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Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol

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PROSECUTING THE PERSECUTED: HOW OPERATION STREAMLINE AND EXPEDITED REMOVAL VIOLATE ARTICLE 31 OF THE CONVENTION ON THE STATUS OF REFUGEES AND 1967 PROTOCOL

Emily Puhl*

Article 31 of the Convention on the Status of Refugees (Convention) and 1967 Protocol (Protocol) prohibit party States from imposing criminal penalties on refugees for illegal entry or presence in the country to which they have fled. The United States, which ratified the 1967 Protocol, does just this under Operation Streamline, which prosecutes individuals who cross the U.S.-Mexico border without authorization. This prosecution not only subjects refugees to criminal penalties and jail time, but also bars refugees from eligibility to seek full asylum in the United States due to being removed after serving a federal sentence. Because Operation Streamline only operates on the Mexico-U.S. border, this procedure disproportionately affects asylum seekers from Latin American countries, especially Mexican citizens, who are often excluded from other refugee protections. This article argues that in order to conform with its obligations under the Convention, the United States should both reform Operation Streamline to strengthen detection of and protections for asylum seekers, and remove the barriers currently in place that prevent those removed under Expedited Removal from applying for asylum. In doing so, the United States will come closer to fulfilling its obligations under the Protocol and increase access to humanitarian relief for all individuals who should qualify.

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INTRODUCTION

V.T.¹ was born in Mexico. Until the age of fifty-one, she lived in and operated a flower shop in Mexico City. She fled to San Francisco in 2007—without authorization to enter the United States—escaping her husband’s attempts to kill her by setting her on fire. In 2010, she returned to Mexico to visit her dying mother. While she was there, her husband tried to run her over with a truck. Afraid for her life, she took a bus to Ciudad Juarez to flee to the United States, where her only son lived.

Lacking the time necessary to apply for a tourist visa or another document to enter the United States,² V.T. used her remaining savings to pay a *coyote*³ to cross into El Paso, Texas. The coyote gave her a U.S. permanent resident card containing a different woman’s name and told her to show it to the Customs and Border Protection (CBP) agent when she went through the border crossing station. As she walked up to the agent at the border, her options for seeking refugee status and international protection from her husband dramatically changed for the worse. And her relationship to the United States and the Department of Homeland Security (DHS) were permanently damaged.

At the border crossing, the agent arrested V.T. for fraudulently using a visa to enter the United States. Despite telling every U.S. government employee about her fear of returning to Mexico—including the CBP agent who interviewed her, the nurse who treated her in the detention center, and her federal public defender—the I-867B form⁴ completed by the Border Patrol indicated that she was not afraid to return to Mexico. She thus was denied a credible fear interview, which would have allowed her to seek asylum in the United States. Instead, she was charged with a federal criminal offense for using a fraudulent document to enter the United States.

In El Paso, V.T. pled guilty to and served a four-month sentence for fraudulent use of a document under 18 U.S.C. § 1546.⁵ She was immediately

1. V.T.’s story is loosely based on a client whom I helped represent in detained removal proceedings in San Francisco during the summer of 2013. As of September 2013, she was no longer in detention but continued to litigate her withholding claim.

2. It is unlikely that V.T. would have qualified to receive any entrance visa to the U.S., since her previous entry into the country without authorization would have barred her for ten years. *See* Immigration and Nationality Act § 212(a)(9)(B) (1952). Additionally, as explained below, her intent to flee Mexico would have made her ineligible for a temporary nonimmigrant visa.

3. A *coyote* is a Spanish term for an individual or organization that transports an unauthorized immigrant across an international border.

4. The form I-867B, Notice and Order of Expedited Removal, contains questions for assessing whether or not a non-U.S. citizen excluded at the border has any fear of returning to his or her country. *STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 13 (2005)*, available at http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/evalCredibleFear.pdf.

5. This statute defines the crime as using:

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

...

for the purpose of satisfying a requirement of section 274A(b) of the Immigration

deported back to Ciudad Juarez through a border removal process called Expedited Removal. Still afraid that her husband was waiting to kill her in Mexico City and unable to financially support herself in Ciudad Juarez, she tried again to cross into the United States. This time she crossed on her own because she could not afford to pay another coyote. A Border Patrol agent caught her while she was walking across the canal to reach El Paso. Having already been deported three months earlier, she was charged with and convicted of criminal illegal reentry⁶ and served a sentence of ten months in federal prison.

After serving her second federal prison sentence, V.T. was transferred from federal prison in Nevada to an Immigration and Customs Enforcement⁷ (ICE) detention center in Dublin, California, to await her second removal to Mexico pursuant to the original 2010 order issued under Expedited Removal in El Paso. But once in California, she found someone who listened to her fear of returning to Mexico and underwent a reasonable fear interview with an asylum officer. This officer found that she was eligible to apply for withholding of removal because of persecution she faced as a married woman from Mexico.⁸ When a local non-profit immigration attorney met V.T. in May 2013, she had already spent over eleven months in ICE detention trying to find a competent attorney to help her adjudicate her claim of withholding of removal for domestic violence in Mexico—the claim that should have qualified her for asylum when she first encountered the Border Patrol in El Paso in 2010.

V.T.'s criminal prosecutions in Texas occurred as part of a program broadly referred to as "Operation Streamline," which started in 2005 and has since fundamentally transformed the immigration enforcement practices of the DHS along the U.S.-Mexico border.⁹ The border sector of El Paso is one of six CBP sectors that participate in this program, which eliminates the discretion of federal prosecutors in deciding when to prosecute immigration offenses. Instead, the program requires that the United States Attorneys Office charge all arrested aliens with federal immigration offenses, including the charges of illegal reentry and fraudulent use of a visa that were brought against V.T. This program fails to avoid prosecution of asylum seekers because it relies on the Expedited Removal process in which Border Patrol officers have been known to disregard the credible fears voiced by border

and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 1546(b) (2002).

6. See 8 U.S.C. § 1326 (1996).

7. According to its website, "ICE enforces federal laws governing border control, customs, trade and immigration." It is a division of DHS that carries out the interior enforcement of immigration laws in the United States. *Who We Are*, Immigration and Customs Enforcement, <http://www.ice.gov/about> (last visited Mar. 16, 2015).

8. For a brief history of asylum law as it pertains to women as a particular social group, see generally Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46 (2010). While before August 2014 there was no precedential case law protecting women under asylum law, DHS had argued for the grant of asylum to women who suffered persecution by their husbands as early as 2004 in *In the matter of Alvarado-Pena*. See Department of Homeland Security's Petition on Respondent's Eligibility for Relief, *In re Alvarado-Pena* (2004) (No. A 73 753 922), available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_RA_DHS_Brief_02_19_2004.pdf. Rodi Alvarado-Pena was granted asylum by an Immigration Judge in 2009. Musalo, *supra* note 8, at 2.

9. JOANNA LYDGATE, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE, POLICY BRIEF 1 (2010), available at https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

crossers, preferring instead to send them back to their dangerous homes. This results in frustrating situations like V.T.'s, where refugees are convicted of non-violent crimes, serve significant time in prison, face subsequent removal, and later must meet a higher legal standard to qualify for refugee protection in the United States.

