we left it.*[31]

Defense attorneys surveyed by Human Rights First indicated—irrespective of whether they feel it's worthwhile to mention asylum claims in federal court—that a significant portion of their illegal entry and illegal reentry clients were asylum seekers. Of the defense attorneys who practice along the southern border, 48 percent indicated that more than half of their clients are asylum seekers, and 66.7 percent indicated that asylum seekers make up more than 25 percent of their caseloads. Many remarked that their caseloads consisted of an increasing number of asylum seekers or other vulnerable individuals in need of protection.

These reports match global and regional trends. Amid rising levels of systemic violence in the Northern Triangle (El Salvador, Guatemala, and Honduras), asylum applications soared in surrounding Central American countries (*e.g.,* Belize, Costa Rica, Mexico, Nicaragua, Panama) by 2,249 percent between 2011 to 2016.

In the United States, more individuals sought asylum from the Northern Triangle in the three-year period from 2013 to 2015 than in the prior fifteen years combined.[32] In FY 2016, CBP noted that a "growing share of unauthorized migrants are surrendering to law enforcement to seek humanitarian protection rather than trying to evade detection or apprehension."[33]

Despite the regional refugee and displacement crisis, CBP officials continue to refer asylum seekers and other vulnerable individuals for criminal prosecution, even when it is clear they have come to the United States to seek asylum—a legal act. These referrals continue to grow, despite the Refugee Convention's Article 31 prohibitions against penalizing refugees for illegal entry or presence. Article 31, as explained above, protects asylum seekers from the very type of criminal prosecutions that the Trump Administration has been working to escalate.

In some cases, federal defense attorneys have indicated that border patrol arrest reports have "credible fear claim" stamped on them.[34] According to CBP, criminal prosecution "does not influence the outcome" of one's asylum claim. Seeking asylum, therefore, "cannot be used as a criterion to exclude an undocumented alien from a possible prosecution for a criminal act."[35] This position however ignores Article 31's prohibition of penalization—and hence referrals for prosecution and prosecutions themselves—even if the penalized refugees are still allowed to pursue their asylum case.

Examples of asylum seekers charged, prosecuted, and convicted of illegal entry or reentry include:

- **Mexican couple who told U.S. border officers they fled death threats were criminally prosecuted and returned to country where they feared harm without asylum eligibility assessment.** "Marisol" and her husband fled Guerrero, Mexico due to extortion and death threats made against them and their family members by a cartel. In October 2017, they fled through the Rio Grande Valley and approached border patrol officers, who took them into custody.

  Although the couple explained their reasons for fleeing Mexico, border officers told them to sign documents in English and removed them to Mexico the next day. Out of desperation, they attempted to enter the United States in Arizona seven days later. Marisol's husband explained to border agents what had happened to them and their reason for flight.

  Instead of referring them for a protection screening interview, the agents referred Marisol and her husband to the U.S. Attorney's Office, which then prosecuted them for illegal entry through Operation Streamline in Tucson. Their criminal defense attorneys did not ask about

asylum, instead emphasizing that if they did not accept a plea agreement, they would face up to six months in prison.

The plea agreement they were offered required that they plead guilty to illegal entry and serve 30 days in prison. In November, without an opportunity to request asylum, Marisol and her husband were returned to Mexico where they continue to fear for their lives.[36]

- **Honduran asylum seeker who called authorities once she safely crossed the border was referred for prosecution and convicted of illegal entry.** "Leticia" fled threats in Honduras after she witnessed a murder committed by a gang. Upon entering the United States, she called 911. CBP responded to the 911 call, processed Leticia, noted her intention to apply for asylum, and then referred her for prosecution for illegal entry.

  At a Streamline hearing in Tucson federal court on December 14, 2017, Leticia was convicted of illegal entry. While ICE subsequently detained her in an immigration detention facility, where she may have had access to a credible fear interview, she was nonetheless criminally prosecuted.[37]

- **Pakistani man was referred for prosecution and charged with illegal entry, despite requesting asylum.** "Babar" and his wife were both members of the Pakistani army. After Babar's wife was raped by army officers, Babar confronted the individuals responsible, went to the police, and went to the local media to seek justice for his wife. However, the responsible officers were not investigated. In retaliation, the officers murdered both his wife and young daughter, and later tortured, sexually assaulted, and threatened to kill Babar.

  He fled to the United States where, immediately upon crossing the border, he encountered a border agent and requested to pursue the asylum process. Instead of being referred for a credible fear interview right away, Babar was referred for criminal prosecution for illegal entry. Babar has elected to have a bench trial, which is scheduled for the end of January 2018.[38]

- **Albino asylum seeker from Guatemala convicted of illegal entry**. "Cristian," who is albino, as well as his nine-year-old daughter, "Paula," faced severe threats by gangs in Guatemala. In July 2017, Cristian and Paula entered the United States in Arizona where they were apprehended by border agents and separated. Paula was sent to the custody of the Office of Refugee Resettlement. Cristian was prosecuted through Operation Streamline in Tucson and sentenced to 75 days for illegal entry.[39]

- **Elderly man from Mexico convicted of illegal entry, later found mentally incompetent in immigration court**. "Edgar," an older man from Mexico who suffers from delusions, was repeatedly harassed, harmed, and abused on account of his mental illness. Seeking protection, he fled to the United States and, after crossing into Arizona, sought out border agents for assistance. Given his mental state, it is unclear to what extent he expressed a clear intent to seek asylum or fear of return.

  Despite this and the fact that he presented with mental health problems, CBP referred Edgar for prosecution and he was prosecuted through Operation Streamline in Tucson. Upon reaching ICE custody, an immigration judge found him incompetent to represent himself and he was appointed legal counsel. Edgar's case is ongoing.

  Pro bono immigration lawyers have reported that they have recently taken on a number of cases of asylum seekers who have been found incompetent in accordance with *Franco v.*

Holder, yet had already been criminally prosecuted for illegal entry and illegal re-entry.[40]

Federal public defenders working in interior states have also indicated an increase in charges for illegal reentry, where asylum seekers have been arrested for illegal reentry despite having active asylum applications.[41] For instance:

- **In New York, federal prosecutors charged a Salvadoran with illegal reentry even though the asylum seeker had expressed a fear of return and passed his protection screening interview.** A New York immigration attorney reported that ICE referred for criminal prosecution her asylum-seeking client from El Salvador who had already passed his reasonable fear screening and had a date for his immigration court hearing. In July 2017, the U.S. Attorney's Office for the Southern District of New York charged her client with illegal reentry.[42]
- **In Colorado, asylum seekers are referred for prosecution at various points in the process to seek protection.** A legal service provider representing asylum seekers held at the Aurora Detention Center reported that in recent months ICE transferred at least two asylum seekers to U.S. Marshals' custody for criminal prosecution for illegal entry or illegal reentry. The U.S. Marshals then transferred one of these asylum seekers back to ICE custody to complete immigration proceedings.

  In both cases, the asylum seekers were in the protection screening process when ICE referred them for prosecution and transferred them to criminal custody. The legal service provider remarked that asylum seekers—who are often already traumatized by their past persecution—have been overwhelmed and deeply disheartened by the transfers to and from criminal and immigration custody.[43]

While anecdotal evidence points strongly to an increase in prosecutions of asylum seekers, understanding the scope or number of asylum seekers affected by referrals for criminal prosecution is challenging because the administration fails to keep even basic statistics on these procedures. Neither DHS nor DOJ maintain statistics on the referrals or prosecutions of asylum seekers for illegal entry or reentry.

Similarly, DHS does not provide up-to-date statistics on its detention of asylum seekers, despite provisions in the Haitian Refugee Immigration Fairness Act of 1998 requiring DHS to provide Congress with annual reports on the detention of asylum seekers and immigrants, including data on the nature of the cases and their outcomes.

Defense attorneys, moreover, likely underestimate criminal prosecutions of asylum seekers as they have very limited time (often less than 30 minutes per client) to vet their clients' cases, and may not readily identify an asylum seeker. Other attorneys reported that they do not raise asylum issues in federal court when they see that CBP has indicated "fear" on the I-213 arrival form.

