

HIAS

Welcome the stranger.
Protect the refugee.

Roadmap to Recovery

A Path Forward after the Remain in Mexico Program

March 2021



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Introduction

For years, the U.S. government allowed individuals applying for asylum to physically remain in the United States while their cases were adjudicated. However, in January 2019, the Trump administration introduced the Migrant Protection Protocols (MPP), known informally as the “Remain in Mexico” program. This fundamentally changed the process by forcing asylum seekers to wait in Mexico for the duration of their immigration court proceedings. This created incalculable suffering to asylum seekers along the border, exacerbated by the coronavirus pandemic in 2020 which shut down the border and suspended all hearings in the United States. More than 70,000 people were impacted by this program.

On President Joe Biden’s first day in office, he stopped new enrollments into MPP and began planning for the wind down of the program. One month later, on Feb. 20, the United States began accepting the first of some 25,000 migrants who still had active cases. HIAS heartily applauds this action.

However, because the damage is lasting to the thousands whose claims were either rejected outright or who returned to their home country without a hearing, HIAS hopes that the Biden administration will do more than just end the program. This report will establish a set of recommendations for the current White House to address the most outstanding concerns. They are based on HIAS’s own eyewitness accounts of conditions at the border, and they are informed by decades of work providing comprehensive services to asylum seekers and refugees.

The Stories of MPP

MPP created a humanitarian disaster along the border. HIAS observed this firsthand, so we developed programming in response to the widespread harm caused by the program. Through this report, we hope to highlight the stories of the asylum seekers in MPP and show the devastation these border policies caused. Just as we are committed to helping those subjected to this program, we are committed to telling their stories to help ensure that a program like MPP is never implemented again.

In discussions at HIAS and among other groups working at the border, there is universal agreement that the Biden administration must find a way to help repair the damage done by MPP and other harmful border policies. This report offers a roadmap for the new administration to unwind these programs in a way that respects asylum seekers’ rights, corrects for past harms, and ensures that these programs are never implemented again.

Our Work on the Border

HIAS staff attorneys and pro bono lawyers provide legal services and support to asylum seekers, including free legal representation for individuals on both sides of the United States/Mexico border. As part of our comprehensive response to the ongoing challenges there, HIAS placed six Border Fellows to provide full-time immigration legal services for nonprofit legal organizations along the U.S. side of the border, including in San Diego, El Paso, and Brownsville. HIAS also operates seven offices on the Mexican side in Juarez, Monterrey, Tijuana, Mexicali, Matamoros, Reynosa, and Nuevo Laredo. Our work in Mexico includes providing refugees with mental health and psychosocial support (MHPSS) and support for survivors of gender-based violence (GBV). With the unwinding of MPP, HIAS is working closely with partner organizations in Mexico to help asylum seekers. We are providing community education to asylum seekers in Mexico, including “Know Your Rights” presentations, and remote follow-ups with asylum attorneys, and on-the-ground paperwork assistance.

The Trump Effect

The Biden administration replaced one of the most immigrant-hostile administrations in United States history, one that curtailed legal immigration, essentially closed the southern border to asylum seekers, and attempted to criminalize the act of seeking asylum. The Migration Policy Institute cataloged more than 400 anti-immigrant policies that the Trump administration installed, extending far beyond asylum, from raising fees to naturalization to penalizing immigrants for applying for health benefits. The report noted: “While it may be possible to rescind many of these changes, others cannot simply be unwound.”¹

Immigrant-serving organizations responded to the election results with significant coordination, pooling resources to devise agendas, transition documents, and action plans. In the same cooperative spirit, Sue Kenney-Pfalzer, Director, Border and Asylum Network at HIAS and Luis Guerra, Strategic Capacity Officer at Catholic Legal Immigration Network, Inc. (CLINIC), convened regional meetings for the more than 20 legal service providers along the U.S./Mexico border to develop proposals for dismantling the Trump administration’s MPP policies. In all, we jointly convened more than a dozen meetings. While other transition documents contained policy recommendations on how to safely unwind border policies, our meetings focused on concrete operational recommendations for the Biden administration. We published an [Executive Summary](#) in January with our recommendations.

The Biden Administration Plan

In the time between the release of the *Executive Summary* of this report and the full report, the Biden administration announced that it would begin processing asylum seekers currently in MPP for entry into the United States.² Many elements of the Biden plan mirror recommendations made in the Executive Summary. For example, the administration is

¹ Sarah Pierce and Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System*, Migration Policy Institute, July 2020.

² <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>

concentrating resources at ports of entry identified in the report, including San Ysidro and El Paso. The administration is also automatically processing changes of venue to alleviate the burden on asylum seekers and has stated its intention to use alternatives to detention. The administration has also stated its intention to process family units together whenever possible. Importantly, the Biden plan also mirrors the Executive Summary's two-track entrance plan, where vulnerable asylum seekers are prioritized for processing.

We hope the initial Biden plan is only the first step. Many people in need of protection, including those previously subjected to MPP but who no longer have active cases, and those deported under other border programs, are not covered by the plan. There has also not yet been any discussion about redress for the harm that these programs have caused. More work needs to be done, and this report presents a complete plan to fully reverse the damage caused by MPP.

PART ONE: CHANGES AND CHALLENGES AT THE SOUTHERN BORDER

Immigration Under the Trump Administration

Although the Trump administration enacted MPP in its final two years, closing the southern border had always been a focus of his administration. Trump's first Attorney General, Jeff Sessions, established the rationalization for that by saying that many asylum seekers were merely "gaming the system."³ The Trump administration began decrying the release of asylum seekers from detention, cynically labeling it as "catch and release" and a "loophole" in the law.⁴ Trump further claimed that asylum seekers merely read from a script and automatically get into the U.S.⁵ President Trump also berated countries that welcomed refugees and asylum seekers, implying that if the United States followed their lead, our country would become a "migrant camp."⁶

Beyond the U.S.-Mexico Border

The Trump administration wasted little time in translating this anti-immigrant sentiment from words into actions. The administration devised a system to erect multiple barriers to any person attempting to seek asylum at the United States/Mexican border.

Those barriers were not necessarily at the United States border, but at borders that migrants had to cross just to get into Mexico. For that reason, the Trump administration placed intense pressure on other countries to strengthen their own borders. Through the threat of increased tariffs, the administration successfully forced Mexico to intercept potential immigrants en route to the United States.⁷ The Trump administration similarly encouraged other Central American countries to prevent immigrant movement towards the United States. In 2019, the administration signed "Border Security Arrangements" with El Salvador, Guatemala, and Honduras (known collectively as the "Northern Triangle") to allow immigration officials to deploy agents "to advise and mentor host nation police, border security, immigration and customs counterparts."⁸

Asylum Cooperative Agreements

The Trump administration also prevented asylum seekers from seeking asylum in the United States by requiring them to apply in other countries instead. Using threats and coercion to gain their assent,⁹ the Trump administration entered into "asylum cooperative agreements (ACAs)" with the Northern Triangle governments. These agreements allowed the United States to reject asylum seekers and send them to another one of these countries to apply for asylum there

³ <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review/>

⁴ <https://www.nbcnews.com/politics/immigration/fact-check-trump-s-misleading-claims-about-catch-release-n870591>

⁵ <https://www.businessinsider.com/trump-mocks-asylum-seekers-calls-system-scam-2019-4>

⁶ <https://www.vox.com/2018/6/18/17475512/trump-migrant-camp-refugee-germany>

⁷ <https://theintercept.com/2020/01/29/remain-in-mexico-year-anniversary-central-america/>

⁸ *Id*

⁹ <https://www.usnews.com/news/national-news/articles/2019-10-16/us-to-restore-aid-to-el-salvador-honduras-and-guatemala-after-immigration-deals-made>

instead. While El Salvador, Honduras, and Guatemala all signed these agreements, Guatemala was the only country that actually accepted asylum seekers.

Through these agreements, an asylum seeker could be sent to a country where they had never been before in order to apply for asylum. A Senate Foreign Relations Committee report found that despite the Trump administration sending 945 asylum seekers to Guatemala under the ACA, none actually received asylum protection.¹⁰

On February 6th, the Biden administration suspended the ACAs and began the process to fully terminate them.¹¹ However, the administration did not announce any relief for asylum seekers subjected to these agreements.

Metering

As part of a plan to reduce the number of asylum seekers in the United States, the administration began in April 2018 enforcing a policy known as “queue management,” or more informally, “metering.” Under metering, Customs and Border Protection (CBP) agents only allowed a certain number of asylum seekers to enter each port of entry, limiting the number of people who could ask for asylum each day. The number of asylum seekers CBP allowed into the port was exceedingly low; for example, in a port with hundreds of asylum seekers waiting, immigration officials typically allowed only seven people per day to enter.¹² This was better than other ports, where zero asylum seekers were allowed to enter, with CBP agents forcing asylum seekers to travel to a different port of entry.¹³

Asylum seekers who were subjected to metering needed to add their names to a port-specific list maintained in Mexico. Each list was independently maintained by different organizations, and sometimes by the asylum seekers themselves, which meant there was no standard way to be added to the lists. The process was subject to abuse; for example, sometimes asylum seekers were forced to pay to be added to the list. According to a HIAS Border Fellow, the cost to get on the list could run into the thousands of dollars.

The Trump administration did not invent metering. In 2016, in response to a large influx of Haitian asylum seekers in Tijuana, the Obama administration used a similar process until all the Haitian asylum seekers were processed. However, the Trump administration used this policy across the border, with no emergency requiring it. CBP reassigned staff away from processing asylum seekers, artificially limiting CBP’s ability to process asylum seekers.¹⁴ CBP agents were

¹⁰ <https://www.foreign.senate.gov/press/ranking/release/menendez-publishes-new-report-documenting-cruelty-coercion-and-legal-contortions-in-trump-administrations-asylum-agreements>

¹¹ <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>

¹² <https://www.npr.org/2019/07/03/738586876/metering-policy-at-the-southern-border-faces-renewed-scrutiny>

¹³ <https://www.documentcloud.org/documents/7279351-DHS-OIG-Report-CBP-Has-Taken-Steps-to-Limit.html>

¹⁴ Id

also allegedly instructed to tell asylum seekers that the staff at ports lacked the capacity to process them, even if such capacity existed.¹⁵

Metering set the precedent for MPP. By forcing asylum seekers to wait in Mexico, the administration exposed asylum seekers to unsafe conditions in an unfamiliar country. “Metering was a nightmare for people” said one HIAS Border Fellow. People often waited four or five months in squalid conditions. Mexican citizens were also subjected to metering in Juarez, but because they feared their own government, they could not rely on Mexican authorities to manage the metering list, and they had to create their own. During the fall and winter of 2019, there were hundreds of tents filled with Mexican asylum seekers waiting to get into the United States. Many in the metering line grew desperate and attempted to cross the border without inspection.

In addition, some CBP officials began further limiting asylum seekers’ ability to come to the United States. There were reports of immigration officials lying to asylum seekers, telling them incorrectly that policies had changed, abusing asylum seekers physically and verbally, and outright refusing entry.¹⁶

PACR/HARP

In 2019, the administration piloted two new programs in El Paso aimed to further restrict asylum: “Prompt Asylum Claim Review” (PACR) and “Humanitarian Asylum Review Process” (HARP). These two programs that modified screening for asylum seekers were closely related; PACR applied to primarily non-Mexicans, and HARP primarily applied to Mexicans.

Since 1996 and the passage of the *Illegal Immigration Reform and Immigration Responsibility Act*, immigration officials have had the option of placing asylum seekers in an accelerated deportation process known as expedited removal.¹⁷ In expedited removal, a non-citizen may be removed from the U.S. without an immigration court hearing unless they claim a fear of return to their home country. If a noncitizen claims such a fear, they are entitled to a “credible fear interview,” which will determine if they have the opportunity to present an asylum claim in immigration court.¹⁸ These credible fear interviews determine whether there is a “significant possibility” that the asylum seeker “could establish eligibility for asylum...”¹⁹ Historically, most asylum seekers have passed this screening and have their case heard in immigration court,²⁰ as under the law it was described as a process “to quickly identify potentially meritorious claims to protection...”²¹ It is a “threshold screening standard to decide whether an asylum [or torture]

¹⁵ <https://www.buzzfeednews.com/article/adolfoflores/border-officials-asylum-seekers-space-inspector-report>

¹⁶ <https://theintercept.com/2017/07/12/emboldened-by-trump-u-s-border-officials-are-lying-to-asylum-seekers-and-turning-them-away/>

¹⁷ See INA Section 235(b)(1); 8 USC 1225(b)(1)

¹⁸ See 8 USC 1225(b)(1)(B) generally

¹⁹ 8 USC 1225(b)(1)(B)(iii)(IV)

²⁰ <https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview>

²¹ <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>

claim holds enough promise that it should be heard through the regular, full [immigration court] process.”²²

Under PACR/HARP however, before the credible fear interview, CBP detained the asylum seekers rather than the usual federal agency: Immigration and Customs Enforcement (ICE). This difference is crucial because ICE facilities have processes in place to allow lawyers to meet with asylum seekers before the interview, while CBP does not allow lawyers to enter their premises. When CBP officers allowed it, they granted asylum seeker access to a phone to make outgoing calls. However, whether people could actually call a lawyer varied greatly. “It was clear that the whole idea was to make it very difficult to access counsel before your [credible] fear interview,” according to one HIAS Border Fellow who specialized in PACR/HARP cases.