This article argues that the United States' prioritization of prosecuting border crossers under Operation Streamline violates Article 31 of the Convention on the Status of Refugees and 1967 Protocol, which prohibit party States from imposing criminal penalties on refugees for illegal entry or presence.¹⁰ When an asylum-seeker is first prosecuted for a federal criminal offense and is denied a prior opportunity to claim asylum in front of an asylum officer, her only option is to challenge the criminal charges in criminal court. But an asylum claim is not a valid defense to criminal charges in federal court. As discussed below, even asserting the substantively similar defense of duress is almost impossible to prove because of the inadmissibility of most hearsay under the Federal Rules of Evidence in federal court. Because individuals convicted of immigration offenses are subject to immediate removal under the Expedited Removal process, a conviction under Operation Streamline means guaranteed removal and is thus a bar to seeking asylum forever. Because this program only operates on the U.S-Mexico border, this procedure disproportionately affects asylum seekers from Mexico and Central America. In order to conform with its obligations under the Convention, the United States should amend both Operation Streamline and its use of Expedited Removal to strengthen its screening for refugees who would otherwise be charged under Operation Streamline. Such a change would minimize or eliminate the subsequent legal barriers to seeking asylum that an Expedited Removal order imposes on people fleeing violence, especially from Mexico and other Central American countries.

I. OVERVIEW OF ASYLUM IN THE UNITED STATES

Asylum is a form of humanitarian immigration relief available by statute in the Immigration and Nationality Act (INA).¹¹ It gives lawful status to individuals who have a well-founded fear of future persecution in one of five protected categories: race, nationality, religion, political opinion, and membership in a particular social group. The statute is based directly on the international Convention on the Status of Refugees of 1951, originally ratified in 1951 in response to the situation of settling refugees fleeing from the Holocaust and other persecution during World War II.¹² Because of this specific purpose, the original 1951 Convention protected individuals who feared persecution "as a result of events occurring before 1 January 1951."¹³ The 1967 Protocol relating to the Status of Refugees updated the original Convention, allowing for individuals fearing persecution after January 1, 1951 to be protected under the treaty.¹⁴ The United States signed the 1967 Protocol on November 1, 1968.¹⁵ As a signatory of the Protocol, U.S. legal protection should

10. Convention Relating to the Status of Refugees art. 31, Jul. 28, 1951, 189 U.N.T.S. 137.

11. Immigration and Nationality Act § 208 (1952), 8 U.S.C. §1158 (2012).

12. GUY S. GOODWIN-GILL, CONVENTION RELATING TO THE STATUS OF REFUGEES PROTOCOL RELATING TO THE STATUS OF REFUGEES 1 (2008).

13. Convention Relating to the Status of Refugees art. 31, Jul. 28, 1951, 189 U.N.T.S. 137.

14. GOODWILL-GILL, *supra* note 12, at 7. The 1967 Protocol did not change the five characteristics for which individuals may be protected.

15. *Id.* at 7. By ratifying the 1967 Protocol, the United States agreed to apply articles 2 through 34 of the Convention.

reflect the language of the statute that created the United Nations High Commissioner on Refugees (UNHCR).¹⁶ In 1980, the U.S. Congress passed the Refugee Act of 1980 to “explicitly conform[] the immigration law” to its international treaty obligations under the Convention and the Protocol.¹⁷

The United States government provides for two main paths toward obtaining refugee status under its laws. The first path is to apply for refugee status through the UNHCR. The UNHCR’s process screens individuals outside of their home country but not yet inside of the United States. After determining that an individual qualifies for refugee protection under international laws, UNHCR then seeks the approval of the United States for that refugee to reside in that country. If the United States accepts the refugee, she and qualifying family members receive the appropriate identification, travel documents, and government assistance to settle in the United States. The refugee thus arrives in the United States already holding the status of refugee.

The second path, commonly known as political asylum, is available to those who fear persecution and are already within the borders of the United States. Individuals seeking protection through this process must meet the requirements found in INA § 208 and get approval from an Asylum Officer (if applying affirmatively) or an Immigration Judge (if already in removal proceedings). While the decision-makers in the United States operate similarly to UNHCR screeners in third countries to determine whether an individual initially qualifies because of a well-founded fear, U.S. law imposes a number of additional requirements that frequently bar an applicant from qualifying for asylum in the United States. First, an applicant must apply for asylum status within one year of arriving in the United States. Second, an applicant can not have been ordered removed from the United States, either by an Immigration Judge or by a CBP officer under Expedited Removal when apprehended at a U.S. border or port of entry. If an individual is subject to one of these bars and does not qualify for a statutory exception, then an asylum-seeker may only qualify for withholding of removal under INA § 241(b)(3)(B).

While Withholding of Removal prevents the removal of the same protected groups as those protected under the asylum statute, the refugee must prove that she will face a greater level of harm in her home country to receive this protection. While asylum seekers must show only a 10% chance of suffering harm upon returning to their home country, those seeking withholding of removal must show that it is “more likely than not”—or 51% likely¹⁸—that they will suffer harm if returned to their home country. Even if an individual is determined to have a reasonable fear of returning to her country, she still must prove her case to an Immigration Judge during an adversarial proceeding where DHS actively opposes the claim of the refugee through its attorneys.

Finally, if one is fortunate to get an order of withholding of removal from an Immigration Judge, the benefits of such relief are paltry compared to those available with a grant of asylum. Like international refugees, asylees receive access

16. *Id.* at 2.

17. Edward Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 150 (1981).

18. The U.S. Supreme Court has defined this standard as a 51% chance of being harmed based on a protected status. *I.N.S. v. Stevic*, 467 U.S. 407, 424 (1984). This is in stark contrast to the well-founded fear standard: “less than a 50% chance” or perhaps as little as 1 in 10. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

to certain government benefits, can never be removed to their home country, and are eligible to apply for permanent resident status in the United States after one year as a refugee. An asylee, therefore, is granted both the protection of the United States and an opportunity to become a citizen in as few as five years. In contrast, those granted withholding of removal are in fact ordered removed, but guaranteed the protection of not being removed *to their home country while the conditions of persecution exist*. This means that an individual granted withholding not only may be removed to a third country, but also may be removed to their home country if the United States can show that the persecutory conditions no longer exist there. Finally, there is no opportunity to receive any lawful status in the United States with a grant of withholding of removal.

For those fearing harm in their home country, withholding of removal is a temporary and inadequate solution. While it provides momentary reprieve from the fear of being transported back to a dangerous country, it provides no long-term assurance for an individual that they will be allowed to put down roots in the United States. This form of “humanitarian” relief fails to provide maximum protection to those who fear persecution around the world, instilling a perpetual fear of removal if conditions marginally change for the better in her home country.

II. OPERATION STREAMLINE AND CRIMINALLY PROSECUTING IMMIGRATION

Operation Streamline is a relatively recent development in the enforcement of immigration laws and so-called border security that has operated to increase the chances that migrants crossing the border, including refugees, will be subjected to criminal and civil penalties for unauthorized entry into the United States. However, despite its enormous impact on the federal courts, the federal prison system, and immigrants crossing into the United States, Operation Streamline was not established after a deliberative nationwide conversation about how to address undocumented migration. Instead, Operation Streamline began as a mere change in CBP policy for overcoming limited detention space for non-Mexican migrants apprehended in the Del Rio, Texas sector of the U.S.-Mexico border. Prior to 2005, Border Patrol agents typically referred only migrants with serious felony convictions to the U.S. Attorneys Office (USAO) for criminal prosecution for immigration offenses.¹⁹ CBP dealt with all other migrants apprehended at the border in two distinct ways. First, undocumented migrants from Mexico were typically sent back across the border without any formal immigration procedures.²⁰ These “voluntary returns” were not formal deportation orders, had no preclusive legal effect, and therefore did not bar future attempts to enter the United States, either through authorized or unauthorized paths.²¹ Second, undocumented migrants who were not from Mexico could not be easily returned and so were detained for formal immigration proceedings in front of

19. Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 484 (2010) [hereinafter *Assembly-Line Justice*]. See also *id.* at 482 (explaining that, between 2002 and 2008, misdemeanor immigration caseloads more than quadrupled for magistrate judges along the Mexico-U.S. border).

20. *Id.* at 488–89.