Turn Backs at the Border Push Asylum Seekers to Cross Outside Formal Entry Points, Subjecting them to Arrest and Prosecution

CBP's targeting of asylum seekers who do not seek protection at a port of entry is particularly troubling given that CBP has been turning away many asylum seekers at the U.S. southern border ports of entry. In May 2017, Human Rights First issued a report detailing how the U.S. government was illegally turning away asylum seekers at official land crossings along the southern border.[44] The report also highlighted how these turn backs at ports of entry push asylum seekers to cross outside formal entry points, placing vulnerable

asylum seekers at additional risk of kidnapping, exploitation, trafficking, smuggling, and death in remote areas. These misguided practices at the border violate U.S. law, which requires CBP to process asylum claims, and force some asylum seekers who had planned to enter via ports of entry to instead cross the border between ports. For example:

- "Domingo," from Guerrero, Mexico tried to seek asylum at a California port of entry in October 2016, but CBP officers turned him away after telling him that judges were "sick of these claims." When Domingo then attempted to enter the United States near Nogales, Arizona, between ports of entry, he was apprehended and referred for criminal prosecution for "illegal entry." In May 2017, despite stating his fear of return to Mexico in federal court, Domingo was convicted of illegal entry through Tucson's Operation Streamline and sentenced to time-served. After sentencing, local advocates were unable to locate him, and he was not in the ICE Detainee Locator. It is believed that he was immediately deported to Mexico.[45]
- "Yesenia" fled violent beatings by her partner in El Salvador and went to the Nogales port of entry. After she was denied entry, she attempted to cross the border through the desert. Border Patrol apprehended Yesenia and referred her to Operation Streamline for prosecution. She appeared in Tucson Streamline visibly bruised and battered. Her criminal defense attorney was able to get a continuance on her case so that someone could assist her with her asylum application. After bringing a completed asylum application back to the prosecutor, the prosecutor decided to dismiss. She was then transferred to immigration detention in California and received a credible fear interview. She was released from detention on bond and is awaiting her master calendar hearing schedule for July 2018.[46]

Criminal Prosecutions Risk Return to Persecution

Criminal prosecutions violate of Article 33 of the Refugee Convention. This cornerstone of refugee law—enshrined in both U.S. and international law—prohibits the return of a person to a country where she or he fears threats to life or freedom. After serving a federal prison sentence for illegal entry or illegal reentry, individuals are transferred to immigration custody, where U.S. law provides for their right to raise an asylum claim.[47] However, Human Rights First has documented several cases in which asylum seekers have been returned without the opportunity to pursue their claim. For example:

- "Lydia" fled Mexico after Mexican police failed to protect her and her husband from a criminal organization that attempted to murder her husband. Lydia first traveled to the U.S. Embassy in Mexico City to seek information on the asylum process, but was told she must go to the U.S. border. She and her husband crossed into the United States between ports of entry and immediately sought assistance from a border agent. Border Patrol separated Lydia from her husband, processed her for expedited removal, and failed to ask her if she feared returning to Mexico, which is required under U.S. law and regulation. They did, however, refer her for criminal prosecution. In November 2017, the U.S. Attorney's Office in Tucson charged her with illegal entry, and the court sentenced her through Operation Streamline with 74 other individuals. Lydia's attorney had drafted a document in English requesting an interview with an Asylum Officer, which Lydia showed to immigration officers after she completed her criminal sentence. Lydia was not referred for a credible fear interview, as

required by U.S. law. Instead, the immigration officers ignored Lydia's written and oral requests, and she was removed to Mexico. Lydia is now living in a temporary shelter near the U.S.-Mexico border where she fears for her life.[48]

- A Mexican family of three—a husband, wife, and their 25-year-old nephew—was apprehended near the border in Texas in April 2017. A border officer told them that they could not seek asylum in the United States. The family told the border officer that members of the Jalisco Cartel had extorted, beaten, kidnapped, and shot them, as well as 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 their hearing in federal court, 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 at the San Ysidro port of entry and were finally processed and allowed to pursue their protection claims. The mother, who presented with her minor children, was transferred to Karnes Family Detention Center, where she passed her fear interview and was released from detention to pursue her case in immigration court. The husband and nephew remain in immigration detention.[49]

Some attorneys and volunteer court observers indicated that Mexican asylum seekers are at heightened risk of rapid deportation following their transfer out of federal criminal custody.[50] These attorneys and observers told Human Rights First that many defendants from Mexico, who are processed through Operation Streamline and sentenced to "time-served," are immediately brought from the courthouse to a bus and returned to Mexico.

Even when asylum seekers are able to seek protection after serving a criminal sentence, the experience of criminal prosecution may prevent traumatized asylum seekers from pursuing their claims altogether. In 2013, Human Rights Watch found that the criminal process and incarceration in federal prisons delay the opportunity to seek asylum and can exacerbate trauma and other mental health conditions.[51]

Criminal Prosecutions of Illegal Entry and Reentry Violate Constitutional Rights

Noncitizens charged with criminal offenses are entitled to constitutional protections.[52] However, prosecutions for illegal entry and illegal reentry encroach upon these protections. Due process violations are most evident in Operation Streamline and other *en masse*, fast-track hearing proceedings, where defendants are typically restrained in five-point shackles and undergo their entire criminal proceeding—from arraignment to sentencing—in minutes. Language access issues cause further concern, along with the high caseloads carried by federal criminal defense attorneys, which may at times may impede quality of representation. Moreover, the prosecution of illegal entry and reentry impacts Hispanic individuals at a shockingly high rate: of the more than 700 cases Human Rights First observed for this report, all but seven prosecuted individuals were Hispanic. In fact, in FY 2016, 99 percent of individuals convicted of illegal reentry were Hispanic.[53]

Operation Streamline and Other *En Masse*, Fast-Track Proceedings

All eight current and former Operation Streamline courthouses run some version of an *en masse*, fast-track proceeding for individuals charged with illegal entry or illegal reentry. The maximum number of simultaneous prosecutions varies by location, and has reached upwards of 100 defendants in a single hearing.[54] Human Rights First observed 78 defendants processed in one hearing in Las Cruces, and 75 in Tucson. Defendants are ushered into the courtroom, either in the clothes they wore upon arrival in the United States, or in custodial uniforms from the pre-trial detention centers or jails where they are held. Defendants are seated in the courtroom, and are sometimes placed in the jury box or observation gallery depending on the size of the group to be prosecuted.[55]

Magistrate judges—who have limited statutory authority to sentence only low-level, or petty, misdemeanor offenses (i.e. misdemeanor illegal entry)—preside over Operation Streamline and other *en masse*, fast-track hearings.[56] In these petty offense cases, a magistrate judge can conduct the trial and impose a sentence without the presence of a jury and without grand jury indictment. While magistrate judges preside over hearings of other federal crimes (as well as civil matters), illegal entry and illegal reentry made up 67 percent of federal magistrate criminal cases between February 2017, the first full month under Trump, and November 2017, the most recent available data.[57]

In the 1960s, the former Immigration and Naturalization Service was instrumental in lobbying Congress to reduce the penalty for illegal entry from one year to six months, thereby making illegal entry a "petty" offense under the authority of magistrate judges, who could hear a higher number of cases at lower expense and more rapidly.[58]

CBP staff deputized by DOJ as Special Assistant U.S. Attorneys (SAUSAs) serve as prosecutors in some of these hearings.[59] In Tucson, the prosecutors are border patrol attorneys (one of whom wears a border patrol-green sports jacket and lapel pin in court). In the Yuma courthouse, which prosecutes defendants apprehended in Border Patrol's Yuma sector, including parts of both Arizona and California, two prosecutors represent the government: a DOJ Assistant U.S. Attorney (AUSA) prosecutes defendants apprehended in Arizona, and a border patrol agent—who is not even an attorney—prosecutes defendants apprehended in California. According to defense attorneys who practice in Yuma federal court, the border patrol agent is not under the supervision of a licensed attorney while in court—raising concerns that this is unauthorized practice of law. The border patrol agent purports to represent the United States, negotiates plea drafts, and addresses the court.[60]