Lack of access to lawyers was only one barrier to asylum. Asylum seekers in PACR/HARP were kept in CBP holding cells for an average of five to seven days. Unlike ICE holding cells, CBP cells were not designed to house people for more than 72 hours.²³ As a result, according to one lawsuit, CBP conditions were overcrowded and lacked “sanitation, beds, adequate food or water, or proper medical care.”²⁴ They are infamously known as “*hieleras*,” the Spanish word for “ice box,” because of how cold they are kept. In these facilities, asylum seekers reported they slept on the cement floor with only a Mylar blanket – or a thin, foil blanket.²⁵ Conditions in the men’s units were particularly bad according to a HIAS Border Fellow. “It was very unhygienic, especially as the pandemic came along; there was no privacy, people had no access to recreation across the board, there was no yard, you were just in this big bunker type room that you never got to leave.” The HIAS Border Fellow was unaware of any law library that the asylum seekers had access to in case they wanted to prepare their cases. Some asylum seekers were kept in CBP custody for as long as three or four weeks.

The changes enacted with PACR/HARP clearly had a negative impact on asylum seekers in their initial screening interviews. Only 19% of asylum seekers in PACR passed their interview, and only 29% in HARP passed their interview.²⁶ For comparison, before PACR/HARP about 90% of asylum seekers passed this screening process.²⁷

²² Id.

²³ <https://www.rollcall.com/2020/02/26/dhs-expands-asylum-programs-that-fast-track-deportations/>

²⁴ See Section II(A)(1) of American Immigration Council and American Immigration Lawyers Association’s Argument Section of their Amicus Brief in Opposition to the Program: https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/amicus_brief_las_american_immigrant_advocacy_center_v_wolf.pdf

²⁵ <https://www.thecut.com/2018/12/what-are-las-hieleras-iceboxes-used-by-cbp-at-the-border.html>

²⁶ <https://www.buzzfeednews.com/article/hamedaleaziz/detention-facilities-immigrants-problems>

²⁷ <https://apnews.com/article/44db8d368e6a44b7b49279b04e14be34>

On February 2, 2021, President Biden ended both PACR and HARP as part of a series of Executive Orders on asylum.²⁸ However, the Executive Order did not announce any relief for those who had been rejected as a result of these programs.

Restriction by Legal Rulings

While the administration attempted to reject asylum obligations by keeping asylum seekers out, this strategy was merely one part of the overall ecosystem that made finding protection in the United States nearly impossible.

Trump's Attorneys General used their power to refer individual cases to themselves to create new binding precedent for immigration judges. Attorneys General in the past had used this power sparingly, but Trump's Attorneys General used the power more than a dozen times.²⁹ In *Matter of L-E-A-*,³⁰ Attorney General William Barr directed immigration judges to reject asylum claims where asylum seekers suffered or feared persecution because of family members who belonged to a particular social group. In *Matter of A-B-*,³¹ Attorney General Jeff Sessions attempted to categorically deny asylum to those fleeing gang violence or domestic violence.

The Trump administration used the federal rulemaking process in a similar way. One rule attempted to block anyone from receiving asylum if they had crossed through another country and did not attempt to first apply for asylum there. A federal court struck down this rule in 2020 as a violation of the Administrative Procedures Act.³² The administration republished the rule, attempting to sidestep the court injunction.³³

How MPP Worked

The program began on January 29, 2019, as a pilot at the San Ysidro port of entry, separating San Diego and the Mexican city of Tijuana.³⁴ The program ultimately expanded to ports of entry along the rest of the border.

MPP applied to anyone who asked for asylum at any southern border port of entry or who was apprehended near the southern border. After an asylum seeker reached the United States (by

²⁸ See Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

²⁹ <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/>

³⁰ *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)

³¹ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)

³² <https://immigrationimpact.com/2020/07/01/asylum-transit-ban-legal-litigation/#.X5tR-0eSnIU>

³³ <https://www.federalregister.gov/documents/2020/12/17/2020-27856/asylum-eligibility-and-procedural-modifications>

³⁴ https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program#Where_is_the

presenting themselves at a port of entry or by crossing between ports of entry), CBP agents would process the asylum seeker and decide whether to detain the person, release them into the United States, or place them in MPP or a different program. Individual border patrol stations, and even individual CBP agents, maintained wide discretion to decide asylum seekers' fate.³⁵ Some asylum seekers were supposedly meant to be exempt from MPP, notably unaccompanied children (UACs), those with mental or physical health issues, and Mexican citizens and nationals.³⁶ In practice, however, this was not always the case.

When CBP officers placed an asylum seeker in MPP, they would issue a special Notice to Appear (NTA). Similar to a criminal indictment, the NTA is a charging document initiating removal proceedings in immigration court. The NTA, by law, must include notice of the time and place of a person's next immigration court hearing. However, because the asylum seeker in MPP was not allowed to remain in the United States during their immigration proceeding, they could not show up to court on the date and time instructed. So, CBP provided asylum seekers with a second piece of paper with additional instructions. This additional piece of paper, often called a "tear sheet," informed the asylum seeker where and when to show up at the port of entry in order to be escorted to their court hearing.

Typically, asylum seekers were required to arrive at the port of entry about four hours before their hearings were to begin at the MPP court, so for an 8 a.m. hearing, the tear sheet instructed the asylum seeker to arrive at the port as early as 4 a.m. Many asylum seekers found it difficult to travel in the middle of the night to the port of entry. So many slept outside the port the night before, putting them at an even higher risk of kidnapping or violence.³⁷

The program was also not meant to apply to individuals who were likely to face persecution in Mexico. If an asylum seeker expressed a fear of returning to Mexico, CBP was supposed to arrange a *nonrefoulement* interview with an asylum officer. These interviews were similar to credible fear interviews, but with a higher burden of proof—the asylum seeker was required to show that they were *more likely than not* to suffer persecution if returned to Mexico. The asylum seeker needed to affirmatively state that they feared returning to Mexico to receive an interview; immigration officials would not attempt to solicit it.

Beyond a supervisory review of the asylum officer's determination, there was no appeal or review process. If the asylum seeker passed this interview, they were allowed to enter and stay

³⁵ This discretion is one of the arguments that the Trump administration made for why this program was able to be implemented by memoranda and guidance documents, rather than the rulemaking process

³⁶ The full listing of those exempt from MPP, from the January 28, 2019, MPP Guiding Principles Memo, was unaccompanied children, citizens or nationals of Mexico, aliens processed for expedited removal, aliens in special circumstances (returning LPRs seeking admission, aliens with an advanced parole document or in parole status, known physical/mental health issues, criminals and those with a history of violence, those where there is a Mexican or US government interest), noncitizens who are more likely than not to face persecution or torture in Mexico, and others at the discretion of the Port Director

³⁷ See also the Prepared Statement of Laura Pena, American Bar Association Commission on Immigration, at the House Homeland Security Hearing "EXAMINING THE HUMAN RIGHTS AND LEGAL IMPLICATIONS OF DHS'S 'REMAIN IN MEXICO' POLICY." <https://www.congress.gov/event/116th-congress/house-event/LC65122/text?s=1&r=6>

in the United States until the conclusion of their asylum case. Only about 13% of asylum seekers passed these screenings and were allowed to stay in the United States to present their asylum claim.³⁸

While some MPP hearings were conducted in traditional courtrooms, MPP cases for individuals appearing in court in Laredo and Brownsville were heard in “tent courts,” temporary soft-sided structures designed solely to adjudicate MPP cases. These tent courts connected to the immigration judges using videoconferencing technology; the judges did not preside over the hearings in person.³⁹ The Trump administration severely restricted access to these tent courts by the media or advocates.⁴⁰

Since the program began in 2019, more than 70,000 people were subjected to MPP, according to Transactional Records Access Clearinghouse (TRAC) out of Syracuse University. When Biden ended the program, only 25,000 people remained in Mexico. A little more than a third of asylum seekers in MPP have active cases. Of those for whom their cases have been decided, only 641 asylum seekers received any form of relief, according to TRAC. More than 32,000 were denied asylum and have been ordered removed. Over 27,000 were ordered removed *in absentia*. Nearly 7,000 had their proceedings terminated, while the cases of several thousand more were closed on other grounds.⁴¹ In total, asylum seekers did not receive relief in 98.5% of case outcomes so far.⁴² For comparison, in 2018, before MPP was implemented, about 65% of asylum applications were denied, and in 2012 only 42% of asylum applications were denied.⁴³

On January 20, on the first day of President Biden’s term, DHS announced the suspension of new enrollments into the program.⁴⁴ The administration announced on February 11th that individuals with active MPP cases in immigration court would be allowed to enter the United States.⁴⁵ The first asylum seekers in MPP waiting in Mexico entered the United States on February 20.⁴⁶

³⁸ https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

³⁹ Some advocates have argued that this gives the government an even bigger advantage, as the asylum seeker cannot make a good impression or examine evidence. See <https://www.dallasnews.com/news/immigration/2019/09/28/judges-lawyers-say-video-justice-is-just-adding-to-the-mess-within-u-s-immigration-courts/>

⁴⁰ <https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico>

⁴¹ <https://trac.syr.edu/phptools/immigration/mpp/>

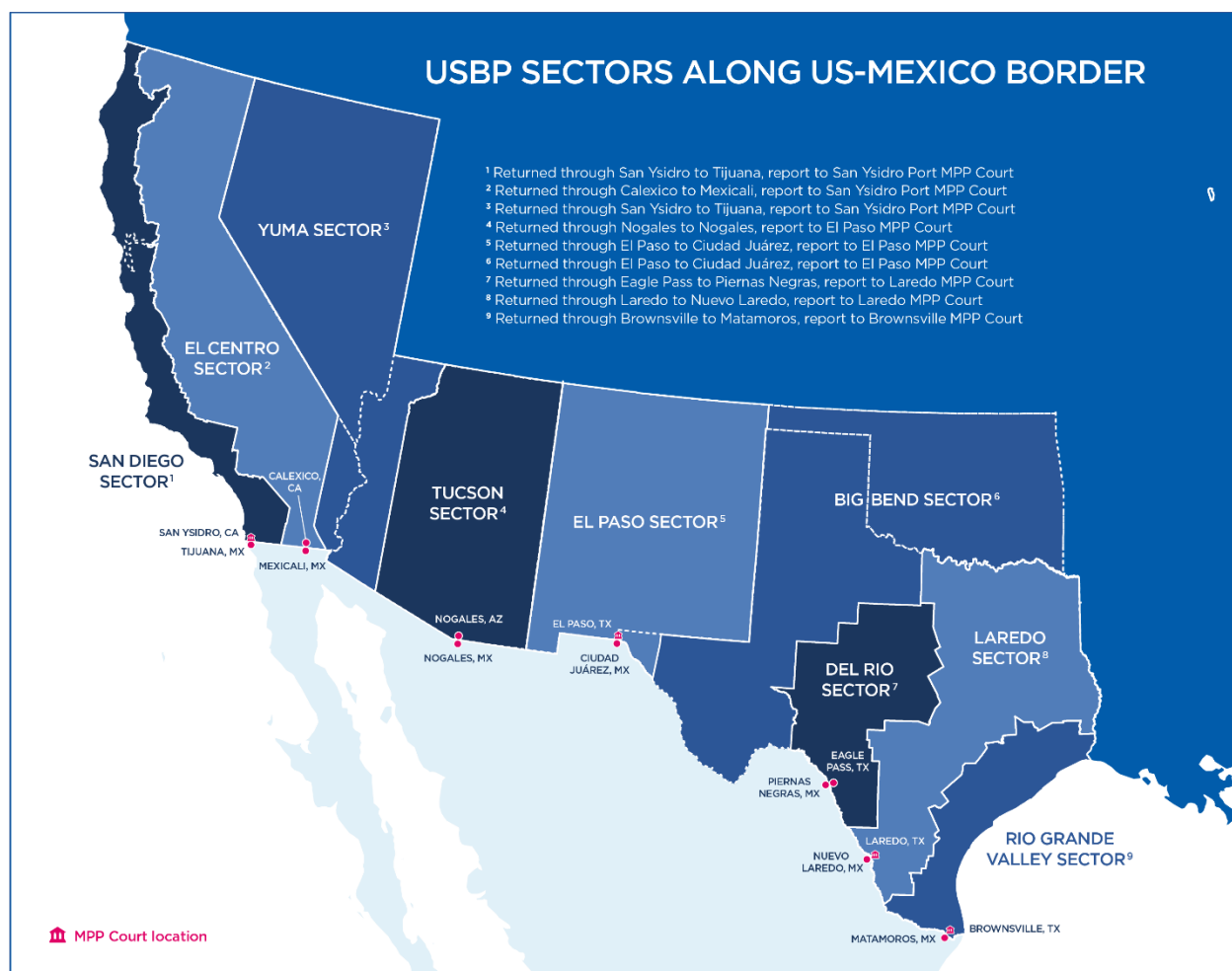
⁴² It is important to note that case outcome numbers that include unfinished cases skew more heavily against outcomes that favor asylum seekers. Cases that result in a removal order, especially *in absentia* cases, are typically resolved far quicker than cases where relief is granted. See <https://trac.syr.edu/phptools/immigration/mpp/>

⁴³ <https://trac.syr.edu/immigration/reports/539/>

⁴⁴ <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>

⁴⁵ <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>

⁴⁶ https://www.washingtonpost.com/health/us-unwinds-trump-policy-making-asylum-seekers-wait-in-mexico/2021/02/19/d048bce2-730f-11eb-8651-6d3091eac63f_story.html



Situation on the Ground

When announcing MPP, the Trump administration touted the Mexican government’s commitment to protect asylum seekers on their soil, provide them with “equal treatment without any discrimination,” and allow them to apply for work authorization.⁴⁷ But the protocols intended to “protect” migrants did anything but that. Instead, asylum seekers found themselves in some of the most dangerous areas of Mexico, often discriminated against, with minimal assistance, and living without knowing whether they would ever get to appear for their hearing. These conditions further traumatized asylum seekers who had already uprooted their lives to flee in search of safety.