21. See *id.* (explaining that an order of expedited removal had a consequence of barring further admission for five years).

an Immigration Judge, which, at the time, took up to ninety days.²²

As border crossing numbers increased and detention space became limited in the Del Rio, Texas sector of the border, DHS authorities had no option but to release increasing numbers of “Other than Mexican” migrants from detention.²³ CBP, unwilling to accept this state of affairs, looked to the federal prison for more bed space to detain apprehended migrants. After discussions with the USAO for the Western District of Texas, the Border Patrol established the policy of Operation Streamline in 2005. The agency hoped to deter increased unauthorized migration through this section of the border while also shifting some of the burden of immigration enforcement to the criminal justice system.²⁴

Under Operation Streamline, Border Patrol agents must refer *all apprehended migrants*²⁵ to the USAO to be prosecuted for offenses including illegal entry, illegal reentry, and fraudulent use of a visa, permit, or document to enter the country.²⁶ The policy thus eliminated the long-established discretion of CBP and USAO in criminal prosecution of undocumented migrants to the United States. While the federal government did prosecute migrants under these statutes before 2005,²⁷ the number of prosecutions pales in comparison to the skyrocketing numbers under the zero-tolerance policy of Operation Streamline.

Operation Streamline has been challenged for violating the constitutional and statutory rights of criminal defendants.²⁸ It nevertheless continues to operate even though the policy was responsible for the deportation of 200,000 people in the 2012 fiscal year alone.²⁹ The program expanded to six of the nine southern border sectors between 2006 and 2009, but is not yet in effect on the U.S.-Canada border.³⁰ Prosecutions in the Operation Streamline border sectors range from forty to eighty individuals per day.³¹ Human Rights Watch reported in May 2013 that immigration related cases made up more than 40% of federal prosecutions, more than any other type of prosecution, including drug crimes.³² In 2012 and 2013, the federal government prosecuted over 90,000 cases of illegal entry and illegal reentry alone,

22. *Id.* at 490 (“Before expedited removal began, the average detention period for a non-Mexican national apprehended at the border was about ninety days.”).

23. These individuals were given a Notice to Appear to compel their appearance at formal immigration proceedings in the future. A large number of these immigrants did not appear for such proceedings. *Id.* at 492.

24. For more information about the increased rates of migration through the Del Rio sector, see generally *id.* at 491–94.

25. Although Operation Streamline was created to address enforcement challenges with “other than Mexican” migrants, the Border Patrol decided to apply it to all migrants to avoid Equal Protection challenges in exempting Mexican migrants from the policy. *Id.* at 493.

26. Congress codified the penalties of illegal entry (8 U.S.C. § 1325) and illegal reentry (8 U.S.C. § 1326) in 1952. *Id.* The offense of fraud and misuse of visa permits was created in 1948. 18 U.S.C. § 1546 (2013) (original version at ch. 645, Stat. 771 (1948)).

27. *Assembly-Line Justice*, *supra* note 19, at 493.

28. Juan Rocha, *Operation Streamline and the Criminal Justice System*, 48 ARIZ. ATT’Y 30, 33–34 (2011).

29. Perla Trevizo, *Immigration Bill Could Swamp Overwhelmed Tucson Court*, ARIZ. DAILY STAR, Sept. 8, 2013, http://azstarnet.com/laestrella/ciudad/immigration-bill-could-swamp-overwhelmed-tucson-court/article_be71df17-623e-52af-80ba-64a6f8e408b9.html.

30. *Assembly-Line Justice*, *supra* note 19, at 494.

31. See *id.* at 496–501 (explaining that El Paso apprehended about forty to fifty people per day in June 2009, and Del Rio has a cap of eighty prosecutions per day).

32. Cindy Chang, *Immigration Cases Make Up 40% of Federal Prosecutions, Study Says: Many Immigrants are Being Tried For Crossing the Border After Being Deported*, L.A. TIMES, May 21, 2013, <http://articles.latimes.com/2013/may/21/local/la-me-ff-immigration-prosecutions-20130522>.

reaching over 97,000 in fiscal year 2013.³³

Operation Streamline prosecutions allow neither federal courts nor USAO prosecutors an opportunity to evaluate the circumstances of an individual defendant's entry, which would protect against prosecuting asylum seekers. The entire process generally consists of one or two appearances before a federal magistrate judge. During the hearing, migrants appear in the courtroom as a group and listen to a court interpreter explain in Spanish the criminal charges against them and a plea agreement. Because the plea deal is already set under the policy, a refugee has no opportunity to present fear of return as a mitigating factor in the prosecution.³⁴ As one observer explained:

The judge asks the migrants, as a group, whether they understand those charges, whether they are satisfied with their legal representation, and whether their plea is voluntary. In unison, they respond, "Sí." Then, one by one, the judge asks each defendant how he pleads. Almost invariably, the answer is "culpable"—guilty. After each defendant enters his guilty plea, an attorney for the U.S. Border Patrol reads the factual basis for that plea. . . . The entire process usually takes just one to two hours.³⁵

Although defendants have access to a defense attorney, each defense attorney may have to meet with anywhere from seven to eighty clients in one day,³⁶ which results in brief and often rushed consultations between attorney and client. Additionally, while the court provides interpretation services to groups of defendants during hearings because of due process requirements, they are often not provided during individual attorney consultations.³⁷ Defense attorneys estimate that 99% of defendants plead guilty.³⁸ This high rate of pleas, coupled with CBP's documented failure to screen for asylum seekers before removing them from the country, make it almost certain that Operation Streamline criminally punishes asylum seekers with credible fears for fleeing their countries.

III. SUBSEQUENT REMOVAL THROUGH EXPEDITED REMOVAL BARS FUTURE CLAIMS TO ASYLUM

After a migrant has pled guilty and served her sentence under Operation Streamline, she is transferred to DHS custody, like V.T. after her first conviction. Because V.T. was apprehended at the U.S.-Mexico border, she was then subject to Expedited Removal, a legal mechanism for facilitating efficient and immediate

33. *At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013: Illegal Re-entry Prosecutions Jump 76% During Obama Administration*, TRACIMMIGRATION, Nov. 25, 2013, <http://trac.syr.edu/immigration/reports/336/>.

34. Rocha *supra* note 28, at 32.

35. *Assembly-Line Justice*, *supra* note 19, at 481–82. See also Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES, Feb. 11, 2014, <http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> (quoting a Federal Magistrate Judge stating that his "record" time for an Operation Streamline hearing is thirty minutes).

36. See Rocha *supra* note 28, at 32; *Assembly-Line Justice*, *supra* note 19, at 505 (explaining that Del Rio defense attorneys may be assigned up to eighty clients in one day).

37. Rocha *supra* note 28, at 32.

38. *Assembly-Line Justice*, *supra* note 19, at 484.

removal of immigrants whom the government has deemed to be inadmissible for entry by fraudulent means, misrepresentation, or without proper travel documents.³⁹ Expedited Removal was established in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, in response to terrorist attacks on the World Trade Center in 1993.⁴⁰ Prior to 1996, any individual who sought entry without a proper travel document, or who expressed intent to violate the terms of their entry visa (for example, by planning to work or study while on a tourist visa), could present their case in front of an Immigration Judge.⁴¹ This opportunity in Immigration Court also allowed for the opportunity to be represented by an attorney during the proceedings.⁴² Under Expedited Removal, however, CBP officers may immediately order the removal of immigrants who seemed inadmissible because their entry was unauthorized or because they presented a threat to national security.⁴³ Because Expedited Removal eliminated the opportunity to appear in front of a judge, it also largely eliminated the opportunity for legal representation.⁴⁴

With an Expedited Removal order, an individual is subsequently barred from entering the United States for a minimum of five years.⁴⁵ In 1997, the program initially applied only to individuals coming to the United States through ports of entry.⁴⁶ Implementation has been expanded since, and in 2004, DHS authorized Border Patrol agents to issue Expedited Removal orders for any migrants apprehended within 100 miles of the border within 14 days after entry without inspection.⁴⁷ The order cannot be reviewed by a judge and thus incorporates no due process protections or appeal rights allowed under the prior immigration review system.