En masse hearings truncate cases to combine the initial appearance, preliminary hearing, plea, and sentencing into one proceeding that can last less than one minute per defendant. (In Las Cruces the initial appearance is held separately, usually two days before the combined, single hearing). For illegal reentry prosecutions, which are felony cases, magistrates can preside over a hearing combining the initial appearance, preliminary hearing, and plea, and then transfer the sentencing phase to a federal district judge. By 2008—the height of Operation Streamline implementation—the median number of days U.S. district courts spent processing criminal immigration cases was fewer than ten days. For all other crimes, the median was 250 days.[61]

The plea and plea agreements are key components of the expedited court proceedings. Since the 2005 launch of Operation Streamline,

the guilty plea rate for immigration offenses in magistrate courts increased from 63 percent in 2004 to 97 percent in 2009.[62] As bail is almost entirely unavailable to defendants charged with illegal entry or reentry, accepting a plea usually guarantees less prison time than if defendants choose to fight their case at trial (even if they ultimately win their case). The logical result is a near perfect guilty plea rate. According to defense attorneys surveyed by Human Rights First, 99 percent plead guilty to illegal entry and reentry. According to the U.S. Sentencing Commission, in FY 2016 99.5 percent of all defendants tried for an immigration offense pleaded guilty.[63] Pleas in Operation Streamline and other *en masse*, fast-track hearings proceed in one of two ways: a straightforward plea of guilty to the illegal entry or illegal reentry charge, or a "flip" or "flip-flop" plea, where a defendant charged with illegal reentry pleads down to the lessor offense of illegal entry.[64]

For most illegal entry defendants prosecuted in courts visited by Human Rights First (and most illegal reentry defendants in Tucson and Yuma), the entire case is completed in one day: defendants meet with their attorneys in the morning, then make an initial appearance, waive a preliminary hearing, plead guilty, waive a presentence report, and are sentenced by the late morning or afternoon. They are then immediately transferred either to prison to serve their sentence, or to immigration custody if sentenced to "time-served."

Such shortcuts threaten basic due process and associated constitutional rights. In 2009, the Ninth Circuit held in United States v. Roblero-Solis that accepting guilty pleas en masse in Operation Streamline violates Rule 11 of the Federal Rules of Criminal Procedure, which requires that courts advise defendants of certain rights before entering a plea, ensure the defendant understands she or he is waiving rights to a trial, and ensure the plea is voluntary. To comply, the Arizona Streamline courts began taking pleas individually, and the other Streamline courts have since followed suit.

However, *en masse* proceedings still continue, and many questions—such as if defendants understand the consequences of perjury, whether they are being treated for medical or psychological reasons, or if they understand everything their attorneys have explained to them—are still asked *en masse* in many courts. Human Rights First spoke with one attorney who described the process: "Clients merely answer 'yes' or 'no' one after the other almost like parrots repeating one after the other without meaningful understanding."

In 2014, the U.N. Committee on the Elimination of Racial Discrimination (CERD) called on the United States to abolish Operation Streamline "to ensure that the rights of non-citizens are fully guaranteed in law and in practice."[65]

Other U.N. bodies have criticized Operation Streamline, as well as the criminal prosecution of asylum seekers and migrants generally. The U.N. High Commissioner for Human Rights stated that "[s]eeking asylum is not a crime, and neither is entering a country irregularly."[66] The U.N. Special Rapporteur on the human rights of migrants noted that "irregular entry or stay should never be considered criminal offences,"[67] 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."[68]

Plea Agreements Contain Immigration Waivers that Force Asylum Seekers to Forgo Asylum and Protection Claims

In FY 2016, 99.5 percent of individuals convicted of immigration-related offenses plead guilty, and

illegal reentry made up 83 percent of these convictions in federal district courts.[69]

Plea agreements for illegal reentry include provisions that require defendants to waive their rights to a trial or to appeal, and some also contain immigration waivers that compel individuals to relinquish their asylum or protection claims. According to a Federal Public Defender from Florida, the government is "using the hammer of threat of prosecution and a long prison sentence to give up the rights in an immigration case."[70]

The waiver provisions in plea agreements vary considerably among districts. Plea agreements used in illegal reentry cases[71] include:

> *the defendant agrees to waive the defendant's rights to apply for any and all forms of relief or protection…These rights include, but are not limited to, the ability to apply for…asylum…withholding of deportation or removal…[and] protection under Article 3 of the Convention Against Torture. As part of this agreement, the defendant specifically acknowledges and states that the defendant has not been persecuted in, and has no present fear of persecution in, [insert country of return]… Similarly, the defendant further acknowledges and states that the defendant has not been tortured in, and has no present fear of torture in [insert country of return]. The agreement is also binding for purposes of removal proceedings.[72] (Eastern District of Virginia)*
>
> *The defendant admits that [defendant] does not have a fear of returning to the country designated in the previous order. If this plea agreement is accepted by the court, the defendant agrees not to contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation, or exclusion.[73] (District of Arizona, Minnesota, and Nebraska)*

While the "flip-flop" plea agreement used in Tucson's Operation Streamline does not contain explicit immigration waivers, it specifies that deportation is the ultimate result of the plea and discourages people from pursuing their protection claims:

> *defendant recognizes that pleading guilty may have consequences with respect to his/her immigration status" and that "[a]lthough there may be exceptions, the defendant understands that the…guilty plea…make[s] it practically inevitable and a virtual certainty that the defendant will be removed or deported…[74]*

Several defense attorneys told Human Rights First that should they request for the immigration waivers to be removed from plea agreements, the agreement would no longer be available to their clients. While defenders can at times persuade prosecutors to remove such waivers, the removal is not guaranteed and often results in their clients receiving less favorable offers. According to defense attorneys, "Sometimes we can get the 'no fear of' language removed from the plea, but it comes at a cost," and "[t]he government will want [increased sentencing] levels in exchange for removal of the asylum language." For instance:

- In a Phoenix illegal entry prosecution of an asylum seeker who experienced severe abuse in Mexico due to his sexual orientation, the prosecutor told the defense attorney that she could remove the immigration provision from the plea agreement, but that in return the prosecutor would recommend a more severe sentence to the judge.

Defendants are Restrained in Five-Point Shackles

While the Fifth Amendment guarantees the right to be free of unwarranted restraints, defendants processed through Operation Streamline/CCI and other en masse, fast-track proceedings are fully shackled in five-point shackles. All eight courthouses visited used varying degrees of shackling:

- In Brownsville, Del Rio, Las Cruces, Tucson and Yuma, defendants are hand-cuffed, their ankles are bound together by chains, and a belly-chain is wrapped around the waist, connected to the handcuffs. By mid-July 2017, a court order prevented Tucson and Yuma from using shackles during Operation Streamline/CCI.
- In El Paso, defendants are not only restrained in the five-point shackling described above, but there is also an additional chain that links the belly-chain to the ankle restraints.
- In Laredo, defendants are held in five-point shackles, but their handcuffs are unlocked for the proceedings.
- In McAllen, defendants are held in five-point shackles, but the handcuffs and belly-chains are removed before the proceedings.

Due to the tight restraints, defendants have a very limited range of motion and must shuffle their feet whenever required to move. The sound of the chains hanging off defendants can make it difficult to hear the proceeding, such that court security often instructs individual defendants to stop fidgeting or shaking their legs because the clanking of the shackles is so loud. Many defendants have difficulty keeping their pants at their waists due to the belly chain—creating a visual illustration of how this proceeding strips immigrants of any human dignity.