⁴⁷https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

Dangerous Conditions

The official State Department travel page lists violent crimes “such as homicide, kidnapping, carjacking, and robbery” as being widespread in Mexico.⁴⁸ The areas where asylum seekers in MPP wait is especially dangerous. Ports of entry for two of the four MPP Courts, Nuevo Laredo and Matamoros, are in the state of Tamaulipas, which has the same Tier 4 “Do Not Travel” State Department travel advisory level as Syria and Afghanistan.⁴⁹ Another port of entry, Ciudad Juarez, in the state of Chihuahua, is also under an elevated Tier 3 travel advisory of “Reconsider Travel.”

Asylum seekers in MPP feel this danger acutely. One HIAS Border Fellow noted that it would be difficult for her to identify a client who has *not* experienced something traumatic while in Mexico. A running tally from Human Rights First has documented over 1,300 examples of murder, rape, torture, and other violence against asylum seekers.⁵⁰ This number is almost certainly underreported, as many asylum seekers are reluctant to report crimes.

HIAS clients have seen shootings and killing from their windows. Some reported that the same gangs they fled in their home countries are present in Mexico. Others said that the persecutors they fled in their home countries tracked them down in Mexico and began harassing and threatening them there.

Targeting by Mexican Cartels

Compounding the danger, asylum seekers in MPP are targets of Mexican cartels. One HIAS Border Fellow remarked that cartels had a “a perception that [asylum seekers in MPP] are traveling with all of their life belongings,” and that “they have family or relatives in the U.S. that they’re going to join that can then pay ransom.” Another HIAS Border Fellow commented that MPP is “feeding [the cartel’s] businesses. They are like, ‘I’ll either extort your family for money or I’ll just sell you.’ ...It’s honestly like the U.S. government is helping [the cartels].” According to another report, cartel members have expanded their criminal activities directly because of MPP.⁵¹

Asylum seekers often are easy to identify in Mexico. “Everyone can pick out the Central Americans and Cubans,” according to one HIAS Border Fellow. Their inability to blend into the Mexican community at large makes them even more vulnerable to cartel crime like kidnapping.

⁴⁸ <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>

⁴⁹ Compare the travel advisory for Tamaulipas (<https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>) with the travel advisory with Syria (<https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/SyrianArabRepublic.html>) and Afghanistan (<https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Afghanistan.html>)

⁵⁰ <https://www.humanrightsfirst.org/campaign/remain-mexico>

⁵¹ <https://www.hrw.org/news/2020/06/02/us-investigate-remain-mexico-program>

If the asylum seeker does not pay, the cartel members can disappear the asylum seeker and rely on the fact that the overwhelming majority of crimes in Mexico are never solved.⁵²

Kidnappings are so common that a number of the cartels have developed a code system, according to another HIAS Border Fellow. Once an asylum seeker has been kidnapped and ransomed, a gang member will give that asylum seeker a code word to use, if kidnapped again, to communicate to other members of the gang that that person has already paid.

Police Harassment

Even with such dangerous conditions, many asylum seekers in MPP are unwilling to seek help from the Mexican police. Filing a police report in Mexico can be time consuming and requires a \$10-40 processing fee.⁵³ Once filed, the police do little to investigate the complaint. One HIAS Border Fellow has assisted hundreds of people who have filed police reports but has yet to hear any follow-up from the police. HIAS clients have also reported harassment from the police when attempting to file their police reports.

Perpetrators of violence are often the Mexican police themselves. HIAS clients regularly report police extortion, with about half the time the police claiming they are “fining” them, and the other half of the time police not even bothering to provide a pretext. According to one HIAS Border Fellow, around half of the asylum seekers who arrive in his city are immediately extorted by police at the airport. The police confiscate their passports or tell the asylum seekers to pay \$200 or they will be forced back to their countries. One HIAS client shared a story about authorities bursting into the room where the asylum seeker and their family were staying and robbing them of everything, including their immigration papers.

Lack of Social Services

Despite claims that asylum seekers would have access to social services, one HIAS Border Fellow describes a “vacuum of services” available to asylum seekers in Mexico. Except for what non-governmental organizations (NGOs) provide, asylum seekers have little access to food, medicine, or shelter. There are a couple of reasons for this, including a lack of capacity by the local and national governments. This situation is aggravated by the fact that asylum seekers are frequently unable to get the promised immigration paperwork, the Form Immigration Multiple (FMM), from the Mexican government. HIAS Border Fellows list a number of reasons why asylum seekers fail to get their paperwork, including office closures due to the coronavirus, and fear of harassment by the Mexican police. Without the necessary paperwork, asylum seekers are unable to legally work or receive critical social services including medical care.

Employment Discrimination

In theory, asylum seekers in Mexico are eligible for work authorization. Yet few asylum seekers in MPP have been able to get jobs. Even when asylum seekers find employment, they remain vulnerable to exploitation by employers. The difficulty that asylum seekers face in finding work

⁵² <https://www.dw.com/en/unsolved-crime-rate-in-mexico-climbs-to-93-percent/a-35919079>

⁵³ <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html>

gives employers tremendous leverage over them. HIAS Border Fellows witnessed numerous instances of harassment, wage-theft, and other discrimination by employers. One HIAS Border Fellow saw multiple cases of employers forcing asylum seekers to deliver drugs and perform other illegal activities.

Housing Discrimination

Some asylum seekers in MPP can afford to rent apartments or rooms in houses. Others are able to live in hotels, although the more affordable hotels often do not have locks on the doors; asylum seekers sleep against the door at night to stay safe. Many asylum seekers live in shelters along the border, though they are crowded and privacy is scarce. Similar to other forms of discrimination they have faced in Mexico, asylum seekers find themselves discriminated against in seeking shelter. One wrong move and asylum seekers would be “evicted out on the streets” in the words of one HIAS Border Fellow.

Medical Trauma

As part of the deal to create MPP, Mexico agreed to provide healthcare to asylum seekers waiting in Mexico.⁵⁴ On paper, this promise has been delivered. Asylum seekers have access to public health insurance, *Seguro Popular*, which covers basic services. One HIAS Border Fellow described this health plan as analogous to Medicaid in the U.S. Many of the shelters have an on-site doctor.

In practice, however, there is little access to healthcare for asylum seekers in Mexico. The on-site doctors in shelters can provide basic medical help, but many asylum seekers require more. Many asylum seekers in MPP suffer chronic illnesses and have never been able to access treatment. By the time they reach Mexico, they need urgent care.

Making matters worse, the Mexican healthcare system is overwhelmed due to the coronavirus pandemic. Many hospitals also discriminate against asylum seekers; one HIAS Border Fellow noted that some of his clients have been turned away from hospitals “because they’re migrants.”

While asylum seekers in MPP struggle to get healthcare, their living conditions make everything worse. For example, the air quality in shelters is extremely poor, and one HIAS Border Fellow reported that many children living in shelters suffer from asthma or other respiratory illnesses.

Children in MPP

Children face unique challenges when placed in MPP. They are particularly vulnerable to trafficking—there are over 300 reported cases of children in MPP who were kidnapped or nearly kidnapped.⁵⁵ Children in MPP also suffer developmental and educational setbacks, as they are often unable to attend school. While some organizations have attempted to provide

⁵⁴ <https://www.dhs.gov/migrant-protection-protocols>

⁵⁵ <https://www.humanrightsfirst.org/campaign/remain-mexico>

education solutions to children seeking asylum,⁵⁶ HIAS Border Fellows articulated concerns that these asylum seekers are losing years of their education that they will never get back.

Gender-Based Violence

The proportion of women seeking asylum has grown in recent years, and many are fleeing gender-based violence (GBV), including physical, sexual, and psychological harm. Countries in Latin America and the Caribbean account for 14 of the 25 most deadly for women.⁵⁷ Ninety-eight percent of gender-related killings are unprosecuted in Latin America.⁵⁸ Fleeing such violence can also be incredibly dangerous; HIAS clients report being raped or kidnapped by members of the cartels en route to the United States.

The areas around MPP ports of entry are also incredibly dangerous for women. One Border Fellow shared a heartbreaking example: intruders entered a house where a mother and her young daughter were staying. The daughter hid in the stove and wasn't found by the intruders, but they kidnapped her mother and trafficked her for sex. The daughter escaped and fled to the United States alone. Her mother was eventually admitted to the United States after passing a nonrefoulement interview.

Women Who Are Pregnant

Initially, CBP often did not place pregnant asylum seekers in MPP. Because immigration officials were given considerable leeway in placing asylum seekers in or removing them from MPP, policies differed from port to port. This was particularly important for pregnant women, as there were persistent rumors that women who were pregnant would not be placed in MPP if they crossed the border near Brownsville, Texas. According to HIAS Border Fellows, pregnant women who heard this rumor often made the dangerous journey, potentially for hundreds of miles, to attempt to cross near Matamoros, across the border from Brownsville.

As MPP wore on, immigration officials at many ports became less likely to exempt pregnant women from MPP, so women continued to attempt to cross into the United States between ports of entry. They began to wait until much later in their pregnancies to make the dangerous journey so that CBP officials would be able to observe their pregnancies, hoping this would convince CBP to remove them from MPP.

LGBTQ Individuals

Lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals fleeing persecution in their home countries also experienced persecution and discrimination in Mexico while in MPP. UNHCR reports that two-thirds of LGBTQ asylum seekers report sexual or GBV in Mexico.⁵⁹ The discrimination frequently follows these asylum seekers to spaces that are supposed to protect them, like shelters or police stations. People who are transgender frequently face refusal of

⁵⁶ See Sidewalk Schools: <https://www.sidewalkschool.org/what-we-do>

⁵⁷ <https://www.thenewhumanitarian.org/news-feature/2020/02/27/Femicide-migration-Central-America-Mexico-US-Mexico-women-violence>

⁵⁸ Id.

⁵⁹ <https://www.unhcr.org/en-us/5a2ee5a14.pdf>

basic services like medical care and are often unable to find jobs because their gender does not match their birth certificates.⁶⁰

Family Separation

The official U.S. government policy of separating parents from their children ended in 2018, but family separation continued under MPP. Every HIAS Border Fellow who works in MPP shared at least one story about the program separating families.

According to HIAS Border Fellows, families would most commonly be separated when a child traveled with a non-parental guardian or relative, such as a grandparent or older sibling. CBP often would classify the child as an unaccompanied minor and allow the child into the United States but put the other family members in MPP. There were also cases of adult children being separated from their parents, presumably because CBP guidance only prevents separation with family units with juveniles.⁶¹ Unmarried couples, especially same-sex couples, were also separated under MPP because they were not married.

Husbands and wives were also sometimes separated, with one put into MPP and the other detained in the U.S if they crossed the border on different days. HIAS Border Fellows shared stories of husbands being separated from pregnant wives, and the separation lasting far beyond the birth of the child. In the case of one HIAS client, the father was only able to meet his baby once the father had a court date. “We were in court and court was literally the only physical space that the mother could bring her child for the father to see. So, we got five minutes in the lawyer room for the father to be with his baby who he has never met before. For five minutes, then he had to go back to Mexico.”

A HIAS Border Fellow shared a story of a woman and her young son who were placed in MPP. The son fell seriously ill and the mother could not find medical care for him in Mexico. Feeling that she had no choice, the mother sent her child, alone, into the United States to apply for asylum as an unaccompanied minor. The son was eventually apprehended and taken into custody, and quickly transferred to a hospital for urgent heart surgery. The HIAS Border fellow tried to help the mother obtain permission to enter the United States to reunite with her son, but immigration officials repeatedly denied the requests. Only later, after the son had received two heart surgeries, did the immigration authorities allow a 30-day parole for the mother to visit her son. The mother was able to stay in the United States while her asylum case proceeds after sustained advocacy by her attorney.

⁶⁰ <https://www.thenewhumanitarian.org/news-feature/2020/08/13/film-Mexico-US-asylum-shutdown-LGBTQ-danger>

⁶¹ <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>

Nonrefoulement Interviews

The principle of *nonrefoulement* (non-return) is a “cornerstone of international refugee protection.”⁶² As defined in the 1951 Refugee Convention, it states that no asylum seeker may be sent to where the refugee’s life or freedom will be endangered based upon a protected ground.⁶³ The United States is a signatory to the 1967 Protocol to the 1951 Refugee Convention and incorporated the principle of nonrefoulement in U.S. law in the 1980 Refugee Act, and thus is legally obligated to not refoule a refugee.⁶⁴

On paper, the nonrefoulement interview was supposed to ensure that asylum seekers were not being returned to danger because of MPP. In practice, the expulsion and return of refugees was routine. One HIAS Border Fellow called the nonrefoulement interview “a mechanism for doing away with a legal obligation.” Asylum seekers had trouble getting these interviews while outside of CBP custody, despite being in danger in Mexico. Many asylum seekers report not being referred for a *nonrefoulement* interview despite having expressed their fear.⁶⁵

The conditions an individual must endure before being afforded a *nonrefoulement* interview discouraged asylum seekers from requesting them. Asylum seekers must wait in the “*hieleras*.” The children of the asylum seeker were also brought into these conditions, making it feel, as one HIAS Border Fellow noted, like a punishment. There was also no guaranteed rest period before the interview – the interviews can happen at any time and have reportedly occurred in the middle of the night. One HIAS client had her interview almost immediately after a 36-hour bus trip.

The interviews, according to HIAS Border Fellows, could feel accusatory. Sometimes, asylum seekers were “shot down” over minor inconsistencies that could be easily explained with additional questioning. Sometimes the interviews ended after just 20 minutes, following a series of only yes-or-no questions. Other times, the interviews could last hours. One HIAS Border Fellow reported that the legal standard was often misapplied in the interviews, resulting in erroneous denials.⁶⁶

These interviews often occurred without any legal representation. Asylum seekers without lawyers had no real opportunity to submit documents to corroborate their claims. At the end, there was no explanation given to the asylum seeker, just a single sheet of paper saying whether they passed or failed.