Human rights advocates have debated the perils of Expedited Removal since 1996. Technically, if an individual states to a CBP officer that she fears returning to the country she left, she is entitled to an interview with an asylum officer to determine if her fear is credible or legitimate based on the facts of the individual's case and the current state of asylum law. However, advocates have decried the treatment of asylum seekers questioned by CBP officers at ports of entry, arguing that bona fide asylum seekers are being mistreated by CBP officers and then returned to countries where they face persecution or even death.⁴⁸ Additionally, an Expedited Removal order bars a refugee from seeking asylum if she manages to subsequently

39. Allen Keller, M.D. et al., *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS 1, 4 (Feb. 2005) [hereinafter *Credible Fear*].

40. Pub. L. No. 104-208, 110 Stat. 3009, Div. C (1996) (codified in scattered sections of 8 U.S.C.).

41. Mark Hetfield et al., *Executive Summary*, in UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOL. I, 1 (Feb 2005). See also *Assembly-Line Justice*, *supra* note 19, at 489.

42. See Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS 234, 238 (Feb 2005) [hereinafter *Legal Assistance*] (explaining that "Expedited Removal has had the effect of significantly restricting an alien's right to counsel" because DHS secondary inspectors can now make removal decisions "previously made only by Immigration Judges").

43. *Assembly-Line Justice*, *supra* note 19, at 489.

44. See *Legal Assistance*, *supra* note 42, at 238.

45. Immigration Nationality Act of 1952 § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2013). This bar also includes seeking entry by applying for a visa during these five years.

46. This comprises of airports and land crossings.

47. *Legal Assistance*, *supra* note 42, at 234.

48. *Credible Fear*, *supra* note 39, at 4.

enter after being removed, as was the case for V.T. when she tried to escape Mexico a second time. Instead, the refugee is put into Reinstatement of Removal proceedings under § 241(a)(5), in which “the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.”⁴⁹ Following this order of removal, a refugee like V.T. is statutorily ineligible for asylum because “the [person] is not eligible and may not apply for any relief under [the INA].”⁵⁰ This effectively eliminates eligibility for asylum, which is considered a special discretionary form of humanitarian relief only available under INA section 208. Therefore, a removed refugee like V.T. may only assert a claim of Withholding of Removal to remain in the United States—which the United States claims satisfies its obligations under international law—and, as explained above, requires the refugee to prove a higher risk of harm than for asylum to receive a minimal degree of protection from deportation.⁵¹

Thus, the combination of Operation Streamline and Expedited Removal penalizes refugees by eliminating the meaningful humanitarian relief of asylum and forcing refugees to prove a more difficult case to receive Withholding of Removal, a lower level of protection. Because Operation Streamline is not implemented on the U.S.-Canada border, and because the vast majority of migrants apprehended on the U.S.-Mexico border are from Mexico,⁵² refugees from Mexico disproportionately suffer from prosecution under Operation Streamline. Additionally, many refugees like V.T. who flee to the United States from Mexico are restricted from legal authorization to enter the country under the current structure of immigration laws. In order to obtain a nonimmigrant tourist visa, an applicant must not indicate any intent to abandon her foreign residence for any reason during the application process.⁵³ Because refugees from Mexico are typically excluded from this and other legal immigration channels,⁵⁴ they must resort to using false documentation or covert entry tactics to reach the United States.⁵⁵

Finally, refugees from Mexico may not even consider themselves to be eligible to apply for asylum, due to the fact that the United States grants asylum at very low rates for claims from Mexico, and because the majority of Mexicans who apply for asylum today flee cartel violence that typically does not qualify for asylum.⁵⁶ Additionally, political officials have pointed to a fear of “opening the floodgates” to increased migration from Mexico if asylum officers and Immigration

49. TRINA REALMUTO, PRACTICE ADVISORY: REINSTATEMENT OF REMOVAL 3 (2013), http://www.legalactioncenter.org/sites/default/files/reinstatement_of_removal_4-29-13_fin.pdf.

50. *Id.* at 5.

51. See generally ASYLUM OFFICER BASIC TRAINING COURSE, REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS (2008).

52. See *Assembly-Line Justice*, *supra* note 19, at 488 n.33 (explaining that 91% of migrants apprehended at the border in 2009 were from Mexico).

53. Immigration Nationality Act of 1952 § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (2013) (providing a tourist visa for: “(B) an alien . . . having a residence in a foreign country *which he has no intention of abandoning* and who is visiting the United States temporarily for business or temporarily for pleasure”) (emphasis added).

54. See DEPARTMENT OF STATE VISA BULLETIN, <http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html> (last visited Apr. 16, 2015) (indicating that certain Mexican family members of U.S. citizens must wait decades in order to obtain a permanent residency visa to enter the United States).

55. DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY 775 (2d ed. 2013).

56. Jason Dzubow, *A Flood of Mexican Asylum Seekers?* THE ASYLUMIST (Apr. 8, 2010), <http://www.asylumist.com/2010/04/08/a-flood-of-mexican-asylum-seekers/>.

Judges were to start granting protection to refugees from Mexico.⁵⁷ The result is that Mexican migrants are more frequently subject to criminal prosecution under Operation Streamline and are subsequently barred from seeking asylum status after expedited removal. Such penalties should be prohibited under the Convention on the Status of Refugees.

IV. ARTICLE 31 OF THE CONVENTION ON THE STATUS OF REFUGEES PROHIBITS STATES FROM PENALIZING REFUGEES

Operation Streamline's mandate for prosecuting migrants who cross into the United States without authorization violates Article 31 of the Convention on the Status of Refugees and the 1967 Protocol. These international treaties dictate how treaty parties should deal with refugees who cross borders without authorization, emphasizing the need for leniency in applying immigration and criminal penalties. Article 31(1) of the 1951 Convention states:

The Contracting States 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 in the sense of article 1, 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.⁵⁸

“Illegal entry or presence” within the context of this article includes entering a country clandestinely, with the use of smugglers or traffickers.⁵⁹ It also includes using false or falsified documents.⁶⁰ Additionally, this article protects immigrants who arrive in a country lawfully—such as by entering on a temporary visa—but remain beyond their period of authorized stay.⁶¹ These categories describe some of the most common ways that asylum seekers enter a country before applying for international protection under the Convention.

The *travaux préparatoires* of the Convention, which demonstrate the intent of the drafters in preparing the language of the document, indicate that Article 31 was to apply “to refugees who enter or are present without authorization, whether they have come directly from their country of origin” or any other country “in which their life or freedom was threatened” as long as they show “good cause” for their entry into the country of asylum.⁶² The term “penalties” has been interpreted to prohibit the imposition of “criminal penalties,” based on the French translation of the

57. Lee Stranahan, *Congressman Reveals Obama Policy that Opened Asylum Floodgates*, BREITBART (Aug. 25, 2013), <http://www.breitbart.com/big-government/2013/08/25/congressman-reveals-obama-policy-that-opened-asylum-floodgates/>.

58. Convention Relating to the Status of Refugees art. 31, Jul. 28, 1951, 189 U.N.T.S. 137.

59. Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 185, 196 (Cambridge University Press, June 2003), available at <http://www.refworld.org/docid/470a33b10.html> [hereinafter Non-Penalization].