Human Rights First and other courtroom observers have witnessed individuals trip on these chains, sometimes falling to the floor. The restraints are so tight that they often cut into defendants' wrists and ankles, causing difficulties standing and walking.[75] Restraints have been used on pregnant women, those with broken bones, mental disabilities, and handicaps, including individuals using the assistance of a cane, crutches, or a wheelchair. Human Rights First and other observers have witnessed:

- A frail, thin 70-year-old man from Mexico, fully shackled, limping up to the judge.[76]
- A pregnant woman from Mexico sentenced to 30-days in prison.[77]
- A Guatemalan man in desperate need of medical care after being run over by a motorcycle he claimed was driven by Border Patrol.[78]
- A Mexican man with a gunshot wound to the face. The court record reflected the trauma, noting, "record made re competency, medical needs and seizures from a gunshot wound."[79]
- A Honduran man who suffered a severe wrist injury in Honduras while attempting to save his sister from being raped. When his injury was pointed out to the judge, she agreed that it looked "bad" and stated for the record that "the Court recommends the defendant be seen for medical attention."[80]
- A man with severe paranoid schizophrenia who had been deprived for two days of the medication he had taken for twenty years, which was confiscated by Border Patrol at apprehension.[81]

Defendants have expressed sadness due to shackling, stating that: "they treat you like an animal;" "I felt bad…I have never been chained up like that;" and "they put chains on us really

tight…the whole time in there they made me feel like I killed someone."[82]

One advocate who works in a migrant shelter in Nogales stated that for many, the most emotionally tasking aspect of the criminal system is the shackling. Many individuals remain shackled for several hours, from transport to the courthouse in the early hours of the morning, throughout the proceeding, and until they are returned to detention.

In May 2017, the Ninth Circuit held that courts could not employ a blanket policy of shackling defendants, noting that a "presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain." This ruling requires that courts decide on a case-by-case basis whether restraining a person serves a compelling government purpose.[83] As a result, by mid-July 2017, the courts in Tucson and Yuma ceased blanket shackling, permitting defendants to enter the courtroom unshackled in small groups. Still, defendants are shackled before entering the courtroom and immediately upon leaving.

Right to Adequate Counsel

Anyone charged with a crime in the United States has a constitutional right to legal counsel and that representative must have the "opportunity for adequate preparation." A number of attorneys told Human Rights First that the number of clients they were expected to represent during an Operation Streamline or other *en masse* hearings interfered with their ability to provide quality legal representation.

Each day in Tucson's Streamline, the maximum number of clients per attorney is six, whereas in Del Rio, the number has at times reached an untenable 80 defendants per attorney. In these circumstances, the attorney must provide counsel in a group, seminar-style.

Defendants typically meet their attorneys for the first time on the same day they appear in court. For instance:

- In Tucson, defendants first meet their attorneys between 9:30 am and 12:30 pm before the 1:30 proceeding.
- In Yuma, Del Rio, McAllen, Laredo, and Brownsville, attorneys (or the investigators that work for them) meet with clients in the early morning before the proceeding, which takes place sometime between 9:00 and 11:00 am.
- In El Paso, defendants first meet their attorneys in the courtroom at the time of the hearing. They are able to consult with their clients from the time the U.S. Marshals bring them into the courtroom until the magistrate has finished arraigning the other defendants also present in the courtroom.[84]
- In Las Cruces, defendants have two hearings. First, defendants have an initial hearing where they are assigned an attorney. Approximately two to three days later, defendants have their combined proceeding. Attorneys try to meet with their clients in the days before the second hearing, but sometimes are unable to meet with them until the morning of the hearing.

Furthermore, the logistics of group attorney-client meetings raise concerns related to an attorney's duty of confidentiality, as well as attorney-client privilege.[85] During court observations, Human Rights First overheard many attorney-client conversations, as attorneys must find space in the crowded courtroom for discussion. Moreover, being in earshot of others can affect a client's level of comfort to speak openly, which is essential to a full and fair defense. This is especially concerning for asylum seekers, who may feel uncomfortable expressing facts related to traumatic past experiences.

The short amount of consultation time, coupled with high attorney caseloads, allows defendants a diminutive range of time to meet with their attorneys—from approximately one half-hour in Tucson to mere minutes in other courthouses. During this short time, attorneys must establish that the client is competent to appear before the court; determine if any defenses are available, including that of U.S. citizenship or other immigration relief;[86] ascertain if any obvious constitutional violations have taken place; uncover any mitigating factors or legal relief; and advise their client on whether to accept a plea agreement—all with negligible time to research and investigate.

Human Rights First observed defendants who were so rushed through the proceeding they were unsure who their attorneys were. In one case, a defendant asked the judge, "who is my lawyer?" Similarly, judges, fellow attorneys, and prosecutors have needed to assist attorneys in identifying which individual is their client during a proceeding. In one instance, an observer witnessed a judge reassign a defendant to a different attorney during the proceeding, as his attorney had already left.[87]

Language Access

Nearly all defendants in Operation Streamline and other *en masse*, fast-track proceedings do not speak English and rely entirely on court interpreters to understand their criminal proceedings, which are conducted in English. Defense attorneys have expressed concern about the quality of in-court translation, noting that at times court interpreters do not translate the proceedings or defendants' statements precisely.[88] Proceedings are translated to Spanish by earphones, or telephonically for those who speak languages other than Spanish.

Human Rights First has learned of and observed instances where adequate interpretation is not provided. One defense attorney told Human Rights First, "I worry a lot about the indigenous language speakers. I sometimes encounter indigenous language speakers with almost no grasp of Spanish who may have been through Streamline two or three times with no interpreter provided [in their language]. Some of them don't even know they were in criminal proceedings at all."[89]

In one incident in Tucson's Streamline in August 2017, a family of approximately ten indigenous language-speakers were prosecuted together. It was not until after several members had already been convicted and sentenced that it became clear that they did not speak Spanish and therefore could not fully understand that they had been convicted of a crime. Nevertheless, the proceedings continued and all ten family members were convicted of illegal entry.[90]

Some indigenous language speakers may be forced to stay in detention beyond the completion of their criminal sentences, due to the long wait for an interpreter. This has led some attorneys to advise their indigenous language-speaking clients to proceed in Spanish, even if it is not their native language.

Language translation is constitutionally and statutorily protected as it is "fundamental to a full and fair hearing."[91] Failure to provide proper language translation to non-English speakers also raises equal protection concerns if defendants are unable to understand the charges and associated consequences levied against them.[92] The Second Circuit noted that ensuring that defendants understand the proceedings is not only a constitutional matter, but "a matter of simple humaneness."[93]

Even when interpretation is properly provided, there are difficulties understanding the contents of the proceedings due to their speed and the difficulty in translating complex legal terms. Chief

Judge of the District of New Mexico Martha Vázquez acknowledged the difficulty of conducting "hearings in a way that is understandable to defendants…in a legal system entirely foreign to them."[94]

One defense attorney told Human Rights First: "court proceedings involve complex legal language, which, even if accurately translated, means little to many defendants. Defendants tend to just agree with questions asked, and go with the flow."[95]

Border Officials Forcibly Separate Children from Their Parents

Since the summer of 2017, attorneys and other experts working with immigrant families near the border have reported in increase in cases of CBP separating children from their parents and caretakers.

According to the Florence Immigrant and Refugee Rights Project (FIRRP) in southern Arizona, there were at least 100 children held in Phoenix-area shelters in the custody of the U.S. Department of Health and Human Services in late 2017 whom CBP had separated from their parents at the border. In most of those cases, according to FIRRP attorneys, border agents had forcibly separated children from their parents to refer the parents for prosecution on charges of illegal entry or illegal reentry.