⁶² <https://www.unhcr.org/4d9486929.pdf>

⁶³ Art. 33

⁶⁴ The 1951 Convention was limited in scope to those persons displaced in Europe before 1951. The 1967 Protocols eliminated the geographic and timebound restrictions. See <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>

⁶⁵ See *Innovation Law Lab v. Neilson* complaint, paragraph 103

⁶⁶ In one example given, the fellow recalled an asylum officer failing to accept that past persecution creates a presumption of future persecution.

Medical Evaluations

One of the exceptions to being placed in MPP was “known physical/mental health issues.”⁶⁷ In place of a *nonrefoulement* interview, asylum seekers with health issues were to be evaluated by a Department of Homeland Security (DHS) doctor. Yet “medical issues” was never defined. HIAS clients with identical conditions were sometimes treated differently. One HIAS Border Fellow attempted to use “trial and error” to determine what medical conditions qualify, eventually guessing that the standard was “serious medical conditions needing immediate or specialized care that is not available [in Mexico].”

DHS issued a policy guidance on December 7, 2020, directing DHS medical personal to keep asylum seekers “determined not to be fit to travel” out of MPP.⁶⁸ The standard remained ambiguous, and one HIAS Border Fellow stated that he would not put his clients through the process until he had more clarity about the guidance.

Effects on the Legal Cases

While in MPP, asylum seekers were often preoccupied with keeping themselves safe. When the asylum seekers were in court, they were asked to recount past trauma but “that is so much harder when you’re worried about ‘where is my kid going to sleep, are we going to get attacked by a gang, are we going to get attacked by the police who are supposed to control the gangs.’” according to one HIAS Border Fellow. The Fellow also reported that the sustained stress of MPP affected her clients’ ability to remember details or even be able to answer basic questions.

There were also a number of logistical issues that MPP created for asylum seekers. The asylum seekers did not have access to a reliable mail service in Mexico, so they could not receive documentation from family or friends to support their cases, or even mail from the immigration court. CBP often did not record or submit to the immigration court asylum seekers’ correct address. According to one HIAS Border Fellow, in El Paso, CBP listed the shelter Casa Migrante in Ciudad Juarez as the address for all asylum seekers, regardless of whether they lived there. CBP even listed “Facebook” as the address for some asylum seekers.⁶⁹

Asylum seekers waiting in Mexico could easily miss their court dates, which typically resulted in the asylum seeker automatically losing their case and being ordered removed *in absentia*. Minor things like arriving 15 minutes late to the port of entry could result in CBP refusing the asylum seeker entry into the United States. Many asylum seekers also did not understand the consequences of missing their court date, and some mistakenly believed that an emergency like

⁶⁷ <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>

⁶⁸ https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf

⁶⁹ <https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/>

a sick child would be understood and forgiven. Others were prevented from entering due to being the victim of crime or violence, such as being kidnapped on the way to the hearing.⁷⁰

Lack of Access to Legal Counsel

MPP also made it nearly impossible for lawyers to provide meaningful representation. There are a limited number of lawyers along the border, and even fewer lawyers that can go to Mexico to meet with clients. At least one HIAS Border Fellow's organization explicitly forbade their employees from traveling to Mexico because of safety concerns. Beyond the safety issues of traveling into Mexico, there were logistical issues as well. One HIAS Border Fellow reported that meeting with clients requires a multi-step process that "could take half a day or more just to get a signature."

HIAS Border Fellows reported that MPP makes legal representation a nightmare. According to one fellow: "Just trying to maintain a basic communication can be challenging." Many clients were in shared living spaces and could not speak freely. Some clients faced difficulty paying their phone bills and needed to repeatedly change their phone numbers. Others also faced difficulties sending documents because they did not want to leave the house for fear of the danger outside their doors.

The Coronavirus Pandemic and Title 42

The coronavirus pandemic made a terrible situation worse. The Trump administration indefinitely suspended MPP hearings in March 2020. Before the pandemic, HIAS clients would wait as long as four months between hearings. During the pandemic, HIAS Border Fellows had clients who had been in MPP for a year without a hearing. The pandemic has also made it more difficult for lawyers to meet with their clients, and HIAS Border Fellows can no longer cross the border.

Nonrefoulement interviews and medical evaluations were also suspended, with exceptionally rare exceptions, because of the pandemic. One HIAS Border Fellow said she was aware of only one lawyer who was allowed to observe a client's nonrefoulement interview since March 2020.

Title 42

Using the pretext of a dangerous disease to shut down the border to asylum seekers had long been rumored to be among the "wish list" of immigration restrictions of the Trump administration.⁷¹ Their plan involved the Centers for Disease Control and Prevention (CDC),

⁷⁰ See Like I'm Drowning for multiple examples of asylum seekers kidnapped or nearly kidnapped and prevented from attending their hearings. <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>

⁷¹ <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>

using a little-known authority under Title 42 of the United States Code to prohibit immigration from places where there is existence of a communicable disease.⁷² According to reports, officials in the administration considered using this power in other contexts, such as during an outbreak of mumps and during flu season. However, the administration never felt it had sufficient legal basis to issue the order until the coronavirus pandemic.

On March 21, 2020, the Trump administration directed the CDC to shut down the southern border to asylum seekers using the authority under Title 42.⁷³ CBP could now rapidly “expel” individuals from the United States without giving them the opportunity to apply for asylum. Nearly 400,000 people have been turned away at the border under Title 42 and related executive orders.⁷⁴ This order has been repeatedly extended, and the Biden administration has not yet rescinded it.

Title 42 has not been used to bar all people who seek to enter the U.S. at the southern border – it mainly targets asylum seekers. There are broad exceptions for U.S. citizens, individuals engaged in trade activities, and individuals arriving through seaports or airports, raising questions about whether this policy has any real public health rationale. Because CDC scientists doubted the connection between the spread of coronavirus and this order barring asylum seekers at the border, former-Vice President Pence had to overrule CDC scientists to issue this order.⁷⁵

⁷² See 42 USC 265

⁷³ <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>

⁷⁴ <https://www.dallasnews.com/news/immigration/2021/01/19/will-bidens-immigration-measures-include-reversal-of-trumps-asylum-policies-and-public-health-order-aimed-at-certain-migrants/>

⁷⁵ <https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae>

PART TWO: RECOMMENDATIONS

Ending MPP requires far more than simply rescinding the memoranda authorizing it. The Trump administration created multiple programs at the border that created overlapping barriers for those wishing to claim asylum, of which MPP was just one. The Biden administration recognized this, as they officially ended MPP, as well as the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, and the Asylum Cooperative Agreements (ACA). This is the first step to restoring asylum at the border, although the administration continues to turn back asylum seekers under Title 42.

Any plan to end MPP must also provide a remedy for people who were in MPP but are no longer at the border. Among the more than 70,000 people who were placed in MPP, there are 25,000 people who still have active cases. Many have left the border, have relocated to the interior of Mexico, or have been removed to their home country or a third country.⁷⁶ The plan must incorporate solutions for the population at the border and beyond.

While ending MPP and the related border policies, the Biden administration must also take precautions to prevent the spread of the coronavirus. This makes admitting asylum seekers more complex. However, it does not necessarily require delays or border shutdowns. Medical professionals have repeatedly said that asylum processing can safely occur, so long as common-sense preventative measures are taken.⁷⁷ The Biden administration's February 2, 2021, Executive Order creating a regional framework to manage migration, which requires the relevant federal agencies to develop plans for allowing individuals to claim asylum at the U.S. southern border, is the first step towards a reopened border.⁷⁸

Processing Asylum Seekers at Ports of Entry

Humanitarian Parole

Asylum seekers subjected to one of the programs named above should be allowed to apply for Humanitarian Parole under 8 U.S.C. § 1182(d)(5).⁷⁹ Parole authority allows the government to permit non-citizens to enter the US for "urgent humanitarian reasons."⁸⁰ The extreme danger

⁷⁶ It is difficult to estimate the number of asylum seekers currently at the border and those in other places. See https://www.strauscenter.org/wp-content/uploads/MPPUpdate_December2020.pdf

⁷⁷ For example, see these public health recommendations from public health experts:

https://www.publichealth.columbia.edu/sites/default/files/public_health_recommendations_for_processing_families_children_and_adults_seeking_asylum_or_other_protection_at_the_border_dec2020_0.pdf

⁷⁸ Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, issued February 2, 2021, available here:

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

⁷⁹ Parole authority is given to the Attorney General, but it is transferred to the DHS Secretary for immigration matters. See 6 U.S.C. 202.

⁸⁰ 8 CFR 212.5

asylum seekers face in Mexico should be sufficient to satisfy the “urgent humanitarian reasons” requirement.

A noncitizen typically applies for Humanitarian Parole via Form I-131. However, when applying for parole at a port of entry, often CBP does not require the individual to fill out an application. CBP should only require the asylum seeker to provide a U.S. address; CBP should complete the rest of the paperwork.

Centralize Processes at Key Ports of Entry, but Permit Asylum Seekers to Process at the Location Most Feasible

The Biden administration is starting to allow small groups of people in MPP to enter the United States, but for many, it remains challenging to travel to ports of entry (POE). In Ciudad Juarez, for example, most asylum seekers live in the outskirts of the city, and they must rely on dangerous and unreliable public transportation to get around. For asylum seekers who have relocated elsewhere in Mexico, traveling back to the border can be especially dangerous. For example, Highway 85D between Monterrey and Nuevo Laredo is dangerous enough to warrant a specific travel advisory from the U.S. State Department against its use.⁸¹ Asylum seekers who have moved to Monterrey must take a circuitous route to report to their originally assigned POE.

To address this issue, asylum seekers with active MPP cases who are now allowed to enter the United States may present themselves at *any* POE, regardless of where CBP originally processed them. The administration should centralize resources at the following key Ports of Entry (POE), where well-established civil society organizations can provide services to the asylum seekers.

- a. San Ysidro, CA
- b. Nogales, AZ
- c. El Paso, TX
- d. Laredo, TX
- e. Hidalgo, TX
- f. Brownsville, TX

Operate Key POEs at Maximum Capacity

While winding down MPP as quickly as possible is a priority for the new administration, the speed at which it can do so depends on the capacities at the POEs. The administration should evaluate and address infrastructure and personnel shortages to avoid creating a bottleneck at any POE.

Infrastructure to process asylum seekers at POEs includes administrative equipment (computers, printers, etc.) to process asylum seekers PPE to avoid coronavirus transmission, and, most important, space. In the past when ports of entry have reached capacity, it was often blamed on the lack of holding space for asylum seekers awaiting transfer to Immigration and

⁸¹ <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>

Customs Enforcement (ICE) detention facilities.⁸² CBP's current capacity to hold asylum seekers is likely to be limited due to the coronavirus distancing requirements.

Sufficient holding space can easily be ameliorated. Because CBP already has information on asylum seekers in MPP, PACR/HARP, and the ACAs,⁸³ it should not take a substantial amount of time to process these asylum seekers into the United States. CBP will also have no need to detain asylum seekers entering under Humanitarian Parole for ICE custody. To address the challenges of limited holding space, the administration should not detain asylum seekers to the maximum extent possible.

Insufficient personnel at the POEs is another potential bottleneck. "Metering," allowed port of entry directors to deprioritize processing noncitizens and reassign staff away from that mission.⁸⁴ The Biden administration should adequately staff CBP offices in these locations to ensure that each key POE is operating at maximum capacity.

Develop Oversight Mechanisms

Under metering, CBP officers did not utilize the ports' full capacities, which reduced the number of asylum seekers that could be processed. An Inspector General report found at one port with the capacity to hold 48 noncitizens, officers only held five.⁸⁵ There are reports of CBP officers, apparently acting on their own volition, refusing entry to asylum seekers on false grounds.⁸⁶

Correcting this requires continuous monitoring, as there are a variety of reasons why the full capacity is not used at a particular POE that could be causing delays. There could be insufficient staff to properly monitor more detainees, or a lack of infrastructure, or a need to segregate populations could prevent each holding facility from being used to capacity.⁸⁷

The administration should therefore apply oversight mechanism at these key POEs. As monitoring CBP's capacity requires detailed knowledge, and given the unique and changing restraints of each port of entry, it should include trained staff with access to all data on the usage of CBP holding space and records on staff assignments within CBP's mission priorities.

Prioritize Processing of Vulnerable Populations

One of the most important parts of ending MPP is determining how people can physically cross the border into the U.S. Unfortunately, the administration cannot simply let everyone affected by MPP and related programs line up at the border and enter, because of the large number of

⁸² <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>

⁸³ For example, CBP has already processed, interviewed, and fingerprinted individuals in MPP

⁸⁴ <https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf>

⁸⁵ Id

⁸⁶ <https://theintercept.com/2017/07/12/emboldened-by-trump-u-s-border-officials-are-lying-to-asylum-seekers-and-turning-them-away/>

⁸⁷ An example given in the Inspector General report is a facility with capacity to hold twenty noncitizens in two rooms of ten beds. However, if there is a single unaccompanied minor, then that noncitizen will be the sole occupant of one of the rooms, thus limiting the port's holding capacity to 11 people or 55% of the original capacity.

impacted people. Public health concerns also mandate the avoidance of crowds as much as possible.

In light of these concerns, the administration created a process to prioritize the processing of particularly vulnerable asylum seekers. However, the horror of MPP is that almost every individual in the program faces some danger in Mexico, so this confounds typical vulnerability criteria. However, there are several categories of people who should be prioritized for processing.

1. Medical Conditions and Mental Illness. Even as originally implemented, the MPP Guiding Principles memo issued on January 28, 2019, acknowledged that medically vulnerable individuals would face danger if forced to wait in Mexico, and enumerated those with known physical/mental health issues as not amenable to placement in MPP.⁸⁸

The Biden administration should provide medically vulnerable individuals with special protections in post-MPP processing, using a clearer standard than “physical/mental health issues.” The definition must be both broad enough to capture the universe of people with medical conditions who are particularly vulnerable and well-defined enough for individuals and legal service providers to rely upon.