60. *Id.*

61. *Id.*

62. *Id.* at 189.

treaty.⁶³ Scholars have argued that the object and purpose of the treaty should call for a more expansive definition of “penalties,” including the use of detention for asylum seekers or bars on eligibility for asylum status.⁶⁴

The acts contemplated by the framers of Article 31 clearly include the crimes prosecuted by Operation Streamline and the acts undertaken by migrants such as V.T. to enter the United States while fleeing their home countries. The Ad Hoc Committee on Statelessness and Related Problems explained its rationale for proposing this protection, stating, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of a national passport and visa) into the country of refuge.”⁶⁵ Such was the case for V.T., who was not able to remain safely in Mexico for a period long enough to apply for a visa to the United States. Based on the text of the Convention, V.T. appears to qualify for the protections outlined in Article 31.

However, the United States has not incorporated such protections in its immigration law or policy to the extent of other State parties to the Convention. Some countries have created legal mechanisms to avoid subjecting refugees to criminal penalties, such as creating statutes allowing asylum claims to serve as defenses to illegal entry. For example, the United Kingdom adopted Section 31 of its Immigration and Asylum Act of 1999, which provides:

(1) It is a *defence for a refugee charged with an offence* to which this section [concerning, among others, deception to gain entry, assisting illegal entry] applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—

- (a) presented himself to the authorities in the United Kingdom without delay;
- (b) showed good cause for his illegal entry or presence; and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.⁶⁶

This statute explicitly incorporates the text of the Refugee Convention.⁶⁷ In *R. v. Uxbridge Magistrates’ Court and Another, ex parte Adimi*,⁶⁸ Lord Justice Simon Brown elaborated that the intended purpose of Section 31 is to provide “immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.”⁶⁹ He also declared that the statute applied as much to refugees as to “presumptive refugees,” including those who use false documents, or enter

63. The French version translates “penalties” as “sanctions pénales.” *Id.*

64. *See generally id.*

65. *Id.* at 190 (citing Draft Rep. of the Ad Hoc Comm. on Statelessness and Related Problems, ‘Proposed Draft Convention Relating to the Status of Refugees’, UN Doc. E/AC.32.L.38 (Feb. 15, 1950) Annex I (draft Art. 26); Annex II (comments, p. 57)).

66. *Id.* at 197–98 (emphasis added).

67. *Id.*

68. [1999] EWHC (Admin) 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, available at <http://www.refworld.org/docid/3ae6b6b41c.html>.

69. Non-Penalization, *supra* note 59, at 203.

clandestinely.⁷⁰ Thus, refugees who enter the United Kingdom through a variety of unauthorized channels are allowed by this section to use their claim of asylum as a direct defense to criminal charges of illegal entry. Additionally, the incorporation of “presumptive refugees” into this protection implies that U.K. law would protect even those individuals who had not yet applied for or been granted refugee status before being charged with an offense.

In contrast, the United States has not explicitly allowed for such a direct defense. Its only explicit waiver can be found in a regulation that prohibits DHS from issuing a Notice of Intent to fine “for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution.”⁷¹ However, this provision only prevents DHS from issuing a civil penalty to refugees for document fraud. It does not prohibit the USAO from charging, convicting, and imprisoning refugees for their act of unauthorized entry. It also does not prohibit charging individuals, such as V.T., with a criminal offense of “Fraud and misuse of visas, permits, and other documents” under 18 U.S.C. § 1546.⁷²

Because the need to seek protection in the United States is not a defense to this charge, an individual, such as V.T., who uses a false visa to enter the United States can still be charged and convicted with the criminal offense of fraudulent use. Instead of the protection that she would receive under U.K. law, V.T. will pay a fine or serve jail time, despite the prohibition under Article 31 of the Convention in cases where the alien has a well-founded fear of persecution. Therefore, by broadly applying Operation Streamline to all “unauthorized” migrants and not allowing for increased detection and protection of refugees before prosecution, the United States’ compliance with Article 31 falls far short of avoiding penalties prohibited by this international treaty and far short of the compliance implemented by our counterparts in the United Kingdom.

V. POSSIBILITIES FOR SEEKING ASYLUM AFTER PENALTIES ASSESSED BY OPERATION STREAMLINE AND EXPEDITED REMOVAL

Ideally, the United States would eliminate the use of Operation Streamline or Expedited Removal, two outdated policies that contribute to the largest amount of government resources allocated in the federal government.⁷³ However, these

70. *Id.*

71. 8 C.F.R. § 270.2(j) (2013).

72. Section (a) of the statute provides that

[w]hoever . . . uses, attempts to use, possesses, obtains, accepts, or receives any such visa, . . . or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it . . . to have been otherwise procured by fraud or unlawfully obtained; . . . [s]hall be fined under this title or imprisoned not more than . . . 15 years (in the case of any other offense), or both.

18 U.S.C. § 1546 (2002). Ignorance of the law is not a defense. “Defendant sought to introduce facts which established that she did not know that her conduct violated federal law. This is a classic mistake or ignorance of law argument, and as such, it is not a valid defense.” *United States v. de Cruz*, 82 F.3d 856, 867 (9th Cir. 1996). Perhaps the laws of the United States have not allowed for such a defense because of the increased reliance on criminal prosecution and formal Expedited Removal to enforce immigration laws since 1996 and September 11, 2001.

73. In 2012, the budgets of ICE/CBP and United States Visitor and Immigrant Status Indicator

solutions are unlikely to come about in the current political climate that increasingly relies on the criminal justice system and the immigration system to “protect” the nation-state. Although Operation Streamline exists as a policy of an executive agency and could be revoked without input by Congress or the courts, it is unlikely to be eliminated while the Obama administration is under attack by Republicans for seemingly not enforcing immigration laws.⁷⁴ Additionally, Expedited Removal is established in statute and so must be repealed by Congress. With the current inactivity of a Congress controlled by Republicans who repeatedly use anti-immigrant rhetoric to appeal to their base,⁷⁵ repealing a program that purports to promote security interests is unlikely to happen in the foreseeable future.

However, the courts, Congress, and DHS could all separately provide avenues for allowing individuals to seek asylum once entrapped by Operation Streamline. Criminal prosecution, time in prison, and removal from the United States subjects migrants, including refugees, to physical, emotional, and legal harms. The federal government could mitigate the long-lasting immigration consequences of an illegal reentry conviction or an Expedited Removal in three ways: (1) Congress and federal courts could allow asylees to present a claim of asylum as a duress defense in federal court; (2) DHS could allow asylees to present their asylum claim first to an immigration judge and then terminate federal criminal proceedings after a finding by that immigration judge; or (3) Congress could remove the statutory bars to seeking asylum that are applied after an order under Expedited Removal.

A. *Asylum as a Defense to Criminal Entry Charges?*

Congress has the constitutional power to amend federal laws to provide defenses against criminal charges in federal court. With this power, Congress could provide for a defense in criminal court similar to that adopted by the United Kingdom, as discussed in Section V above. With this defense, refugee status could prevent the government from convicting an asylum seeker of illegal entry and reentry, following the practices of other countries and applying the text of the statutes to unauthorized entry. If an asylum seeker like V.T. were able to successfully raise her claim to refugee status in criminal court, she could avoid criminal entry charges because she would show that she did not need advance permission to enter the United States.

Currently, a refugee may only assert an asylum claim in administrative proceedings, either affirmatively in the Asylum Office or defensively in Immigration Court, which are not Article III courts. Because Operation Streamline requires prosecution of criminal charges in federal court before adjudicating an individual’s claim to refugee status in Immigration Court, a refugee cannot assert asylum as a defense in federal court. Additionally, many jurisdictions that apply Operation

Technology were greater than all other principal law enforcement budgets combined. Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE 12 (Jan 2013).

74. These assertions are baseless, as the Obama administration deported more individuals during a six-year reign than did President G.W. Bush during his two terms in office. Nora Caplan-Bricker, *Who’s the Real Deporter-In-Chief: Bush or Obama*, NEW REPUBLIC (Apr. 17, 2014), <http://www.newrepublic.com/article/117412/deportations-under-obama-vs-bush-who-deported-more-immigrants>.