Similarly, the Houston Chronicle reported 22 cases it had identified since June where border officials had separated children from their parents—who had no history of immigration or criminal violations—to refer the parents for prosecution for the misdemeanor of illegal entry.[96]

Criminal defense attorneys in Arizona, New Mexico, and Western Texas similarly reported an increase in cases where border agents separated children from their parents. One El Paso defender told Human Rights First: "it's a change from the past, where they were not prosecuting persons who came with children. Now it's making these minors 'unaccompanied' by separating them from their parents."[97]

El Paso Magistrate Judge Miguel A. Torres noted this trend in November, writing that "[t]he Court, in a number of recent illegal entry cases over the last several months, has repeatedly been apprised of concerns voiced by defense counsel and by defendants regarding their limited and often non-existent lack of information about the well-being and whereabouts of their minor children from whom they were separated at the time of their arrest."[98]

In October, border patrol agents in El Paso acknowledged they were separating families (despite previous statements implying they did not),[99] and CBP's Office of Assistant Chief Counsels noted that "'[a]ny increase in separated family units is due primarily to the increase in prosecutions of immigration-related crimes.'"[100]

Examples of this practice tearing families apart include:

- **Venezuelan family of asylum seekers prosecuted and child sent to foster care.** A father, mother, and 15-year-old daughter fled government threats in Venezuela in May 2017 and entered the United States near Presidio, Texas. Upon apprehension, the family handed border patrol agents U.S. forms requesting asylum. Despite their clear indication of an intent to seek asylum, border patrol separated the girl from her mother and referred her parents for criminal prosecution. They then pled guilty to illegal entry.[101]
- **Salvadoran asylum-seeking mother separated from her three young children.** A mother and her three young children fled El

Salvador and crossed into the United States near El Paso, Texas. The mother told border patrol agents that she had received death threats and needed asylum. Although she presented the children's birth certificates, immigration officials took her children from her and they were placed in federal foster care in New York. Agents detained the mother and subsequently convicted her of illegal entry.[102]

- **Two mothers from El Salvador separated from their 16 and 13-year-old children.** After crossing into the United States via the Rio Grande River, border agents apprehended two mothers and separated them from their children. A federal prosecutor then charged the mothers with illegal entry—providing neither mother with information regarding where their children were sent, or how to contact them. One mother explained to the magistrate judge presiding over her criminal hearing that the only information a border patrol agent would provide was that her son "was going to be taken to where the government puts them." When she told the judge "I'm worried…not knowing anything about him," he responded, "I would be very worried as well if it was me." [103]
- **A Honduran grandmother separated from her 7-year-old grandson**. According to the grandmother, border patrol agents, after apprehending her and her grandson near the southern border, told her "to say goodbye to your grandson because it's going to be days that you won't see him." They referred her for criminal prosecution for illegal entry. She later explained to the federal judge that while they gave her a paper when she was arrested, she could not understand what it said. The judge responded, "that doesn't sound real helpful."[104]
- **Two fathers from Honduras separated from their sons**. Two fathers from Honduras were arrested and prosecuted for illegal entry and separated from their 14 and 11-year-old sons and given no information regarding their whereabouts or how to find them.[105] One father explained to the judge in federal criminal court proceedings that he had been told by border patrol that his 14-year-old son would be taken "to an institution for children."[106]

The U.N. Committee on the Rights of the Child has spoken out strongly against any actions that separate children from their parents or caretakers as a result of immigration status enforcement.[107] Moreover, separating children from their parents constitutes a penalty under Article 31 of the Refugee Convention. According to the UNCHR, the term "penalties" is broadly understood as any punitive measure, which may include measures aimed at retribution for or deterrence of illegal entry or presence.[108]

The separation of children from their parents also presents an increasing challenge to defense attorneys, who are often sympathetic to their clients' heartbreak and fear for their children's wellbeing, but lack resources to assist their clients in tracking down their children, as this is outside the scope of their representation. One federal public defender in Las Cruces, New Mexico told Human Rights First that she spent an entire day away from her criminal caseload just trying to track down children.[109] CJA attorneys are only compensated by the court for services necessary for the case; meaning that locating children taken into custody is essentially a pro bono service.

Families continue to arrive in the United States in large numbers seeking protection, as the conditions in the Northern Triangle remain perilous. In its most recently published statistics, border patrol apprehended 8,121 families along the southwest border in December 2017, nearly double the number from two months earlier.[110]

Criminal Prosecutions of Illegal Entry and Reentry are Costly and Ineffective

In 2015, the OIG found that DHS did not track the precise costs of Operation Streamline, either for itself or for its law enforcement partners, and made a topline recommendation that officials try to generate cost estimates for the program.[111]

For FY 2018, DOJ requested an additional $145 million in order to "enhance […] border security and immigration enforcement" in accordance with President Trump's January 25 executive order.[112] Prior to this request, DOJ's costs for three initiatives which fell under the "enforce immigration laws" umbrella already stood at $788.9 million. DOJ increased its request to $933.9 million, to pay for:[113]

- **Immigration Enforcement Prosecutors**: DOJ requested an additional $7.2 million for "Immigration Enforcement Prosecutors," noting that "[f]ederal prosecution of border crime is an essential part of our nation's defense and security and critical to public safety."
- **U.S. Marshals' Salaries and Expenses**: DOJ requested an additional $8.8 million for salaries and expenses for the U.S. Marshals (USMS) to ensure that "high levels of court security" and timely detainee processing can proceed. This initiative already cost $228.9 million.
- **Federal Prisoner Detention**: DOJ requested an additional $50.3 million to the existing $381 million-dollar budget for "Federal Prisoner Detention" to support anticipated annual cost increases for the USMS detainee population resulting from the January 25, 2017 executive order. In Tucson alone, the USMS estimated it spent $63 million annually to detain Streamline defendants.[114] Grassroots Leadership conservatively estimated that the incarceration costs for immigrants convicted of illegal entry and illegal reentry were more than $7 billion since the start of Operation Streamline in 2005.[115] These costs are in addition to those ICE spends on civil detention and processing.

The above costs do not include expenses and salaries for defense attorneys and investigators paid to represent these individuals. For instance, federal courts pay CJA panel attorneys an hourly rate of $132 to represent defendants in Operation Streamline and other *en masse,* fast-track proceedings.[116]

These costs also do not include compensation for judges and their staff, in addition to bilingual court services and personnel needed both during attorney-client meetings and court proceedings. According to former U.S. Attorney for Arizona, Paul Charlton, "[t]he flood of immigration cases is a big drain on the entire federal criminal justice system as a whole: pretrial services, U.S. marshals, jail beds, sentencing reports, prison cells, and so on."[117]

Additionally, there are security and public safety disadvantages associated with prosecuting illegal entry and reentry, as it diverts scarce judicial and prosecutorial resources from addressing more serious crimes. According to Alex Nowrasteh, an immigration expert at the Cato Institute, "every dollar spent on prosecuting an illegal immigrant for illegal reentry is a dollar that could have been spent on prosecuting or investigating a real crime." Mr. Nowrasteh further explained that resources could be better allocated to violent crimes and property crimes.[118]

Criminally prosecuting individuals for illegal entry and illegal reentry also appears to be ineffective as a deterrence mechanism—its stated objective.[119] In its 2015 report, the OIG concluded that CBP did not have an adequate system in place to measure whether or not Operation Streamline—or related criminal prosecutions—have succeeded in deterring individuals from

migrating to the United States without authorization.[120] Similarly, a 2017 U.S. Government Accountability Office (GAO) report found that the way in which border patrol calculates recidivism rates (i.e. effectiveness) for those prosecuted for illegal entry and reentry is inaccurate, as their calculations do not assess an immigrant's apprehension history beyond one fiscal year.[121] According to Retired Brownsville Judge Felix Recio, "prosecutions have no deterrent effect whatsoever. People will just continue crossing."[122]

Today, southern border crossers are increasingly coming to the U.S. to seek protection from human rights violations, violence, and other forms of persecution. With many facing life or death choices, increased enforcement measures such as prosecution, are even less effective in deterrence. Asylum seekers, unaccompanied children, and others seeking protection, make up a group the Institute for Defense Analyses (IDA)—a DHS contractor—calls a "non-impactable population," and a group which increased from less than two percent of border apprehension in 2003-2009 to over 33 percent in 2016.[123] According to IDA, these individuals "make no attempt to evade detection, and all […] surrender to the first USBP agent they encounter," noting that traditional enforcement mechanisms are not effective in deterring this population.

Endnotes

[1] William V. Moore, *Blease, Coleman Livingston*, SOUTH CAROLINA ENCYCLOPEDIA (2016).

[2] Kelly Lytle Hernández, "How crossing the US-Mexico Border became a crime,", *The Conversation* (Apr. 30, 2017), available at http://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604.

[3] *See* Doug Keller, "Re-thinking Illegal Entry and Re-entry", 44 Loyola University Chicago Law Journal 65 (2012); *see also* Ingrid V. Eagly, "Immigrant Protective Policies in Criminal Justice", 95 *Texas Law Review* 245 (2016); Ingrid V. Eagly, *Prosecuting Immigration*, 104 *Northwestern University Law Review* 1281 (2010), 1350; Jeffrey S. Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RESEARCH CENTER. (Apr. 23, 2012.