People with medical conditions and mental illness for entry into the United States should be prioritized. The standard outlined in Section 504 of the Rehabilitation Act of 1973,⁸⁹ which defines disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual,”⁹⁰ will allow asylum seekers and attorneys to identify how medical conditions will be judged and what conditions will qualify.

2. Pregnant Women. Pregnant women should be prioritized for entry into the United States. While the lack of access to health care in Mexico for asylum seekers is generally concerning, it is especially troublesome for pregnant women, particularly those with at-risk pregnancies. The lack of healthcare has led many pregnant women to attempt to cross the border without authorization. One HIAS Border Fellow reflected: “They are willing to risk their own lives and their child’s lives. Because they are that desperate. I can’t imagine what that’s like.”

One example is particularly illustrative.⁹¹ A pregnant woman, her husband and two children fled persecution in their home country of Guatemala and were placed in MPP in Tijuana in May 2019. The woman said that her persecutors tracked her down, and they began making threatening phone calls saying they knew she was in Tijuana and would come to find her. Fearing for her and her family’s safety, the family crossed the U.S. border in the desert. The woman began to feel contractions during the journey. Once apprehended by Border Patrol, her

⁸⁸ <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>

⁸⁹ 29 USC 794

⁹⁰ 42 U.S.C. 12102(1)

⁹¹ This story and the subsequent lawsuit also appeared in several news outlets, see <https://www.buzzfeednews.com/article/emaconnor/pregnant-woman-birth-border-patrol-aclu-complaint>

husband begged the immigration officials for help, but they allegedly ignored him and took them to a border station.⁹² The woman gave birth standing up, holding a trash can for support, at which point Border Patrol agents finally began to help.

3. LGBTQ Individuals. LGBTQ individuals should also be prioritized for entry into the United States. Early on, although CBP did not list LGBTQ individuals as ineligible for MPP in the initial MPP Guiding Principles memo,⁹³ CBP entertained attorney requests to remove LGBTQ asylum seekers from MPP. The Department of Homeland Security (DHS) eventually changed course and decided that LGBTQ identity was insufficient to exempt people from MPP. Numerous organizations⁹⁴ including HIAS, have detailed the danger that LGBTQ individuals face in Mexico, particularly people who are transgender.

4. Non-Spanish Speakers. Non-Spanish speakers, including indigenous language speakers, should be prioritized for entry into the United States. Initially, MPP was largely limited to Spanish speakers, who could speak the local language in Mexico and therefore were deemed at least somewhat able to take care of themselves and access support. In early 2020, DHS extended MPP to Brazilian asylum seekers. This policy change put these asylum seekers in extreme danger. Non-Spanish speakers require interpreters (who are very difficult to obtain) to access basic services, face major barriers to finding employment, and generally have trouble assimilating into the local culture. Practitioners along the border have noted these factors make non-Spanish speakers more vulnerable to violent crime in Mexico, including kidnappings.⁹⁵

This issue also particularly affects indigenous language speakers who seek asylum. Often, these speakers face high levels of discrimination. HIAS Border Fellows have observed that indigenous language speakers are mistreated at shelters, are last to get food, and are figuratively “left in the dark” with respect to social services, since most cannot read or write in Spanish. Many indigenous language speakers also look different from the local Mexican populations, making them easy prey for the cartels.

5. Victims of Gender-Based Violence. People in MPP are at particular risk for GBV while they wait in Mexico, so HIAS also strongly believes that GBV survivors and those at risk of gender-based violence (GBV) should be prioritized for admission to pursue their asylum claims.

Many people in MPP are survivors of domestic and sexual violence, and conditions in MPP prevent healing and access to counseling and support to recover from their trauma is non-

⁹² In the lawsuit connected with this incident, the complaint alleges, among other things, that the Border Patrol agent gave the family a “rough ride” to the station, a practice where the agent purposely makes wild swings and slams on the brakes while driving, in order to physically throw the asylum seekers around the car. See <https://www.documentcloud.org/documents/6827805-2020-04-07-OIG-Cmplt-Final-Redacted.html>

⁹³ <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>

⁹⁴ <https://www.rollcall.com/2019/11/19/remain-in-mexico-policy-faces-internal-critiques-at-house-hearing/>

⁹⁵ <https://www.vox.com/2020/1/30/21114252/trump-brazilian-mpp-remain-in-mexico>

existent. Prioritizing these individuals for entry will take remove them from dangerous conditions that retraumatize them.

Determining Membership in Vulnerable Groups

CBP is a law enforcement agency,⁹⁶ and its officers do not have the training necessary to adjudicate sensitive claims. Asylum officers, by contrast, undergo substantial training in interview techniques and working with vulnerable populations. These DHS employees are much more qualified to determine whether someone is a member of one of these vulnerable priority groups.

Determining membership in vulnerable groups threatens to further burden asylum seekers unless the administration adopts an approach to alleviate that. Asylum officers should play the primary role in determining whether someone is a member of one of the priority processing groups. The process for determining that an asylum seeker is in a vulnerable priority group should be as simple as possible⁹⁷ to increase the speed of adjudication and minimize re-traumatization of asylum seekers.

Phased Entrance Plan for Remaining Populations

For those asylum seekers who are not members of vulnerable/priority groups, the administration should implement a plan that will provide asylum seekers with a high degree of certainty about when they should present themselves at a port of entry to enter the United States.

The phased entrance plan should have clear and easily understandable criteria for when an asylum seeker will be allowed to enter the United States. It should balance fairness to asylum seekers with ease of understanding and administrative efficiency. Generally, CBP should plan to process asylum seekers in the order in which they originally presented themselves at the border.

While no system will be able to perfectly satisfy these requirements, an objective criteria is found in using the last three digits of a non-citizen's Alien Registration Number. These Alien Registration Numbers, often referred to as "A Numbers," are assigned to every individual who asks for asylum in the United States. These numbers are referenced on the asylum seekers' paperwork and should be generally known to the asylum seeker. Should an asylum seeker not know their A Number, it is possible for the asylum seeker to look it up.

Preserve Family Unity in Processing

Any plan to allow asylum seekers into the United States must ensure that families are kept intact. The administration should process family units together, regardless of the age of the

⁹⁶ <https://www.cbp.gov/about>

⁹⁷ Many in the regional groups that helped formulate these recommendations believed that the burden on asylum seekers should be kept extremely low. When applicable, attestations should be used to prove membership in these groups.

family members. The definition of what constitutes a family should be expanded to better reflect the realities on the border.

Requiring that families be processed together is an important safeguard against even inadvertent separation of families. Once one member of a family is eligible to enter the United States, the entire family should be permitted entry as well. DHS should make exceptions to this only for compelling reasons, like the health or safety of a family member, and where there is no other reasonable alternative to separation.

The definition of a family should fit the reality of families crossing the border, which would be correct for the many instances of continued family separation along the border. A family unit is currently defined as a child under 18 and at least one parent or legal guardian. However, this definition ignores the reality of the diverse composition of families who seek asylum. This definition leaves out non-parental caretakers, non-married couples, and other nontraditional family structures, such as a grandparent caring for a grandchild, an older sibling caring for a younger sibling, or a same-sex couple. DHS should expand the definition of a family to include children under the age of 21, people in common-law marriages (committed partnerships without marriage certificates); and non-parental family caregivers, such as grandparents, aunts and uncles, and older siblings.

Coordinate with the Mexican Government to Ensure Safe Transit Through Mexico to POEs at the US/Mexico Border

Asylum seekers subjected to MPP or one of the related programs are geographically dispersed. Some remain relatively near the POEs into the United States, but many HIAS clients moved deeper into the interior of Mexico, including as far away as Mexico City. They moved to find more stable housing, safer locations, or to be closer to relatives or friends. Some asylum seekers who lost their cases, having previously been in MPP or another border program, were returned to their home countries.

The overwhelming majority of asylum seekers covered under this plan who are not currently at the border, will have to cross Mexico again to reach the United States and continue their asylum claims. As detailed previously, that is a daunting proposition. Asylum seekers have told HIAS staff about kidnappings, rapes, extortion, and other harm while journeying through Mexico. One HIAS Border Fellow put it bluntly: “I honestly think every single one of my clients has a story like that.” Therefore, the Biden administration should work closely with the Mexican government to ensure that asylum seekers that have been subjected to MPP, PACR/HARP, the ACAs, or expelled due to the CDC’s order closing the U.S. southern border to asylum seekers, are allowed to pass through Mexico for the specific and limited purpose of reaching the United States for further asylum processing.

Processing Through the USRAP

HIAS recommends that asylum seekers who could quickly qualify for admission through the U.S. Refugee Admissions Program (USRAP) should be allowed to apply for expedited admission to the U.S. as a refugee. There is precedent for this.⁹⁸ Admission as a refugee provides greater legal and social protections and reduces the burden on the immigration courts. If the applicant cannot qualify for expedited admission as a refugee or indicates that they cannot safely wait for the adjudication of a refugee application, they should be allowed to apply for expedited Humanitarian Parole through a U.S. consulate or embassy.

Processing at Consulates

For some asylum seekers, it would be safer to apply for permission to enter the United States at U.S. consulates and embassies, rather than at a port of entry. The United States operates consulates across northern Mexico, including in Ciudad Juarez and Matamoros, and further south in cities far from the border like Mexico City and Monterrey. Allowing asylum seekers to apply at U.S. embassies and consulates in Mexico and in Central American countries would also reduce crowding at ports of entry and protect people from the risks of traveling to the border.

Asylum seekers applying at consulates would be applying for advanced parole, which is analogous to Humanitarian Parole. It allows legal entry into the U.S. at a future date without a visa. The application is made on the same form as Humanitarian Parole, Form I-131. Similar to the proposed process for applying for Humanitarian Parole, the process for applying for advance parole should be simplified. An asylum seeker granted Advance Parole can either fly to the United States or present themselves at a land port of entry and enter the United States to pursue their asylum claim. Advance Parole would prevent asylum seekers from being detained by ICE upon arrival in the United States. To prove eligibility, asylum seekers should only have to demonstrate that they were subjected to one of these programs and that they have an intended destination in the United States, whether it be with family, friends, or a shelter able and willing to receive them. No fee should be charged to request advance parole.

In addition, some asylum seekers have already attempted to visit a U.S. consulate to apply for a visa to claim asylum. Since no such visa is available, those visa applications were denied. Some U.S. consulates also require visitors show their legal status in that country prior to entering the consulate. Asylum seekers in MPP are entitled under Mexican law to a temporary immigration status in Mexico while their asylum cases are pending; however, many asylum seekers lack this status and documentation. Some have been removed to their home countries, or to a third country, and have crossed back into Mexico without permission. Others have experienced harassment by Mexican authorities, and now feel unsafe applying for or renewing their

⁹⁸ The U.S. previously did this for the resettlement of Kosovar Albanians as part of the Humanitarian Evacuation Program. See <https://reliefweb.int/report/albania/here-come-kosovars-may-1999>

documents. Still others have been impacted by the COVID-19 pandemic and have been unable to renew their documentation when it expired. Therefore, before beginning consular processing, DHS and the Department of State should develop an outreach campaign to explain to asylum seekers that this process is different and asylum seekers are eligible to apply again, this time for advance parole. The outreach campaign should clarify and publicize that legal status is not required for those who are seeking consular interviews for post-MPP processing to the United States.

Messaging and Outreach

Prepare Clear Messaging in Multiple Languages and Publicize in Advance

Preparing and publicizing a plan to process asylum seekers will minimize confusion and increase efficiency. The administration should prepare their messaging in multiple languages, and they should use channels that asylum seekers are already familiar with and regularly use to disseminate their message.

There is already a system in place that asylum seekers regularly use. Asylum seekers are familiar with the electronic Executive Office of Immigration Review (EOIR) Case Information Hotline. Through this system, an asylum seeker can call a 1-800 number to ascertain the status of their case before the immigration court, as well as future hearing information.⁹⁹ The EOIR Case Information Hotline is also accessible online.¹⁰⁰ This hotline should be set up to provide as much information as possible about the asylum seekers' individualized cases.

The system already ties the case information to the asylum seekers' individual A numbers; it should be updated to include information about when the asylum seeker will be eligible to come into the United States, and where. This can be done by the immigration court clerks or other staff of EOIR.

The information should also be as accessible as possible to as many different language speakers as possible. This case information is currently available in English and Spanish, but it should also be made available in the other commonly spoken languages of people in MPP. Finally, it is critical that the administration's message about post-MPP processing be clearly written and broadly communicated. The administration should publicize the full plan to unwind MPP and related border programs in English, Spanish, Brazilian Portuguese and relevant indigenous languages (including K'iche, Q'eqchi and Kaqchikel, and Mam). The plan should be posted on official DHS information portals, such as the 1-800 number that asylum seekers call to check the status of their case, the DHS website, and at the POEs.

⁹⁹ <https://www.justice.gov/eoir/customer-service-initiatives#:~:text=The%20Executive%20Office%20for%20Immigration,day%2C%207%20days%20a%20week.>

¹⁰⁰ <https://portal.eoir.justice.gov/InfoSystem/Form?Language=EN>

Coordinate with Nonprofits to Ensure Dissemination of Clear and Consistent Messaging

Getting information out to asylum seekers will require more than official US government outreach. It will be critical to ensure that trusted networks of nonprofit organizations that serve asylum seekers, including medical providers, shelters, and legal service providers, receive and can disseminate the correct information. Notably, many asylum seekers already have established relationships with organizations along the border, where they can receive reliable and accurate information. In addition to providing legal services, “we’re also their social workers, or the only person they have to vent to,” explained one HIAS Border Fellow. A plan to widely disseminate a clear message to asylum seekers should tap into these established relationships.