75. See, e.g., Adam B. Lerner, *Rep. Steve King decries ‘deportable’ in Michelle Obama’s balcony*, POLITICO (Jan. 20, 2015), <http://www.politico.com/story/2015/01/state-of-the-union-2015-steve-king-114410.html>.

Streamline do not allow for mitigating factors, such as fear of returning to one's country, to alter the group pleas offered to migrants being prosecuted.⁷⁶ Thus, current procedures bar a federal court from *even considering* a refugee's fear of return and assessing whether she deserves to avoid prosecution under Operation Streamline. The courts and DHS could mitigate the harm of this procedure by either allowing criminal defendants under Operation Streamline the opportunity to present an asylum claim as a duress claim or allowing those with credible fears the opportunity to go in front of an Immigration Judge before enduring prosecution.

1. Current Complications for Asylum as a Duress Defense in Federal Court

For an asylum claim to operate as a duress defense, the federal courts would need to reconsider the evidence necessary for an asylee to prove her defense. A duress defense to a criminal reentry charge has similar elements to asylum: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm.⁷⁷ Defendants must prove each element of a duress defense by a preponderance of the evidence.⁷⁸ Under criminal case law, the defendant's testimony given or offered must meet a "minimum standard as to each element of the defense" so that it would support an affirmative defense if a jury finds it to be true.⁷⁹ Thus, if the evidence is insufficient on even one element, the defendant cannot present the defense at trial and the jury cannot even hear her claim to asylum before conviction.⁸⁰

However, even when an individual could reach the moment of asserting a duress defense in criminal court, procedural and cultural barriers may ultimately deny the use of an asylum claim as a duress defense in criminal court as illustrated by the Tenth Circuit case *U.S. v. Portillo-Vega*.⁸¹ Mr. Portillo-Vega repeatedly crossed into the United States from Mexico, and was convicted of illegal reentry in 2000 and subsequently deported in 2002. In 2003, an Immigration and Customs Enforcement (ICE) agent found him in Utah. Upon arresting him, Portillo-Vega signed a supposedly sworn statement on a form that contained an unchecked "box which an individual could check if he believed he faced harm in his own country."⁸²

At the Tenth Circuit, Portillo-Vega challenged the district court's decision to preclude him from asserting a duress defense,⁸³ specifically, that the Federal Mexican Police (the Federales) threatened him with "death or serious bodily injury if he did not leave Mexico"⁸⁴ because they knew he worked with Arizona officials working in the Drug Enforcement Administration in the 1980s.⁸⁵ The district court heard the parties' motions at a hearing at which "Portillo-Vega made a proffer of

76. Rocha, *supra* note 28, at 33.

77. *United States v. Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007).

78. *Id.*

79. *United States v. Bailey*, 444 U.S. 394, 415 (1980).

80. *Portillo-Vega*, 478 F.3d at 1197–98.

81. *See id.* at 1197–1202.

82. *Id.* at 1196 n.2.

83. *Id.* at 1197.

84. *Id.* at 1199.

85. *Id.* at 1198.

evidence and each party argued the relevant law.”⁸⁶ Portillo-Vega intended to testify and present a number of witnesses to corroborate the threats of the Federales.⁸⁷ He also planned to present an expert to testify on the negative treatment that DEA informants receive from Federales in Mexico.⁸⁸

The district court’s evaluation of the evidence reveals how evidence that might be reasonably sufficient to establish a claim of asylum in Immigration Court would not meet the standard necessary to present a duress defense in federal court. The district court determined that Portillo-Vega could not assert this defense because he “failed to carry his burden on any element of the duress defense.”⁸⁹ For the first element, the district court noted “the lack of documentary evidence” demonstrating that Portillo-Vega ever worked for the DEA.⁹⁰ It also declared the threats against him to be “amorphous” in nature.⁹¹ Instead, the court explained: “It seems like the most logical explanation for [his re-entry in November 2002] was that he was coming back to see his family.”⁹² However, since the INA allows for the asylum seeker to meet her burden entirely with credible testimony and does not require documentation,⁹³ the proffered evidence, if accepted as credible by the Immigration Judge, could have been sufficient to satisfy the existence of a threat in civil proceedings. Additionally, under the INA and Convention, the desire to reunite with one’s family alone does not prevent one from obtaining refugee status if the person is also fleeing persecution.⁹⁴

For the second element, the court found that Portillo-Vega must not have had a “well-grounded fear” of threats made by the Federales because he returned to a border town instead of “fleeing ‘deep into the heart of Mexico’ or returning to the United States.”⁹⁵ It also emphasized the fact that Portillo-Vega admitted “that he had no fear of returning to Mexico.”⁹⁶ The court seemed to refer to the lack of checkmark next to the statement indicating he was afraid to return to Mexico and the fact that his form had a check in the box “expressing his desire to be returned to his home country.”⁹⁷

Studies highlighting the procedural inconsistencies of CBP agents in the application of Expedited Removal suggest that the court’s reliance on this checked box may have been misplaced. When CBP agents were observed asking individuals in secondary inspection to sign the I-867 form confirming the veracity of their

86. *Portillo-Vega*, 478 F.3d at 1198.

87. *Id.* at 1199.

88. *Id.*

89. *Id.* at 1200.

90. *Id.*

91. *Id.*

92. *Portillo-Vega*, 478 F.3d at 1200.

93. Immigration Nationality Act of 1952 § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2009).

94. See Immigration Nationality Act of 1956 § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2014); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 39 (1992), available at <http://www.refworld.org/docid/4f33c8d92.html> [hereinafter HANDBOOK] (“The expression ‘owing to well-founded fear of being persecuted’ . . . makes all other reasons for escape irrelevant . . . unless they also have well-founded fear of persecution for one of the reasons stated.”).

95. *Portillo-Vega*, 478 F.3d at 1200.

96. *Id.*

97. *Id.* at 1202.

statements made to agents during the inspection, less than 30% of individuals were read back their statements to check for accuracy.⁹⁸ Additionally, several individuals who were read their statements before confirming their accuracy identified errors in the statements recorded by the agents.⁹⁹ These results indicate the possibility that migrants frequently sign forms that do not accurately reflect their fear of returning to their home countries and that falsely demonstrate a willingness to return, as in the case of V.T. and Portillo-Vega.

Finally, regarding the third element—that there was no reasonable opportunity to escape the threatened harm—the court found that Portillo-Vega did not avail himself of opportunities to express his fear of the Federales because he was in the United State for over three months and did not contact law enforcement.¹⁰⁰ The court emphasized this point despite recognizing that Portillo-Vega was afraid “they would just return him to the Federales in Mexico.”¹⁰¹ The Tenth Circuit concluded that he failed to seek protection in the United States and thus failed to meet the third element of duress. However, unlike the three-month requirement expressed by the district court here, asylum regulations allow asylum seekers not in criminal proceedings to apply up to one year after entering the United States.¹⁰² The court effectively imposed yet another higher burden on asylum applicants in criminal proceedings by requiring them to assert asylum almost immediately upon entering the country. Unfortunately, despite Portillo-Vega’s seemingly adequate claim based on imputed political opinion or particular social group, the Tenth Circuit upheld the denial of his duress defense and the conviction of illegal reentry.

The Tenth Circuit’s evaluation of Portillo-Vega’s duress claim illustrates the need for evidentiary flexibility in allowing a refugee to effectively assert an asylum claim as a defense to criminal immigration charges. In contrast to a criminal defendant asserting duress, an asylum seeker in civil proceedings may not necessarily need to prove each of these elements, and the burden of proof may become much lower than preponderance of the evidence. While a claim for asylum must show persecution analogous to “immediate threat of death or serious bodily injury” and the applicant must have a well-founded fear, applicants who can show past persecution do not have to show there was no opportunity to escape the harm.¹⁰³ Also, since hearsay is not allowed in criminal proceedings,¹⁰⁴ this eliminates a large portion of evidence that is used to prove asylum cases, which frequently rely only on hearsay evidence in testimony by the asylum seeker herself. The result is a higher burden on asylum seekers to prove duress in criminal court to defend against criminal entry charges than that placed on the same person proving her asylum case in civil proceedings.