[4] U.S. Department of Homeland Security Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing* (May 15, 2015), OIG-15-95 (hereinafter "OIG Report").

[5] According to CBP U.S. Border Patrol Acting Chief Ronald Vitiello, Operation Streamline was renamed the "Criminal Consequence Initiative" in FY 2016. *See Hearing on Declining Deportations and Increasing Criminal Alien Releases—The Lawless Immigration Policies of the Obama Administration Before the S. Comm. On the Judiciary and Subcomm. On Immigration and the National Interest* (2016)(written testimony of Ronald Vitiello, CBP U.S. Border Patrol Acting Chief), available at https://www.dhs.gov/news/2016/05/19/written-testimony-cbp-senate-judiciary-subcommittee-immigration-and-national.

[6] In its height, Operation Streamline was operational in eight federal courthouses: Brownsville, Del Rio, El Paso, Laredo, and McAllen, Texas; Tucson, Arizona; and Las Cruces, New Mexico.

[7] Donald Kerwin & Kristen McCabe, "Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes", MIGRATION POLICY INSTITUTE (Apr. 29, 2010)*; see also* TRAC Immigration, *At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013* (Nov. 25, 2013).

[8] Executive Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

[9] Memorandum: Implementing the President's Border Security and Immigration Enforcement Improvements Policies, DEP'T OF HOMELAND SEC. (Feb. 20, 2017).

[10] Memorandum from the Attorney General Jefferson Sessions for All Federal Prosecutors, Renewed Commitment to Criminal Immigration Enforcement, DEP'T OF JUSTICE (Apr. 11, 2017).

[11] Memorandum from the Attorney General Jefferson Sessions for All Federal Prosecutors, Department Charging and Sentencing Policy, DEP'T OF JUSTICE (May 10, 2017).

[12] TRAC Immigration, *Immigration Prosecutions for May 2017*. For a discussion of the interplay of this increase on asylum seekers *see e.g*. Human Rights First, *The Rise in Criminal Prosecutions of Asylum Seekers* (July 20, 2017); Natasha Arnpriester, *Seeking Asylum is Not a Crime, but Trump is Prosecuting Them Anyway*, HUMAN RIGHTS FIRST (July 20, 2017).

[13] TRAC Immigration, *Immigration Prosecutions for June 2017*. For a discussion of the interplay of this increase on asylum seekers *see, e.g.* Natasha Arnpriester, *As Prosecution Rise, Trump Admin Penalizes Asylum Seekers*, HUMAN RIGHTS FIRST (Aug. 4, 2017).

[14] Calculations computed from TRAC, *Prosecutions for April 2017*; TRAC, *Prosecutions for November 2017*, and TRAC Immigration, *Immigration Prosecutions for November 2017*. For illegal entry, prosecutions increased from 1,547 in April to 2,367 in November. For illegal reentry, prosecutions increased from 2,534 in April to 3,182 in November. Of the 4,556 prosecutions in magistrate court in April, 34 percent (1,535) were for illegal entry and 29 percent (1,298) were for illegal reentry. Of the 4,223 prosecutions in district court in April, 12 were for illegal entry and 1,236 were for illegal reentry. Of the 5,582 prosecutions in magistrate court in November, 40.8 percent (2,277) were for illegal entry and 28.1 percent (1,569) were for illegal reentry. Of the 4,414 prosecutions in district court in November, 90 were for illegal entry and 1,613 were for illegal reentry.

[15] TRAC Immigration, *Immigration Prosecutions for November 2017*.

[16] Meeting with Supervisory Assistant Federal Public Defender, District of New Mexico, Las Cruces, Sept. 6, 2017.

[17] Court observation of Magistrate Judge Collis White, Albert Armendariz, Sr. United States Courthouse, Del Rio, Texas, Nov. 8, 2017. (Court observations were conducted by Human Rights First unless otherwise noted.)

[18] Court observation of Magistrate Judge Leon Schydlower, El Paso District Court, El Paso, TX, Sept. 7, 2017.

[19] Court observation of Magistrate Judge James F. Metcalf, John M. Roll United States Courthouse, Yuma, Arizona, Nov. 6, 2017.

[20] Court observation of Magistrate Judge Carmen E. Garza, Las Cruces United States Courthouse, Las Cruces, New Mexico, Sept. 5, 2017.

[21] Court observation of Judge Robert C. Brack, Las Cruces United States Courthouse, Las Cruces, New Mexico, Sept. 6, 2017.

[22] Observation of Sentencing Proceedings, Honorable Robert C. Brack, District Judge, U.S. Courthouse, Las Cruces, N.M. (Sept. 4, 2017).

[23] Observations by Human Rights First and End Streamline Coalition. Judge Bruce Macdonald, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona.

[24] Meeting with Border Community Liaison, Tucson Sector Border Patrol Tucson, Arizona, June 21, 2017; email correspondence with Public Affairs Specialist, U.S. Customs and Border Protection, Del Rio, Texas, Nov. 14, 2017; email correspondence with Supervisory Border Patrol Agent, Rio Grande Valley, Nov. 15, 2017; email correspondence with Tucson Sector Border Patrol, Nov. 16, 2017; email correspondence with Southwest Border Branch Chief, U.S. Customs and Border Protection.

[25] In-person conversation with Special Assistant U.S. Attorney, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, June 20, 2017.

[26] "The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees." Protocol Relating to the Status of Refugees, art. 1(1), Oct. 4, 1967, 606 U.N.T.S. 267.

[27] Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection*, UNHCR (background paper commissioned by UNHCR for an expert roundtable held in Geneva, Switzerland, Nov. 8-9, 2001), p. 190 (quoting Draft Report of the Ad Hoc Committee on Statelessness and Related Problems, 'Proposed Draft Convention Relating to the Status of Refugees', UN doc. E/AC.32.L.38, 15 Feb. 1950, Annex I (draft Art. 26); Annex II (comments, p. 57)).

[28] See UNHCR, Summary Conclusions Article 31 at par. 10 (c); UNHCR Advisory Opinion at p. 2; Dr. Cathryn Costello, Article 31 of the 1951 Convention Relating to the Status of Refugees, UNHCR Legal and Protection Policy Research Series (July 2017) at p. 18; UNHCR, "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum seekers (Feb. 1999), par. 4.

[29] See Dr. Costello, Article 31 Analysis for UNHCR, at pp.27ff; UNHCR, Summary Conclusions of Expert Roundtable on Article 31 of the 1951 Convention relating to the Status of Refugees, ¶ 10(f), 8-9 November 2001 (Assessment of "delay" is a "matter of fact and degree" that "depends on the circumstances of the case, including the availability of advice"); UNHCR 1999 Detention Guidelines, par. 4 ("given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicious of those in authority, …. there is no time limit which can be mechanically applied or associated with the expression "without delay.").

[30] Email correspondence with Supervisory Assistant Federal Public Defender—Branch Chief, Southern District of Texas, Laredo, Jan. 3, 2018.

[31] Email correspondence with CJA panel attorney, Tucson, Arizona, Aug. 9, 2017.

[32] Nadwa Mossad, *Refugees and Asylees: 2015*, DEPARTMENT OF HOMELAND SEC. 5 (Nov. 2016) (referring to affirmative asylum). The number of individuals granted asylum from these countries also rose during this period, increasing by 2,534 percent for asylum seekers from El Salvador, 936 percent for Hondurans, 638 percent for Guatemalans, and 230 percent for asylum seekers from Mexico. *Id.* at 6. Affirmative asylum applications: El Salvador: From 71 in 2013, to 1,870 in 2015; Guatemala: From 232 in 2013, to 1,713 in 2015. Honduras: From 107 in 2013, to 1,109 in 2015; Mexico: From 202 in 2013, to 667 in 2015. Similarly, asylum applications from other countries experiencing war or unrest have skyrocketed, including Venezuela and Syria). Executive Office for Immigration Review, *2016 Statistical Yearbook* (indicating that ranked at number 23 in 2014, number 13 in 2015, and number 17 in 2016 on a list of top nationalities granted asylum); U.S. Citizenship and Immigration Services, *Asylum Office Workload, October 2016 to September 2017*.