While the public-facing websites and 1-800 number could help provide people with general information, they would be less able to address any follow-up questions from asylum seekers. Asylum seekers will be eager to know how the new plan affects them personally. Collaborating with nonprofit organizations already working at the border will be critical in ensuring that asylum seekers access this information.

The number of asylum seekers that will need this information could overwhelm official channels. Even if the official channels could handle the volume of questions, some asylum seekers have lost trust in U.S. government officials. According to one HIAS Border Fellow, “I honestly don’t know whether something with the U.S.’ seal on it would even be trusted by most of the people in MPP at this point.”

HIAS has found a variety of ways to get information to the asylum seekers. For example, we have hosted Facebook live sessions, giving updates and answering questions. One recent session reached a thousand people. We also operate hotlines for asylum seekers. We are exploring other ways to disseminate information, including recorded Know Your Rights sessions and individualized Know Your Rights meetings with HIAS staff attorneys and HIAS pro bono attorneys.

Establish and Support Relevant Partnerships

Invest in Social Service Providers to Meet Needs of Post-MPP Entrants

Ending a massive program like MPP requires close coordination with organizations along the border, including social service organizations that can provide asylum seekers with shelter, food, medicine, and essential items like clothing and toiletries. These organizations will need to be adequately resourced in order to handle the large number of asylum seekers formerly in MPP who will need their help immediately upon entering the United States. The COVID-19 pandemic both complicates and adds to the urgency of this work, as shelters must reduce

capacity to maintain social distance and set up quarantine spaces while simultaneously dealing with reduced donations and in-person support from volunteers.¹⁰¹

In addition, the administration should draw on the expertise of resettlement agencies to help meet the needs of the newly arriving asylum seekers. These agencies and their networks across the country should be funded using the mechanism of the Department of State's Reception and Placement grants for those admitted as refugees, and through funds from the Office of Refugee Resettlement (ORR), modeled on the funding provided to asylum seekers paroled into the United States from Northern Iraq in 1996.¹⁰²

¹⁰¹ <https://www.thenewhumanitarian.org/news/2020/06/29/Mexico-US-coronavirus-mass-expulsions-asylum-halt>

¹⁰² ORR handled the 1996/97 admission of Iraqi Kurds who were evacuated to Guam, a U.S. territory, before being brought to the continental United States. In that case, the INS eligibility interviews occurred on Guam itself rather than overseas. Because Guam is U.S. territory, the Kurds were processed as asylees rather than refugees (see Refugee Reports, Vol. 17, No. 12). However, because the evacuation and processing of the Kurds was in all other respects a refugee admissions program, the asylees received R&P services through the voluntary agencies -- unlike other persons granted asylum in the United States. ORR, rather than the State Department, provided the R&P grants to the agencies.

PART THREE: HOW TO END MPP (AFTER ENTERING THE UNITED STATES)

Much of the work to unravel MPP will involve policy and procedural changes that will affect asylum seekers after they enter the U.S. It is important that the administration's processes not subject a traumatized population to inappropriate procedures, but welcome asylum seekers into the United States and aid in their transition to a new country.

Detention and Case Management

We are pleased that the Biden administration is eliminating the use of detention during the processing of MPP asylum seekers to the greatest extent possible, in line with international laws and standards, as outlined in the UNHCR Detention Guidelines,¹⁰³ which recommend that “detention of asylum-seekers should normally be avoided and be a measure of last resort.”¹⁰⁴ Asylum seekers in detention suffer high rates of trauma, and alternatives to detention are less expensive, more humane, and see high rates of compliance from asylum seekers.¹⁰⁵ This approach would reduce re-traumatization, allow effective access to supportive services, and maintain compliance with asylum proceedings.

Limited CBP Detention

Asylum seekers may face brief periods of detention as part of the process of entering the US. However, CBP should hold asylum seekers for no longer than needed. Because CBP has already processed asylum seekers when placing them in MPP, PACR/HARP, or ACAs, it already has much of the requisite information to speed up processing. There should be a presumption that CBP holds no asylum seeker in custody for more than four hours.

No ICE Detention

Under the Trump administration, CBP transferred asylum seekers to ICE custody for detention. Detaining asylum seekers is inherently inappropriate. Immigration detention is civil in nature; it is not supposed to be punitive. Yet immigration detention is essentially prison: detainees have no freedom of movement and wear prison-like uniforms; the concrete, austere facilities are surrounded by barbed wire fences; there are cells, strict schedules, and guards enforcing the rules.¹⁰⁶ “It’s a difficult conversation as a lawyer to have, to say ‘look, you’re walking into a jail,’” reports one HIAS Border Fellow. Asylum seekers frequently suffer from neglect or abuse

¹⁰³ UNHCR, Detention Guidelines, Available at <https://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

¹⁰⁴ Id. At page 6.

¹⁰⁵ International Detention Coalition “There are Alternatives,” see pages 9-12, available at <https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf>.

¹⁰⁶ For a first-hand account comparing prisons and detention centers, see <https://www.usatoday.com/story/opinion/voices/2019/05/16/ice-immigration-detention-center-like-prison-otero-column/1190633001/>

while in detention,¹⁰⁷ including allegations of horrific medical abuse in a detention facility in Georgia.¹⁰⁸

Many asylum seekers, due to the persecution they have suffered, fear law enforcement and the police. Detained asylum seekers suffer higher levels of post-traumatic stress disorder (PTSD), depression, and anxiety compared to asylum seekers who are not detained.¹⁰⁹ Conditions in immigration detention are so dire that HIAS clients who have been to both jail (for misdemeanor violations) and immigration detention have said they preferred being in jail.

The dangers of immigration detention in a pandemic are even greater. Detention facilities hold people in congregate settings, where it is often impossible to socially distance. Human rights groups have detailed other public health failings in the immigrant detention system, including ICE officials not providing soap or hand sanitizer, transferring detainees between facilities without quarantining, and refusing to be transparent about detention facilities' policies and procedures on COVID-19.¹¹⁰ HIAS Border Fellows and clients have seen other troubling examples of detention facilities inadequately handling the pandemic, including guards not always wearing masks. For these reasons, more than 9,000 individuals have contracted COVID-19 while in immigration detention; 126 individuals have died of COVID-19 while in immigration detention.¹¹¹

Detaining asylum seekers in ICE custody, in the middle of a global pandemic, also violates their due process rights to counsel, as lawyers meeting with clients in ICE detention has been practically impossible. ICE's own guidance says that people should not visit detention facilities during the pandemic.¹¹² Yet without in-person visits, it is nearly impossible to represent asylum seekers. "For a little while we were having so much trouble getting in touch with people that we'd... be unable to represent people," said one HIAS Border Fellow. Another Border Fellow said that dealing with her local detention facility, "has been something of a nightmare." Initially, she was told to email the facility to make a formal request to talk to her clients, but her requests went unanswered. She later found out that no detention center staff monitor the email address in question. Just to arrange a phone meeting with her client required a four-step

¹⁰⁷ Life inside detention was characterized by one ACLU report as the following: "For immigrants caught in this system, life is often a nightmare of rampant medical neglect, overuse of solitary confinement, sexual abuse, excessive use of force, arbitrary transfers to other facilities across the country, unreasonably high bond costs, and long periods spent away from family members and loved ones." <https://www.aclu.org/news/immigrants-rights/whats-it-like-to-be-in-immigration-lockup-during-a-pandemic/>

¹⁰⁸ <https://www.nbcnews.com/news/us-news/migrant-women-file-class-action-lawsuit-alleged-medical-abuse-ice-n1252066>

¹⁰⁹ Montgomery, Edith et al. The Impact of Detention on the Health of Asylum Seekers: A Systematic Review. 1 September 2015. Available at <https://onlinelibrary.wiley.com/doi/abs/10.4073/csr.2015.13>

¹¹⁰ See, for example, Amnesty International's "We Are Adrift, About To Sink," <https://www.amnesty.org/download/Documents/AMR5120952020ENGLISH.PDF>.

¹¹¹ <https://www.vera.org/tracking-covid-19-in-immigration-detention> (data current as of January 28, 2021).

¹¹² This advice has been archived, but see the cached version of <https://www.ice.gov/coronavirus> accessed on January 24, 2021, "As a precautionary measure, ICE has temporarily suspended social visitation in all detention facilities."

process that could take her nine hours per single phone meeting.¹¹³ These administrative barriers make it nearly impossible to asylum seekers to get help with their cases or access other supportive services.

Even when HIAS Border Fellows are able to connect with their clients, the clients have little control over who is nearby and potentially listening to the conversation. Confidentiality is a “foundational component” of the attorney-client relationship.¹¹⁴ It is crucial to fully understanding the client’s situation and providing sound legal advice. Since the pandemic started, however, those in detention have been denied this fundamental right. HIAS Border Fellows report that ICE is non-cooperative in ensuring confidentiality in phone calls, claiming that there is nobody nearby to overhear the call or failing to facilitate calls in general.

Asylum seekers should not be subject to ICE detention once they arrive in the United States. Instead, they should have access to alternatives to detention and only detained under extreme circumstances.

Alternatives to Detention

The Obama administration created the Family Case Management Program that proved to be a cheaper alternative to detention and led to near perfect compliance in official appearances. This program used case managers to assist asylum seekers in fulfilling their legal obligations, like attending regular check-in appointments with immigration officers during their asylum cases.¹¹⁵ The program also educated asylum seekers about their rights and responsibilities, helped them arrange transportation to and from court, and assisted with repatriation to their home countries if their asylum claims were denied.¹¹⁶ It was active in five metropolitan areas: Baltimore/Washington, Chicago, New York City/Newark, Miami, and Los Angeles. The program enrolled 954 participants between January 2016 and June 2017.¹¹⁷

In that short time, it achieved a 99% compliance rate for ICE check-ins and 100% compliance for court hearings.¹¹⁸ It was also far cheaper than detention, costing an average of \$36 a day per person, as compared to \$133 a day for a single adult and \$319 a day for a person in family detention.¹¹⁹ The program was not perfect; it was criticized for awarding contracts to GEO Care, a subsidiary of one of the largest private-prison corporations GEO Group, Inc.¹²⁰

¹¹³ The process she now uses, for just getting a telephone call, is to call the center, leave a message for her client to call her back, then once her client calls her back request to speak with the “pod manager.” From there the pod manager would have to authorize a phone call.

¹¹⁴ https://www.abajournal.com/magazine/article/lawyers_confidentiality_public_comment

¹¹⁵ <https://s33660.pcdn.co/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf>

¹¹⁶ <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf>

¹¹⁷ <https://www.niskanencenter.org/restore-the-family-case-management-program-for-asylum-seekers/>

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ <https://s33660.pcdn.co/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf>

The Trump administration abruptly ended the program in June 2017, with no reason or explanation for this termination given.¹²¹ Ending this program was a mistake. The Biden administration should reopen the Family Case Management Program as an alternative to detention. It should expand the case management program to other major metropolitan cities. Using the destination addresses that ICE will have, ICE should work to enroll those who have been subjected to all of the covered programs of this plan.¹²²

Transportation

CBP should develop procedures for releasing each asylum seeker after processing them. This release process should include updating each asylum seeker's address to where they intend to stay in the United States, as well as adhering to advice provided by medical professionals to reduce the risk of COVID-19 transmission post-release. As the last step, DHS should provide transportation to shelters for all asylum seekers. CBP and the shelters should work together, ahead of time, to ensure that there is sufficient space in the shelter, now a real concern given the reduced capacity that many shelters have due to coronavirus concerns. CBP and the shelters must work together to ensure that sufficient quarantine space is available for any asylum seeker that exhibits any symptoms of illness.

Most asylum seekers have family or friends in the United States with whom they can live. Few asylum seekers will need to stay in the shelters for any extended period of time. It should be the policy of the administration to swiftly allow these asylum seekers to reunite with their friends and families in the United States. The administration also should continue to proactively reunite families that were separated as a result of MPP or related programs.¹²³

Changes of Venue

Individuals who were in MPP will continue to have active cases with the U.S. immigration courts after they enter the U.S. Currently, those cases fall within the jurisdiction of a handful of immigration courts along the border. They will have future hearings scheduled in these courts, which will create a problem for asylum seekers who hope to reunite with family or friends elsewhere in the United States. Without additional action, their immigration proceedings will remain pending at the immigration courts at the border. To continue their asylum claims, the asylum seekers would either need to stay near the border, where they may have no friends or

¹²¹ <https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration/>

¹²² MPP, PACR/HARP, or the ACAs

¹²³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>

family to support them, travel back to the border court for their hearings, or request that the immigration court change the venue of their case to a different immigration court.

In theory, this is an easy problem to solve. Immigration courts already accept motions to change venue, and the asylum seeker could petition the court to transfer their case to the immigration court closest to the asylum seeker's new address. Yet, there are several logistical problems to this on a larger scale. First, filing a motion to change venue requires adherence to strict standards set by the Immigration Court Practice Manual; it is close to impossible for an asylum seeker to do themselves without legal representation. Second, there are too few legal service organizations along the border to help prepare motions for all of the asylum seekers affected by MPP, PACR/HARP, and ACAs. For example, in El Paso there are only three legal organizations that serve asylum seekers; they cannot possibly handle the caseload that would be required to prepare all of these motions. The administration should instruct attorneys at ICE's Office of the Principal Legal Advisor (OPLA) to file motions to change venue for all pending MPP cases to the immigration court nearest to the address provided by the asylum seeker.

PART FOUR: CORRECTING THE LEGAL HARM

Bringing people into the safety of the United States and processing them in a humane way is not enough to compensate for the harms committed under MPP. Individuals covered under this plan have been deprived a fair shot at seeking asylum, and that must be rectified.