98. *Credible Fear*, *supra* note 39, at 19.

99. *Id.*

100. *Portillo-Vega*, 478 F.3d at 1201.

101. *Id.*

102. Immigration Nationality Act of 1952 § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2009) (requiring the alien to demonstrate “by clear and convincing evidence that the application has been filed within 1 year after the date of alien’s arrival in the United States”).

103. According to 8 C.F.R. § 208.13(b)(1)(i)(B) (2013), the government has the burden of showing that “the applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so,” if it chooses to rebut an applicant’s presumption of future persecution.

104. FED. R. EVID. 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress”).

The need to admit hearsay evidence in asylum cases stems from the unique nature of persecution cases. UNHCR has recognized in its handbook that these cases tend to involve a lack of access to documentary evidence, explaining that often a refugee rarely will be able to provide documentary evidence or other proof.¹⁰⁵ This occurs because a person fleeing from a situation of persecution will often leave only “with the barest necessities and very frequently even without personal documents.”¹⁰⁶ Even in cases where independent research may be conducted to provide some documentary evidence, the agency plainly admits that certain statements may not be provable, such as statements made in isolation by government officials or family members.¹⁰⁷ UNHCR thus recommends that an applicant should “be given the benefit of the doubt” if her account appears to be credible, and the requirement of evidence should therefore “not be too strictly applied in view of the difficulty of proof inherent in” the situation of a refugee.¹⁰⁸

To account for this, the Board of Immigration Appeals, which oversees the adjudication of defensive asylum claims, established that, “the strict rules of evidence are not applicable in deportation proceedings.”¹⁰⁹ Hearsay is also admissible as long as it is “probative” and “fundamentally fair.”¹¹⁰ Additionally, INA § 208(b)(1)(B)(ii) holds the testimony of an asylum applicant to be sufficient to sustain her burden of proof without corroboration. Even when the immigration judge decides that the applicant should provide corroborative evidence, there is an exception where “the applicant does not have the evidence and cannot reasonably obtain the evidence.”¹¹¹ While, as a rule, inconsistent statements should not be accepted, an adjudicator of an asylum claim can be more flexible with rules of proof and evidence than a magistrate judge presiding over a criminal proceeding can be. The relative strictness of the Federal Rules and adversary system of the federal courts suggest that either major reforms need to be made in how federal courts adjudicate duress defenses in immigration prosecutions or other avenues may be more successful in protecting refugees caught up in Operation Streamline.

2. Allowing Refugees to Bypass Criminal Prosecution During an Asylum Adjudication

The frustrating assessment of an asylum claim by the Tenth Circuit in *Portillo-Vega* illustrates the need for Operation Streamline to be amended to allow refugees to avoid federal court altogether. Textually, refugee status negates an essential element of criminal illegal reentry because refugees are not required to seek advance permission to arrive at or cross the U.S. border under the Convention. 8 U.S.C. § 1326(a) states that an alien meets the elements of criminal reentry when she:

105. See HANDBOOK, *supra* note 94, at ¶ 196 (stating “cases in which an applicant can provide evidence of all of his statements will be the exception rather than the rule”).

106. *Id.*

107. *Id.*

108. *Id.* at ¶ 197.

109. *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984).

110. *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003) (“In fact, in immigration proceedings “[t]he sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.”).

111. Immigration Nationality Act of 1952 § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2013).

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless

(A) . . .

or

(B) with respect to an alien previously denied admission and removed, *unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act.*¹¹²

A migrant's intent of fleeing persecution upon entering the United States, theoretically, would place the migrant in exception B of the statutory definition of illegal reentry. Article 1 of the Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted . . . is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹¹³ Individuals from Mexico who seek asylum must arrive at or cross an international border to leave their country of persecution and, as previously mentioned, the Convention prohibits countries from imposing penalties on refugees that enter without authorization. The result suggests that individuals entering the United States to flee persecution would fit within 8 U.S.C. § 1326(a)(2)(b) because, under the Convention, they should not be required to obtain advance consent to enter the United States and cannot satisfy the elements of illegal reentry.

However, in actual practice, the zero-tolerance policy of prosecuting migrants on the U.S.-Mexico border and the failures of CBP agents to identify asylum seekers during the Expedited Removal process result in subjecting potential asylum seekers to criminal penalties under 8 U.S.C. § 1325 and 8 U.S.C. § 1326 and subsequent *refoulement*¹¹⁴ to their home countries. Studies have documented that migrants who are processed through Operation Streamline and Expedited Removal do not understand their rights and are subject to inadequate constitutional protections that may allow an attorney to determine if a migrant qualifies for asylum.¹¹⁵

The group proceedings carried out during Operation Streamline, combined with the large and fast-paced caseload of defense attorneys, results in ineffective

112. 8 U.S.C. § 1326(a)(1)–(2) (2013) (emphasis added).

113. Convention Relating to the Status of Refugees art. 31, Jul. 28, 1951, 189 U.N.T.S. 137. (emphasis added).

114. *Refoulement* is the returning of a refugee "in any manner whatsoever to any country where he or she would be at risk of persecution." Goodwin-Gill, *supra* note 12, at 4.

115. See, e.g., YOU DON'T HAVE RIGHTS HERE: US BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM, HUMAN RIGHTS WATCH, (2014); Karen Musalo, *Expedited Removal*, 28 HUM. RTS. 12 (2001); A CHILD ALONE AND WITHOUT PAPERS, CENTER FOR PUBLIC POLICY PRIORITIES, 2008; *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (2001); Brian Aust, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers through the Lens of the Universal Declaration of Human Rights*, 20 HAMLINE J. PUB. L. & POL'Y 107 1998–1999; Lisa Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213 1999.

assistance of counsel.¹¹⁶ Once charged with illegal entry, a migrant that has no criminal record faces the possibility of spending at least thirty days in jail if she chooses to challenge the case at trial and reject a much shorter plea bargain offered at the group hearing,¹¹⁷ which also serves as her initial appearance hearing, her detention hearing, and her sentencing hearing.¹¹⁸ Attorneys only have hours (or sometimes less than thirty minutes)¹¹⁹ to advise a client of her legal remedies before the plea hearing. Because it could take an attorney several days to investigate whether a client has a viable claim for asylum, the client and attorney must decide during the brief consultation before the plea hearing whether the client should simply plead to the short sentence and avoid a potentially longer period of jail time or risk more time waiting in prison to make an uncertain attempt at claiming asylum in criminal proceedings.¹²⁰

This situation may be even more difficult for asylum seekers because they are often afraid to admit why they have a fear of returning to their home country, or they may be afraid of government authorities. UNHCR states in its handbook, “A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.”¹²¹ This individual may fear telling a judge such details for fear of her home country learning of the information provided and thus facing further retaliation upon being returned to her home country.

This individual may also be unaware that her claim qualifies for asylum because CBP agents often do not inform migrants of such a right during the process of secondary inspection and Expedited Removal at a port of entry. A study on Expedited Removal procedures regarding the treatment of migrants brought into secondary inspections¹²² revealed that agents did not always provide information about seeking asylum in the United States, even though DHS procedures required agents to provide such information by reading the text of an I-867 form. Observations at San Ysidro, California, which had the largest number of observed secondary inspections, showed that only in 9% of cases did a customs agent read aloud to a migrant or present in written form the required information, which explained that “U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country” and that the migrant should tell the officer “during this interview” because she will not have another chance.¹²³ Finally, another study found that, even when a migrant expressed a fear of returning, the migrant was still removed without a credible fear interview in 15% of cases because the agent did not think that the type of fear would qualify.¹²⁴ The

116. *Assembly-Line Justice*, *supra* note 19, at 487.