[33] U.S. Department of Homeland Security, *CBP Border Security Report: FY 2016* (Dec. 30, 2016).

[34] Email correspondence and in-person interviews with CJA panel attorneys, Tucson, Arizona, June-Dec. 2017.

[35] According to CBP, "CBP can prosecute an undocumented alien criminally, while at the same time the alien makes a claim to credible fear administratively. Neither process affects the outcome of the other. The fact that an undocumented alien is being prosecuted does not influence the outcome of his or her credible fear claim. The claim of credible fear cannot be used as a criterion to exclude an undocumented alien from a possible prosecution for a criminal act." U.S. Department of Homeland Security Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing* (May 15, 2015), OIG-15-95 (hereinafter "OIG Report"), 17.

[36] Email correspondence with Joanna Williams, Advocacy Director, Kino Border Initiative, Nogales, Arizona, Nov. 2017.

[37] Email correspondence with CJA panel attorney, Tucson, Arizona, Dec. 2017.

[38] Email correspondence with Assistant Federal Public Defender, District of New Mexico, Las Cruces, Jan. 2018.

[39] Email correspondence with Florence Immigrant & Refugee Rights Project, Florence, Arizona, Jan. 2018.

[40] Email correspondence with Florence Immigrant & Refugee Rights Project, Florence, Arizona, Jan. 2018.

[41] Email correspondence with Assistant Federal Public Defender, District of Nebraska, Jul. 20, 2017. Telephone conversation with New York immigration attorney, July 11, 2017.

[42] This individual's trial date was pending at time of writing and the immigration judge had issued a continuation until his criminal matter had been determined. Email correspondence with immigration attorney, July 6, 2017 and Sept. 7, 2017; Telephone conversation with immigration attorney, July 11, 2017.

[43] Telephone conversation with Sarah Plastino, Senior Staff Attorney—Detention Project, Rocky Mountain Immigrant Advocacy Network (RMIAN), Jan. 11, 2018.

[44] Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017).

[45] Email correspondence with Joanna Williams, Advocacy Director, Kino Border Initiative, Nogales, Arizona (June 2, 2017).

[46] Email correspondence with Peter Hirschman, Lead, Asylum Group, Keep Tucson Together, Tucson, AZ, Dec. 2017.

[47] *See, e.g.*, 8 U.S.C. § 208; INA § 241(b)(3)(A), which provides that the ""Attorney General may not remove an alien to another a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."; *see also* 189 U.N.T.S 137 Convention Relating to the Status of Refugees Art. 33, Jul. 28, 1951.

[48] Email correspondence with Kino Border Initiative Legal Fellow, Florence Immigrant & Refugee Rights Project, Florence, Arizona, Dec. 2017.

[49] Case on file with Human Rights First; Follow-up email correspondence with Nicole Ramos, immigration attorney, Tijuana, Mexico, Aug. 10, 2017.

[50] Email correspondence with CJA panel attorneys and immigration advocates, Tucson, Arizona, Nov.-Jan. 2017.

[51] 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, *Social and Legal Studies* 22(4) (2013).

[52] Mathews v. Diaz, 426 U.S. 67, 77 (1976) (noting that due process protections apply to "aliens" whose presence is "unlawful, involuntary, or transitory"); Wong Wing v. United States, 163 U.S. 228 (1896) (finding that noncitizens charged with crimes are protected by the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment is not confined to the protection of citizens).

[53] United States Sentencing Commission, *Quick Facts: Illegal Entry Offenses* (March 2017).

[54] OIG report.

[55] For instance, Human Rights First sat with Border Patrol officers in the back of both the McAllen and Las Cruces courtroom, as the jury box and gallery was full of defendants. In Del Rio, defendants were placed in the jury box and all wore surgical face masks.

[56] "In all petty offense cases . . . a magistrate judge may conduct the trial and impose the sentence without the defendant's consent. In Class A misdemeanor cases, a magistrate judge may conduct the trial, either with or without a jury, and impose the sentence only with the defendant's consent and where the defendant has waived the right to adjudication by a district judge. The defendant's consent and waiver may be made in writing or orally on the record." *Federal Rules of Criminal Procedure*48; 18 U.S.C. § 3401 (2010); 28 U.S.C. § 636(a)(3)-(5) (2009); Baldwin v. New York, 399 U.S. 66, 69 (1970).

[57] Calculation computed using TRAC Prosecutions reports from February through November 2017. The total number of criminal cases in federal magistrate courts were 58,725, and of these 39,171 were for illegal entry and reentry.

[58] Ingrid V. Eagly, Prosecuting Immigration, 104 NW. U. L. REV. 1281, 1326 (2010) ("the immigration agency lobbied Congress to establish a misdemeanor court that would allow for criminal immigration enforcement 'at less expense and with a greater amount of effectiveness' than was possible with Article III courts…immigration authorities convinced Congress in 1952 to amend the Immigration and Nationality Act to reduce the penalty for the crime of simple illegal entry from one year to six months. With this change in place, illegal entry met the federal definition of 'petty offense.' This reduction in maximum sentence was critical because it meant that illegal entry cases could proceed before magistrate judges without the right to trial by jury or grand jury indictment.")(citations omitted).

[59] "The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires…" 28 U.S.C. § 543 (a) (2010).

[60] In-person conversations, Yuma defense attorneys, November 2017 and January 2018; Juan Rocha, "Operation Streamline and the Criminal Justice System," Az. Att'y, Nov. 2011.

[61] Eagly, *supra* note 3 at 1324.

[62] *Id.*, at 1329.

[63] *Id.,* at 1329; United States Sentencing Commission, *Statistical Information Packet: Fiscal Year 2016 Ninth Circuit* (2016), Table 3; Survey response, on file with Human Rights First.

[64] All eight courthouses observed for this report use the straightforward guilty plea for both illegal entry and illegal reentry charges. In a "flip" or "flip-flop" plea, where a defendant charged with illegal reentry can plead down to a lesser offense of illegal entry, allowing the felony to be "flipped" into a misdemeanor that a magistrate judge has the authority to sentence. This plea type is largely and regularly used in Tucson and Yuma, but on occasion has been used in some of the other courts. For "flip-flop" plea agreements, the sentence is usually stipulated in the agreement, leaving no room for variance based on individual circumstances. Former Tucson Magistrate Judge Charles Pyle stated, "the judge only has discretion to reject a plea outright. We cannot lower or raise the agreed upon sentence. I have rejected some pleas when a defendant wanted to accept the plea without actually admitting their guilt. Otherwise, Streamline sessions are pretty brainless for me." *See also*, Judith A. Greene, Bethany Carson, and Andrea Black, *Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border*, Grassroots Leadership, July 2016 at 47-48 [hereinafter "Indefensible"].

[65] 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, para. 18.

[66] Office of the United Nations High Commissioner for Human Rights, *Hungary violating international law in response to migration crisis: Zeid* (Sept. 17, 2015), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449.

[67] 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.

[68] Report of the Working Group on Arbitrary Detention, A/HRC/7/4 20 (Jan. 10, 2008).

[69] In fiscal year 2016, there were 15,744 offenders convicted of illegal reentry, accounting for 82.6 percent of all immigration offenders sentenced under the guidelines. U.S. Sentencing Commission, *Quick Facts: Illegal Entry Offenses*, Mar. 2017 available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY16.pdf.

[70] Brooke Williams, Shawn Musgrave, "Federal Prosecutors Using Plea Bargains as a Secret Weapon for Deportations", *The Intercept*, Nov. 15, 2017.

[71] To increase the number prosecutions along with a lack of resources, federal districts introduced "fast-track" that allowed federal prosecutors to offer defendants who are charged with illegal reentry "extremely favorable sentences, outside of the federal sentencing guideline parameters, for willingness to almost immediately accept a guilty plea." Jane L. McClellan & Jon Sands, "Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences", 38 *Arizona State Law Journal* 517 (2006), 517-8.

[72] Federal Defenders Office: Training Division, *Fast-Track Plea Agreements*, available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/fast-track-plea-agreements.pdf.