Legal service providers have expressed concern that ending these programs, however, could result in the administration putting more asylum seekers into expedited removal screening proceedings. DHS claimed under the Trump administration that the number of asylum seekers, and the resulting backlog, prevented them from properly executing their responsibilities.¹²⁴ Some will argue that the streamlined procedures of expedited removal will now be necessary in the absence of programs like MPP. While expedited removal would be quicker, it would be a disastrous way to process asylum seekers.

A number of reports, including from the U.S. Commission on International Religious Freedom (USCIRF), document the shortcomings of expedited removal. USCIRF published a report in 2005 that found that in the course of expedited removal proceedings, asylum seekers were often put in jails or jail-like facilities, quality assurance procedures created a bias towards negative fear determinations, and the “outcome of an asylum claim appears to depend not only on the strength of the claim, but also on which officials consider the claim, and whether or not the [person] has an attorney.”¹²⁵ The follow up report found in 2016 that “there were continuing and new concerns about the processing and detention of asylum seekers in expedited removal...”¹²⁶

Rather than replacing MPP with flawed processes like expedited removal, the Biden administration should tailor a legal process for the unique procedural stance of each class of asylum seekers.

Those Formerly in MPP Who Have Removal Orders

Because court hearings for individuals in MPP did not give asylum seekers a fair chance to ask for protection, the Biden administration should allow asylum seekers to re-start the process and require Office of the Principal Legal Advisor (OPLA) to automatically file a Motion to Reopen for any individual under MPP who presents at a port of entry who was ordered removed, whether the person’s case was heard and decided by an Immigration Judge, or whether the person was ordered removed in absentia. Similarly, the administration should instruct immigration judges to grant these motions.

Cases Denied on the Merits

In order to seek asylum in the U.S., an asylum seeker must complete and file a Form I-589. The form is 12 pages long and asks asylum seekers to classify the harms they suffered or fear in

¹²⁴ https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf

¹²⁵ https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/execsum.pdf

¹²⁶ <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>

their home country into one of five protected grounds for asylum. It is incredibly difficult to complete this form without the assistance of an attorney; for those who are unhoused, living in shelters, or are illiterate it is nearly impossible. Often, asylum seekers cannot find private spaces to work on their applications, or they are distracted by the constant commotion happening around them. Later, before a judge, the asylum seeker will be required to present their claim coherently and consistently. If a judge notices a discrepancy between the written form and the oral testimony, she may decide that the inconsistency means the asylum applicant is not credible.

Asylum seekers must also complete the I-589 form in English,¹²⁷ a difficult proposition for someone who doesn't speak the language. There are "translators" in Mexico who offer to interpret and complete the I-589 forms on an asylum seeker's behalf, but many are not legitimate. According to one HIAS Border Fellow, these translations are terribly done and border on outright scams. "Whole paragraphs can be left out." This can result in inconsistencies on the form or in attached declarations.

These inconsistencies are critically important because, as another Border Fellow noted, the Immigration Judges deciding claims for asylum seekers in MPP almost always deny the cases based upon credibility of the asylum seeker. When the asylum seeker's testimony in court does not match the story presented on their I-589 form, the Immigration Judge is likely to assume that the asylum seeker is not telling the truth about what happened to them. Therefore, asylum seekers formerly in MPP should be permitted to present their claims anew, from a safe and stable environment in the United States. Filing Motions to Reopen would be the best way to quickly restart this process.

In Absentia Orders

If an asylum seeker misses any one of their court dates, an Immigration Judge can order them removed *in absentia*. An *in absentia* removal order carries a high penalty.

Many asylum seekers miss their hearings for reasons beyond their control. Asylum seekers do not always understand the consequences of missing a court date. Sometimes the penalties have never been explained to the asylum seeker. Other times the asylum seeker may assume that immigration officials and judges will understand and reschedule a missed hearing where an emergency, like a sick child, arises. However, this is not often the case, and instead the immigration court will issue an *in absentia* removal order, ending the asylum seeker's chances at seeking or winning protection.

Asylum seekers in MPP also sometimes missed their hearings due to confusion as to the time and date of the court hearing. For example, asylum seekers needed to be at the POE four hours before their hearing, but if an asylum seeker did not fully understand this and showed up to the port of entry when the hearing was supposed to begin, CBP refused to transport the asylum seeker to the court. Similarly, the court might change the date and time of the asylum seeker's hearing. Though the court has a duty to inform the asylum seeker of this change by mail, in

¹²⁷ <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>

practice, this does not always happen. In many cases, DHS has labeled the asylum seeker's address in Mexico as simply *domicilio conocido* (address known), or in other cases, has labeled the address as "Facebook."¹²⁸ If the court changed the asylum seeker's hearing date, there is little practical chance that the asylum seeker received this notice. When the asylum seeker reported to the POE on the original hearing date, CBP refused to transport the asylum seeker to court. When the asylum seeker failed to arrive at court on the scheduled day, the court issued a removal order *in absentia*.

Some asylum seekers were ordered removed *in absentia* after failing to appear in court because they could no longer wait after months or years living in dangerous conditions in Mexico. For them, the constant danger defeated the purpose of seeking asylum, which was to find a safer place for them and their family. Instead, they find themselves back in danger, just like in their home country, but with the added burden of being in a foreign country with no friends or connections. Enforcing these *in absentia* removal orders would be a miscarriage of justice. We recommend that DHS should file, and the Immigration Court grant, Motions to Reopen for all asylum seekers in MPP who were ordered removed *in absentia*, a number that totals more than 30,000 people.¹²⁹

Those in MPP Whose Removal Proceedings Were Terminated

There is a process within immigration law for asylum seekers to affirmatively apply for asylum with U.S. Citizenship and Immigration Services (USCIS), rather than before the immigration courts. A critical difference between seeking asylum before USCIS and seeking asylum before the immigration court is that the process before USCIS is non-adversarial; an asylum seeker's claim is adjudicated by an officer, and there is no prosecutor or judge. This process of applying for asylum affirmatively "is something that I think is more conducive to having an interview" according to one Border Fellow. This process is preferable for many individuals formerly in MPP because it will better guard against re-traumatizing asylum seekers as they tell their story.

Some MPP asylum cases ended in termination rather than a removal order in immigration court.¹³⁰ As many of these cases were terminated due to deficiencies in the charging document, the process should not simply be restarted in immigration court again. The Biden administration should allow any asylum seeker in MPP whose case was terminated by an immigration judge to file for asylum affirmatively with United States Citizenship and Immigration Services (USCIS).

¹²⁸ <https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/>

¹²⁹ See <https://trac.syr.edu/phptools/immigration/mpp/>

¹³⁰ Some immigration judges found that the Notices to Appear DHS issued against the asylum seekers were irreparably defective, resulting in the entire proceeding being *void ab initio*. For the most part, DHS appealed these terminations to the Board of Immigration Appeals.

Those Formerly in PACR/HARP or the ACAs Who Have Removal Orders

PACR/HARP and the ACAs prevented asylum seekers from pursuing asylum claims in the United States. Asylum seekers subjected to these programs should be given an actual chance to apply for asylum.

Under the ACAs, an officer conducted a threshold screening to determine whether to subject the asylum seeker to an ACA.¹³¹ If the asylum seeker was eligible for an ACA and not able to show that any exception applied, the asylum seeker was deemed ineligible for asylum.¹³² Unless an immigration official, in their discretion, decided that “it is in the public interest for the alien to receive asylum in the United States...” under 8 U.S.C. 1158(a)(2)(A), that asylum seeker was prevented from seeking asylum before the case had begun.

Asylum seekers subjected to PACR/HARP did not have a fair chance to seek asylum. CBP severely restricted their ability to speak to a lawyer by placing them in CBP custody, where lawyers are not allowed on the premises. One HIAS Border Fellow characterized it as “very cynical, aggressive use of different styles of detention to just make it difficult to access informed advice.” The Fellow further stated that “they made it physically impossible for [asylum seekers to get legal advice].” Asylum seekers are only allowed a short time to make phone calls, and many call friends and family who have not heard from the asylum seeker. In these programs, CBP housed asylum seekers for days or weeks in places designed to house people for only 72 hours. The administration should require DHS to rescind all removal orders issued under the Prompt Asylum Claims Review and the Humanitarian Asylum Review Process (PACR/HARP) Programs and the Asylum Cooperative Agreements (ACAs). Because these asylum seekers will not have had proceedings before an immigration court before, they should be able to apply for asylum affirmatively, similarly to those in MPP whose asylum proceedings were terminated.

Those Currently in MPP Who Have Appeals Pending

Some asylum seekers who attended their individual hearing and were ordered removed on the merits have sought review of these decisions by the Board of Immigration Appeals (BIA). These cases are appealing immigration court rulings made in MPP courts, where asylum seekers had no realistic chance of winning. Many of these appellate cases remain pending. The administration should require the Board of Immigration Appeals to remand all MPP cases currently on appeal to the immigration court in the jurisdiction where the asylum seeker now resides.

¹³¹ <https://www.federalregister.gov/documents/2019/11/19/2019-25137/implementing-bilateral-and-multilateral-asylum-cooperative-agreements-under-the-immigration-and>

¹³² *Id.*

Those Subjected to MPP Who Re-Entered the United States Without Permission

Some asylum seekers in MPP entered the United States without inspection while their cases were pending or after an immigration judge rendered a negative decision. Asylum seekers entered the U.S. without permission for a variety of reasons, including fleeing cartels or other dangers in Mexico or because they were pregnant. “People are so desperate that they don’t see that they have another option” remarked one HIAS Border Fellow.

Some asylum seekers who re-entered the U.S. without permission were caught and returned to Mexico, but others are still in the United States. These asylum seekers face criminal liability for illegal entry¹³³ or illegal reentry.¹³⁴ Rather than punish these asylum seekers by prosecuting them, the Biden administration should designate the asylum seekers for Parole in Place.¹³⁵ Parole in place is a way for someone who is in the United States without permission to apply for immigration benefits despite already being in the U.S. Additionally, the administration should not prosecute illegal entry into the U.S. by any asylum seeker in MPP. The administration should allow the asylum seeker to file a Motion to Change Venue to their current location. These Motions to Change Venue should be automatically granted.

Addressing the One Year Filing Deadline

Under the *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 (IIRAIRA), asylum seekers must file their asylum applications within one year of arrival in the United States.¹³⁶ Many asylum seekers formerly in MPP will have already missed their “one year filing deadline,” if the accrual of a year begins on the date of their first entry to the U.S. The administration should put these asylum seekers in the same position as they would have been had they never been placed in these programs. The one-year filing deadline for any asylum seeker who has been subjected to MPP, PACR/HARP, or the ACAs should begin on the date that the asylum seeker is admitted to the U.S., either under Advanced Parole (if the asylum seeker applied for admission from a U.S. embassy or consulate), or Humanitarian Parole (if the asylum seeker applied for admission at the U.S. border).¹³⁷

¹³³ 8 USC 1325

¹³⁴ 8 USC 1326

¹³⁵ Alternatively, nunc pro tunc parole as a parole from the date of original entry.

¹³⁶ 8 USC 1158(a)(2)(D)

¹³⁷ Alternatively, there is an exception to the one year filing deadline for “extraordinary circumstances.” See 8 USC 1158(a)(2)(D). One could argue that placement into MPP, PACR/HARP, or the ACAs qualifies as such an extraordinary circumstance, but each asylum seeker would be forced to prove this in court. If courts could decide this, sua sponta, which would largely arrive at the same outcome as the above suggestion.

Addressing Asylum Seekers in Countries Other Than Mexico

Many people placed into MPP or PACR/HARP left Mexico to escape the endemic violence. Those subjected to the ACAs were deported to a third country. Some asylum seekers returned to their home countries, feeling that if they have to face life-threatening danger regardless, they might as well face it where they have friends and family. Others fled to third countries where they felt they would be safer. These asylum seekers should not be penalized.

Asylum seekers are normally ineligible for asylum if they are “firmly resettled” in another country,¹³⁸ including if they have resided in a third country and were offered (or received) a permanent form of legal status there.¹³⁹ These asylum seekers sincerely attempted to apply for asylum in the United States first; the administration should issue guidance on the term “firm resettlement” in this particular context. The administration should issue a Guidance Memo instructing Immigration Judges that asylum seekers being returned to their home country after being subjected to MPP, PACR/HARP, the ACAs, or being expelled due to the CDC’s order is not evidence of their safety in their home country. Nor does it show that the asylum seekers have availed themselves of the safety of their home country, nor is it evidence that the asylum seeker intended to abandon their claim. For asylum seekers who fled to a third country, the administration should clarify that time spent in a third country after having sought asylum in the U.S. first is not evidence of firm resettlement.

Pause Asylum Cases

Pausing asylum cases will have the added benefit of allowing asylum seekers to recover and heal after the trauma they have experienced. They need time to process the trauma before they can speak about it in a coherent way. One HIAS Fellow expressed how clients “are so traumatized right now, that I don’t even feel that I can sit them in front of a judge.” She described how they cry and break down in court. “I think everybody will need more time.”

The administration should stay any pending asylum proceedings until it has fully reviewed recent asylum policy changes. This pause should be automatic for all asylum cases, and for any procedural issues like employment authorization it should not count as a delay caused by the asylum seeker. Hearings should not restart until the review is complete and the administration has made changes to regulations that created new barriers to asylum. The administration should make this review as expeditious as possible.

¹³⁸ 8 USC 1158(b)(2)(A)(vi)

¹³⁹ 8 C.F.R. 208.15. Note that an updated definition is set to go into effect on January 11, 2020, see <https://www.federalregister.gov/documents/2020/12/11/2020-26875/procedures-for-asylum-and-withholding-of-removal-credible-fear-and-reasonable-fear-review>, but is currently enjoined by a court. See *Pangea Leagl Services v. DHS*, ordered on January 8, 20201; <https://immigrationequality.org/wp-content/uploads/2021/01/55-Order-re-Motion-for-TRO-PI-002.pdf>

PART FIVE: PREVENTING THE RETURN OF MPP

The chaotic nature of migration through Mexico provided an excuse for the Trump administration to implement MPP. The conservative media used it to stoke fears about asylum seekers, and the Trump administration used it to demonize people traveling north. Unfortunately, migration is almost by definition chaotic, and while the chaotic nature is not typically more than a logistical challenge, it provides an opportunity to weaponize the issue of immigration. It is important to find ways to humanely manage migrant flows to prevent a future administration from weaponizing the issue again.