117. *Id.* at 509.

118. Rocha, *supra* note 28, at 32.

119. *See Assembly-Line Justice*, *supra* note 19, at 505 (explaining that Del Rio defense attorneys may be assigned up to eighty clients in one day).

120. *Id.* at 509.

121. HANDBOOK, *supra* note 94, at ¶ 198.

122. *Credible Fear*, *supra* note 39, at 13. The study observed secondary inspections at six ports of entry, including one border crossing at San Ysidro, California, which is the busiest land border crossing in the Western Hemisphere. *Fact Sheet*, U.S. GENERAL SERVICES ADMINISTRATION, (Sept. 12, 2013), <http://www.gsa.gov/portal/category/105703>.

123. *Credible Fear*, *supra* note 39, at 13.

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combination of this process with the failure of Expedited Removal procedures to adequately identify refugees and inform migrants of their right to seek asylum result in situations similar to V.T.'s.

Therefore, DHS should implement additional procedures to provide a second attempt to assert asylum for those who are initially overlooked by CBP officers at the time of apprehension. In light of the procedural errors by CBP officers highlighted in the studies of Expedited Removal, the DHS or U.S. Attorney General's office should allow for a refugee to assert her fear of returning to her home country at the first appearance in front of the federal judge after consulting with an attorney about the possibility of applying for asylum. If the refugee asserts this fear, prosecution should be deferred to allow for a credible fear interview with an asylum officer. In the event that the asylum officer finds the fear to be credible, the prosecution for illegal entry, illegal reentry, or misrepresentation should be terminated.

This procedural addition would result in many benefits for refugees and the federal government. First and most importantly, it would provide more effective protection of refugees by offering another opportunity for meritorious asylum claims to be asserted and identified. Second, identifying individuals who should not be subject to criminal prosecution and Expedited Removal would save the federal government significant resources in prosecution, detention, and removal operations. Finally, it would lend more political credibility to the overall immigration enforcement system, which has the largest budget of all federal law enforcement agencies and has been decried as a money-making machine for private corrections corporations.

B. Collateral Challenges to Criminal Immigration Convictions and Expedited Removal Orders After Obtaining Refugee Status

Finally, in light of the failure of the federal government to protect refugees, the federal government should take the following steps to correct these procedural failures. First, the government should allow refugees to assert asylum claims, despite an Expedited Removal order. Next, it should create a pathway to bring collateral challenges to criminal immigration convictions or Expedited Removal orders after receiving a grant of asylum from an Immigration Judge. This option follows other forms of humanitarian immigration relief that has been established by Congress in recent decades, such as the T and U visas.

The T visa was created in 2000, as part of the Trafficking Victims Protection Act. The purpose of creating the T visa was to help immigrant victims of trafficking reintegrate into their communities by providing them the lawful status necessary to help law enforcement prosecute traffickers. It also aids in their successful settlement in the United States without fear of removal during such prosecutions. Similarly, the U visa was created in 2000 as part of the Battered Immigrant Women Protection Act in order to help victims of crimes who assist with law enforcement actions. In passing this legislation, Congress intended to "offer[] protection to victims of crimes" who "fear removal from the United States."¹²⁵

Both of these visas, established two decades after the Refugee Act of 1980,

ASYLUM SEEKERS IN EXPEDITED REMOVAL 54 (2005), available at <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

125. 72 C.F.R. § 17 (2007).

illustrate how removal orders do not have to bar individuals from seeking humanitarian relief. Each of the laws establishing these nonimmigrant visas¹²⁶ include special provisions addressing the grounds of inadmissibility that bar an individual from obtaining a visa. Specifically, a prior removal order, even one under Expedited Removal, can be waived by the government and allows a victim of trafficking or crime to gain a lawful status in the United States.¹²⁷ Additionally, after three years with a T or U visa, an individual may apply for and obtain permanent residency, despite a prior order of removal.¹²⁸ The approval of a U visa petition cancels an Expedited Removal order “by operation of law,” allowing for the approved U-nonimmigrant status to completely override a prior order under Expedited Removal.¹²⁹

Because asylum is also a form of humanitarian relief, Congress should establish that a grant of asylum could cancel an order of removal (such as Expedited Removal). This would allow refugees to submit an application for asylum, disregarding their prior removal—affirmatively if not currently in removal proceedings or defensively if already in immigration proceedings.¹³⁰ A grant of asylum by an officer or Immigration Judge would then operate to cancel an expedited order of removal by operation of law, putting the refugee in the same place as an asylee that was not removed upon entry. This would allow a second chance to refugees who were unable to successfully assert their fear of return to their home country during prior entries into the United States. It would also provide an alternative avenue for protecting refugees who experience human rights violations by Customs and Border Patrol agents. Finally, it would create uniformity in the ways that the DHS treats all victims of crime.¹³¹

CONCLUSION

Operation Streamline and Expedited Removal, separately and in tandem, violate Article 31 of the Convention on the Status of Refugees and the 1967 Protocol. Operation Streamline penalizes asylum seekers first by imposing criminal sanctions and prison time for unauthorized entry. Then Expedited Removal

126. A temporary visa for a limited period of time that does not grant permanent resident status. Both visas last for a term of four years.

127. Immigration Nationality Act of 1952 212(d)(13)–(14), 8 U.S.C. 1182 (2013).

128. Immigration Nationality Act of 1952, 245(l), (m), 8 U.S.C. 1255 (2014).

129. 8 C.F.R. § 214.14(c)(5)(i) (2014) (“For a petitioner who is subject to an order of exclusion, deportation, or removal issued by the Secretary, the order will be deemed canceled by operation of law as of the date of USCIS’ approval of Form I-918.”). It is unclear whether the T visa also cancels the order in the same way.

130. Immigrants’ rights organizations have recently brought litigation to successfully allow such adjudication of asylum claims despite prior removal orders under Expedited Removal. *Groundbreaking Federal Court Settlement Gives Asylum Seeker Facing Reinstatement of Removal a Chance to Present her Case in Court*, NAT’L IMMIGRANT JUSTICE CTR. (Feb. 4, 2014), http://immigrantjustice.org/press_releases/maldonado-lopez-settlement#.VNgM5LDF_Xp.

131. Unlike the U visa, the T visa does not always require that the qualifying trafficking activity take place inside the United States. The trafficking may take place in another country, as long as the person is in the United States “on account of trafficking.” This means that a person may be trafficked from one country into the United States. Carole Angel & Leslye Orloff, *Human Trafficking and the T-visa*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, THE NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT 1, 3 (July 2013), http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/2012/september-20-21-2012-new-orleans-la/trafficking/11_T-visa-MANUAL-ES.pdf.

summarily removes refugees and bars them from seeking the form of asylum available under section 208 of the INA, forcing them to prove a higher level of risk of harm to receive non-refoulement from the United States to their home country. Not only does the imposition of criminal penalties on asylum seekers violate Article 31 of the Convention, but also the evidentiary requirements of a criminal proceeding in federal courts effectively prevent asylum seekers from providing sufficient evidence to prove their claim. In order for the United States to comply with international obligations under the Convention, the federal government should establish alternative procedures and create safeguards for refugees who assert their fear of return after being caught up in either of these processes. The DHS and the Department of Justice should establish a procedure that suspends prosecution of individuals under Operation Streamline if, during their hearings, they again assert a fear of return to their home country. Congress should also establish a waiver of Expedited Removal orders for individuals who seek and are granted asylum, similar to the U and T visas. Doing this will eliminate wasted resources on penalizing refugees and serve as a small initial step towards a more humane system for accepting immigrants into the United States.