[73] Federal Defenders Office: Training Division, Fast-Track Policies, Feb. 12, 2012, available at https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/specific_guideline/fast-track-policies.pdf.

[74] *ID*.

[75] Court observations, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, May-June 2017; Court observations by End Streamline Coalition, Operation Streamline, Evo A. DeConcini U.S. Courthouse, Tucson, Ariz. (2014-2017).

[76] Court observation of Magistrate Judge Carmen E. Garza, Las Cruces United States Courthouse, Las Cruces, New Mexico, Sept. 5, 2017.

[77] *Id.*

[78] Court observation by End Streamline Coalition, Magistrate Judge Bruce Macdonald, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, Dec. 14, 2015.

[79] Court observation by End Streamline Coalition, Magistrate Judge Bruce Macdonald, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, Jan. 6, 2015.

[80] Court observation by End Streamline Coalition, Magistrate Judge Leslie Bowman, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, May 30, 2017.

[81] Court observation of Magistrate Judge Eric Markovich, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, June 19, 2017.

[82] 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, *Social and Legal Studies* 22(4) (2013).

[83] United States v. Sanchez-Gomez, 859 F.3d 649, (9th Cir. May 31, 2017) (en banc).

[84] This information is based on proceedings before El Paso Magistrate Judge Leon Schydlower, who conducts his proceedings in a single hearing.

[85] *Model Rules of Professional Conduct* r. 1.6, American Bar Association (2016); Swidler & Berlin v. U.S., 524 U.S. 399 (1998) ("The attorney–client privilege is one of the oldest recognized privileges for confidential communication."); Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, CENTER FOR PROFESSIONAL RESPONSIBILITY (May 2007).

[86] In some cases, defendants have been found to be U.S. citizens or legal permanent residents. *See e.g.* Written Statement of Heather Williams, House Judiciary Subcommittee on Commercial and Administrative Law, Oversight Hearing on the Executive Office of U.S. Attorneys 10 (June 2008); Lomi Kriel, "Streamlined: Trump Pressing For Mass Criminalization of Illegal Border Crossers", *Houston Chronicle* (Aug. 25, 2017) (hereinafter "Kriel, "Streamlined: Trump Pressing for Mass Criminalization of Illegal Border Crossers"") (citing Maureen Franco, a federal public defender in the Western District of Texas, who worries that expanding fast-tracked prosecutions will inevitably sweep up potential American citizens. She stated that, "We have seen a real uptick in clients who have legitimate claims to citizenship through the birth of their mother and father or grandparents, but those cases take a lot of time…The wider you cast the net, the more chances that's going to happen." The article also cites a study in which of the one-third who had been criminally prosecuted through Operation Streamline, only 1% "said their attorneys had inquired into their legal status and whether they had rights to U.S. citizenship.").

[87] Court observation by End Streamline Coalition, Judge Bruce Macdonald, Evo A. DeConcini U.S. Courthouse, Tucson, Arizona, Nov. 20, 2017.

[88] Survey response, on file with Human Rights First. *See also, e.g.,* Written Statement of Heather Williams, House Judiciary Subcommittee on Commercial and Administrative Law, Oversight Hearing on the Executive Office of U.S. Attorneys 25 (June 2008).

[89] Survey response, on file with Human Rights First.

[90] Operation Streamline, Honorable Jacqueline M. Rateau, Special Proceedings Courtroom, Tucson, Arizona, Aug. 10, 2017 (Telephone Conversation with observer who wished to remain anonymous due to professional conflicts necessitating confidentiality, Aug. 18, 2017).

[91] *See e.g.* The Court Interpreters Act of 1978, 28 U.S.C. § 1827; Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000) ("It is long-settled that a competent translation is fundamental to a full and fair hearing").

[92] Elizabeth Imbarlina, "The Right to an Interpreter for Criminal Defendants with Limited English", *Jurist* (Apr. 15, 2015), *available at* http://www.jurist.org/dateline/2012/04/iryna-dasevich-criminal-justice.php.

[93] United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

[94] Joanna Lydgate, Policy Brief: Assembly-Line Justice: A Review of Operation Streamline, THE CHIEF JUSTICE INSTITUTE ON RACE, ETHNICITY & DIVERSITY (Jan. 2010), 12-13, available at https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

[95] Survey response, on file with Human Rights First.

[96] Lomi Kriel, "Trump moves to end 'catch and release', prosecuting parents and removing children who cross border", *Houston Chronicle*. (NOV. 25, 2017), available at http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php (hereinafter "Kriel, "Trump moves to end 'catch and release,' prosecuting parents and removing children who cross border"").

[97] Meeting with Edgar Holguin, Assistant Federal Public Defender, Western District of Texas, El Paso, Sept. 7, 2017.

[98] Order, U.S. v. Zavala-Zavala, EP-17-MJ-4462-MAT, 1, U.S. District Court for the Western District of Texas, Nov. 2, 2017.

[99] In June 2017, Tucson Border Patrol officials told Human Rights First that "family units are not referred for criminal prosecution," reflecting a statement by Assistant Border Patrol chief Carlos Villarreal that, "We don't prosecute family units." Kriel, "Trump moves to end 'catch and release,' prosecuting parents and removing children who cross border".

[100] *Id.*

[101] Kriel, "Streamlined: Trump Pressing for Mass Criminalization of Illegal Border Crossers.

[102] Kriel, "Trump moves to end 'catch and release,' prosecuting parents and removing children who cross border".

[103] Initial Appearance Transcripts, U.S. v. DOMINGUEZ-PORTILLO, U.S. District Court for the Western District of Texas, Oct. 23, 2017; Initial Appearance Transcripts; Initial Appearance Transcripts, U.S. v. Vasquez-Hernandez, 9, U.S. District Court for the Western District of Texas, Oct. 26, 2017.

[104] Initial Appearance Transcripts, U.S. v. Zavala-Zavala, 11, U.S. District Court for the Western District of Texas, Oct. 24, 2017.

[105] Initial Appearance Transcripts, U.S. v. Yanes Mancia, U.S. District Court for the Western District of Texas, Oct. 24, 2017; U.S. v. Claudino Lopez, U.S. District Court for the Western District of Texas, Oct. 24, 2017.

[106] Initial Appearance Transcripts, U.S. v. Jose Francis Yanes Mancia, EP-17-MJ-04461-MAT, 11, U.S. District Court for the Western District of Texas, El Paso Division, Oct. 24, 2017.

[107] *See* Joint Gen. Comm. No. 3, General principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, Nov. 16, 2017; Joint Gen. Comm. No. 4, State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, Nov. 16, 2017; Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration, 2012.

[108] *See e.g.*, Dr. Cathryn Costello, Article 31 of the 1951 Convention Relating to the Status of Refugees, UNHCR Legal and Protection Policy Research Series (July 2017).

[109] Meeting with Assistant Federal Public Defender, District of New Mexico, Las Cruces, Nov. 2017.

[110] U.S. Customs and Border Protection, *Southwest Border Migration FY2018*, *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration, last accessed Jan. 12, 2018 (indicating 4,839 apprehensions of "family units" in October 2017, 7,015 in November, and 8,121 in December).

[111] OIG report, p.11

[112] U.S. Department of Justice, *FY 2018 Budget Request* (2017).

[113] *Id*.

[114] OIG report, p. 36

[115] *Indefensible*, supra note 65.

[116] United States Court Services, *Defender Services*, *available at* http://www.uscourts.gov/services-forms/defender-services.

[117] *Indefensible*, supra note 65.

[118] Betsy Woodruff, "Prosecutor: Jeff Sessions' New Immigration Plan Is 'F*cking Horrifying'", DAILY BEAST (Apr. 12, 2017).

[119] OIG report, at, p. 4.

[120] *Id.*, at. 8.

[121] United States Government Accountability Office Report to the Chairman Committee on Homeland Security House of Representatives, *Border Patrol: Actions Needed to Improve Oversight of Post-Apprehension Consequences* (Jan. 2017).

[122] *Indefensible*, supra note 65.

[123] U.S. Dep't of Homeland Security, Office of Immigration Statistics, *Efforts by DHS to Estimate Southwest Border Security between Ports of Entry*, September 2017.