The border group meetings convened by HIAS and CLINIC focused on the immediate end of MPP and related programs, and the logistical challenges that would entail. They did not include any discussions recommending longer-term policies regarding the MPP. Nonetheless, it is important to look at some of the longer-term policies that the Biden administration could pursue, including blocking, to the extent possible, any future administration from readopting these harmful and cruel policies.

The Biden administration has already begun working on this long-term goal. In the February 2, 2021, Executive Order *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, the Biden administration ordered relevant federal agencies to expand pathways for Central Americans to legally migrate to the United States.¹⁴⁰ Specifically, the executive ordered the Secretary of Homeland Security to consider ways to better identify and process individuals from northern Central America.¹⁴¹ It also required the Secretary of Homeland Security to consider reviving the Central American Minors (CAM) Program created under the Obama administration.¹⁴² On March 10, 2021, the Departments of State and Homeland Security announced that the administration is restarting the CAM program, which allows parents legally residing in the United States to petition for their children come to the U.S. through the U.S. refugee admissions program.¹⁴³

The administration should also follow through on its commitment to expand refugee resettlement from Central America. In the United States, the maximum number of refugees resettled is determined by an annual Presidential Determination (PD), which sets the number of refugees that will be resettled and the number of refugees to be resettled from each geographic region. Historically the number of refugees resettled from Latin America has been a small proportion of the total number resettled; in the last four years the number of refugees resettled from Latin America and the Caribbean have been 955, 809, 948, and 117 respectively.¹⁴⁴ The

¹⁴⁰ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

¹⁴¹ ID at Section 3(a)

¹⁴² ID at Section 3(b)(i)

¹⁴³ <https://www.state.gov/restarting-the-central-american-minors-program/>

¹⁴⁴ <https://www.wrapsnet.org/admissions-and-arrivals/>

administration should ensure that the regional cap for the Americas is high enough to provide persecuted individuals in the Northern Triangle a realistic option to access the program.¹⁴⁵

No administration can fully dictate the executive actions of future administrations, and there is not consensus yet between the Biden administration and Congress on how to reform our nation's asylum system. Yet, there are still several ways to impede a future administration from resurrecting MPP.

Using the Regulatory Process

There are a number of different ways that any administration can affect change. For example, a president could issue an executive order, or the secretary of a department could issue a memo guiding the department's personnel. Which action the administration chooses depends on multiple considerations;¹⁴⁶ but the most durable action that an administration can take is to undertake the rulemaking process to create regulations.

The Administrative Procedures Act (APA) governs the rulemaking process, and it applies to any regulations created, amended, or repealed.¹⁴⁷ The process for issuing regulations is considerably slower than the process for issuing executive actions, as the APA intentionally sought to ensure that agencies incorporate the input of the public and affected parties to the regulations. For most regulations, the agency must provide the public with "adequate notice" of the proposed changes, and it must provide a "notice and comment period" through which the public can weigh in on how the rule might impact them.¹⁴⁸ The federal agency promulgating the rule must consider the public's input and provide logical responses to "significant" comments.¹⁴⁹

Should the Biden administration modify the regulations, it would create an immediate impediment to any future effort to reenact MPP. A future administration could repeal the regulations, but it would have to complete the same lengthy regulatory process, considerably delaying any action.

¹⁴⁵ Allowing applicants to remain in safety is also important, and programs like the Protection Transfer Agreement (PTA), which prescreened individuals and relocated the most vulnerable to Costa Rica, should be expanded and improved.

¹⁴⁶ Some considerations on which action to use include whether the authorizing law specifies the manner of regulating the subject, or whether the administration wants to compel personnel to commit to an action or merely wishes to guide personnel action.

¹⁴⁷ 5 U.S.C. 551(5)

¹⁴⁸ *See generally* 5 U.S.C. 553

¹⁴⁹ 5 U.S.C. 553(c)

Clarify Provisions of the Law

Multiple lawsuits have claimed that the Trump administration had no legal authority to send people to Mexico,¹⁵⁰ and the Trump administration's defense centered on defining words in the statute its own way.¹⁵¹¹⁵² The Biden administration should use the regulatory process to clarify the statutory language that was used to enact MPP. This clarification can be used to prevent a future administration from similarly misinterpreting the statute and resurrecting MPP.

Reject the Grant of Power

The exact language of the law says that DHS "may" return a person to a contiguous territory, but it does not require DHS to do so. DHS, by regulation, would be within its right to refuse to use this discretionary power. Alternatively, DHS could issue regulations requiring extreme circumstances in order to exercise this authority. The administration should use the regulatory process to simply reject the grant of power or severely limit its application.

Working with Congress

Even if the Biden administration were to adopt every measure recommended in this report, there is nothing preventing a future administration from resurrecting MPP. An executive order can undo the actions of a preceding order, and a regulation can reverse a prior regulation. This is the double-edged sword of working within purely executive actions: any action unilaterally taken by one administration can be undone in the same way by a future administration.

Only Congressional action could limit a future administration's actions. For example, if Congress eliminated the provision of the law that purportedly gave DHS authority to implement MPP,¹⁵³ a future administration would have no legal basis to restart the program. Congress could also

¹⁵⁰ The Trump administration based the legality of MPP on one section of the Immigration and Nationality Act, which gives the Attorney General the power to "return the alien to that territory pending [the outcome of removal proceedings before the Immigration Courts]" when a noncitizen applying for admission arrives by land from a contiguous foreign territory. Section 325 of the INA, codified as 8 USC 1225(b)(2)(C). However, this power is limited, and the Attorney General cannot return noncitizens to contiguous territories "when Paragraph 1 applies." See 8 USC 1225(b)(2)(B). The referenced paragraph of the law, 8 USC 1225(b)(1), is quite vast: under the Trump administration it applied to any noncitizens who arrived in the country by land less than two years ago. See <https://www.govinfo.gov/content/pkg/FR-2019-07-23/pdf/2019-15710.pdf>. A common-sense reading would conclude that no asylum seeker can be returned to a contiguous territory if they arrived in the United States by land less than two years ago, and because this describes nearly every person placed in MPP, the program was flatly illegal.

¹⁵¹ DHS argued in court that the limitations found in 8 USC 1225(b)(2)(B), preventing the return of noncitizens when Paragraph 1 "applies," refers only to when the immigration official "applies" Paragraph 1 to the asylum seeker. In other words, DHS argued that "applies" refers to when the individual immigration official "applies" Paragraph 1 to the asylum seeker, rather than whether the statutory language "applies" to the asylum seeker.

¹⁵² In the Innovation Law Lab reply brief, among other arguments, they note that when Congress intends on using the individual immigration official's decision as the basis of "applies," they use language such as "has applied" or "was applied." Page 16.

¹⁵³ 8 USC 1225(b)(2)(C)

pass affirmative protections into law by explicitly prohibiting the return of asylum seekers to contiguous territories until their legal case is completed.

In addition, one of the main ways that Congress exerts its authority is through spending. The Constitution gives Congress the power to spend for the general welfare,¹⁵⁴ and Congress has generally exercised this power by funding programs or preventing the funding of programs.¹⁵⁵ This power to prevent the funding of programs, known as appropriations riders, has been used for almost 200 years to hamper agency activities, and such riders are acceptable so long as they prohibit the use of funds for specific activities. Since almost every federal activity requires at least implicit funding, Congress has wide authority to block objectionable programs.

Congress could include an appropriation rider in the budget preventing the use of funds to restart various parts of the Trump administration's border policies. In fact, there are already bills, such as H.R. 2662, the *Asylum Seeker Protection Act*, which do exactly this. The disadvantage of an appropriations rider is that it only affects the appropriations for that year and must be renewed annually. In renewing the rider annually, Congress would be forced to continually examine the program and the harm it has caused; with this sustained engagement, Congress could build consensus towards a more permanent solution.

Truth and Reconciliation Commission

“ I would want to do this so that people in the U.S. see what we have suffered in the problem keeping us here. I would also be very nervous though, because when I talk about the things that have happened, brings up bad memories and I would probably cry. But I know that sometimes to be heard, it can help to heal. ”

—Female asylum seeker from El Salvador

MPP and the related programs have caused needless harm to persecuted people seeking refuge in the United States. Thousands of families have been living in grave danger in Mexico because they were not allowed to seek asylum in the United States. Many have fallen victim to murder, sexual abuse, and kidnapping.¹⁵⁶

¹⁵⁴ See the United States Constitution, Article I, Section 8, Clause 1

¹⁵⁵ Devins, Neal, "Appropriation Riders" (1994). Faculty Publications. 1635. Available at <https://scholarship.law.wm.edu/facpubs/1635/>

¹⁵⁶ <https://www.humanrightsfirst.org/campaign/remain-mexico> 1,314

Truth commissions, “a temporary, government-sponsored body that investigates political violence, the affected communities and the individuals and institutions responsible,”¹⁵⁷ is an appropriate way to require Trump administration officials to answer for their actions. Such a commission could be convened by the administration or Congress.¹⁵⁸ A bipartisan commission would better create consensus and avoid partisanship. While Trump administration officials continue to defend MPP and related policies as “a success,”¹⁵⁹ the country needs the full story about the impact of MPP.

In conversations with HIAS Border Fellows, a number of clients expressed interest in publicly sharing the trauma they have faced due to MPP or related programs.¹⁶⁰ HIAS clients have said that throughout the asylum process, U.S. immigration officials refused to let them tell their story - whether it was asylum officers asking narrow questions that prevented them from fully answering, or immigration judges failing to give them the opportunity to fully explain. This has magnified the feeling of isolation and powerlessness they have felt throughout their journeys to seek safety. One HIAS Border Fellow said that the whole process felt like gaslighting the asylum seeker; offering a sham process then blaming the asylum seeker when they cannot receive relief. A truth commission would give these asylum seekers a chance to set the record straight about the impact of these policies and how our country treated people who came to our border asking for help.

¹⁵⁷ <https://www.washingtonpost.com/politics/2020/10/21/people-want-truth-commission-if-trump-loses-truth-commissions-have-limits/?arc404=true>

¹⁵⁸ Using a Congressional committee may be more advantageous, as there is already a structure in place to collect testimony, call witnesses, and issue subpoenas if necessary.

¹⁵⁹ <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Morgan-2020-06-25-REVISED.pdf>

¹⁶⁰ While many HIAS clients want to testify or otherwise tell their story, many cautioned that they would want to be anonymous while doing so. The clients feared retaliation by the U.S. government in their case or from criminal gangs targeting them in Mexico.

PART SIX: CONCLUSION

The Biden administration faces significant challenges in repairing the damage left by Trump's border policies. White House officials must develop and implement a plan to process asylum seekers so they may remain safely in the United States while their cases are adjudicated, not just for those in MPP but those in related programs like PACR/HARP and the ACAs. They must reject punitive measures at the border and instead create a humane system for asylum seekers to reunite with friends and family. They must grapple with the ramifications of the legal situation confronting many asylum seekers. Beyond the immediate challenges of unwinding these programs, the Biden administration should also pursue long-term goals that make it more difficult for any future administration from restarting the cruel immigration policies of the Trump administration.

There are a series of questions facing the Biden administration on how our asylum system should function within our larger immigration structure. They owe it to people seeking protection in the United States to answer this in a way that upholds the dignity of those looking for a better life. The recommendations in this report outline some of the many options that HIAS and our partners believe can help to make a positive difference. We look forward to working with the Biden administration to unwind the Trump administration's border policies and replace them with policies that respect U.S. and international law and treat people seeking safety with humanity and compassion.

Author

Andrew Geibel, *Policy Counsel*
andrew.geibel@hias.org

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Rachel Zoghlin, *National Pro Bono Technical Legal Advisor*

Stephen Brown, *Managing Attorney*

Jessica Therkelsen, *Director, Legal Protection*

Rachel Levitan, *Vice President, International Programs*

Naomi Steinberg, *Vice President, Policy and Advocacy*

Bill Swersey, *Vice President, Communications*

Sharon Samber, *Communications Specialist*

Melanie Nezer, *Senior Vice President, Public Affairs*

Mark Hetfield, *President and CEO*

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About HIAS

HIAS is there for refugees when and where they need help most. We are a Jewish humanitarian organization that works in the United States and 15 other countries, providing vital services to refugees and asylum seekers of all faiths so they can rebuild their lives. With the Jewish community beside us, we also advocate for the rights of forcibly displaced people globally. We partner closely with domestic and international leadership, like the U.S. Department of State and the United Nations High Commissioner for Refugees, as well as refugee agencies and human rights groups.

We also engage in advocacy by educating, organizing and mobilizing American Jews to put their values into action and fight for refugees. We work with grassroots advocates, opinion leaders, legislators, and other policymakers to protect and advance policies that promote fair and humane asylum laws, refugee resettlement, and integration. **Learn more at [HIAS.org](https://www.hias.org).**

Cover Photo: Asylum seekers wait at the El Chaparral crossing on the US/Mexico Border in Tijuana, Baja California state, Mexico, February 29, 2020. (Guillermo Arias/AFP via Getty Images)

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HEADQUARTERS

1300 Spring Street
Suite 500
Silver Spring, MD 20910
301-844-7300

NEW YORK OFFICE

212-967-4100

 /HIASrefugees

 @HIASrefugees

 @HIASrefugees

[hias.org](https://www.hias.org)