RESOLVED, That the American Bar Association urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law;

FURTHER RESOLVED, That the American Bar Association opposes the imposition of limitations that restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit;

FURTHER RESOLVED, That the American Bar Association opposes the implementation of procedures that allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries; and

FURTHER RESOLVED, That the American Bar Association opposes procedural restrictions including but not limited to the Migrant Protection Protocols (“MPP”), that prevent migrants from remaining in the United States during the adjudication of their asylum claims.
REPORT

The American Bar Association has long supported policies which ensure that refugees, asylum seekers, and others seeking humanitarian protection (“asylum seekers”) are given fair access to legal protections in the United States. Since 2017, however, several government policies have operated together to severely restrict the ability of asylum seekers to access the asylum system and to receive the due process protections to which they are entitled. While the government has argued that these policies are justified by the high numbers of migrants seeking to enter the United States at the Southwest border, the numbers are not historically high, and thus do not justify such restrictions.¹ In addition to violating fundamental notions of fairness, these policies do not comport with the United States’ international treaty obligations or domestic statutory and regulatory requirements. This resolution urges the government to rescind such policies and restore full and fair adjudication rights for asylum seekers in a manner consistent with U.S. and international law.

While the government has proposed many policies and regulatory changes since 2017 that restrict access to our country’s asylum system, this resolution focuses on several policies that present the greatest threat to asylum seekers’ right to a full and fair adjudication of their claims. These policies are: (1) the Migrant Protection Protocols, or Remain in Mexico policy (MPP); (2) metering, or turning away asylum seekers at ports of entry because of limits imposed on the number of individuals processed through the ports of entry; (3) restrictions on eligibility for asylum for those individuals who did not apply for protection in countries of transit; and (4) the development of international agreements that allow the United States to avoid its international protection obligations by transferring individuals to third countries without conducting an asylum adjudication in this country. Only by rescinding these policies can the government ensure genuine access to asylum, due process, and counsel for asylum seekers in a manner that comports with U.S. and international law.

The ABA is also concerned about any similar government policies that would operate to (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United

States during the adjudication of their asylum claims. Any such policies would be inconsistent with domestic and international law, and violate asylum seekers’ rights.

I. United States and International Legal Framework

U.S. law has enshrined multiple procedural and substantive protections to ensure that individuals seeking humanitarian protection receive a full and fair adjudication of their claims. These protections derive from international law obligations. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the 1951 Convention Relating to the Status of Refugees. Article 33 of the 1951 Convention provides that “[n]o contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The United States is also bound by Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which provides that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Congress subsequently codified these obligations into law.

All non-citizens who present claims for humanitarian protection in the United States are entitled to proceedings that comport with due process. Relatedly, non-citizens, including those seeking humanitarian protection, have a statutory right to counsel in removal proceedings.

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5 I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) (noting that one of the primary purposes in enacting the Refugee Act of 1980 was to implement the principles agreed to in the 1967 Protocol, and that the withholding of removal statute, now codified at 8 U.S.C. § 1231(b)(3), mirrors Article 33); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, Div. G Title XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”).

6 Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”).

7 8 USC § 1362 (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”); 8 USC § 1229a(b)(4)(A) (in removal proceedings, the non-citizen “shall have the privilege of being represented, at no expense to the Government, by counsel of the [non-citizen’s] choosing who is authorized to practice in such proceedings”); Gomez-Velazco v. Sessions, 879 F.3d 989, 993 (9th Cir. 2018) (“The right to be represented by counsel at one’s own expense
The ABA has questioned whether some of the statutory and regulatory provisions that purport to implement the United States’ international treaty obligations, as well as those provisions that otherwise govern removal proceedings and the availability of judicial review, truly ensure access to fundamentally fair proceedings. However, several recent government policies present cause for particular concern, because they threaten the very framework of this nation’s asylum system in a manner not seen in more than 20 years. These policies are all the more troubling because they have been imposed by unilateral Executive action, without input from Congress. The ABA has repeatedly emphasized that our government must address the immigration challenges facing the United States by means that are humane, fair, and effective—and that uphold the principles of due process. Until such time, the government must rescind recent policies that violate these principles.

II. Restrictions on Asylum Eligibility

The Department of Justice (DOJ) has narrowed the scope of asylum eligibility since 2017 through a series of precedent decisions that overturned longstanding legal doctrine regarding persecution based on family affiliation, domestic violence, and criminal/gang violence. Consequently, many individuals fleeing from persecution based on these criteria, particularly from Central America, are finding it more difficult to meet even the threshold standard in an initial asylum screening interview, and those who do have a more difficult time establishing eligibility for protection in court.

While these decisions have had a profound impact on asylum seekers, they were nonetheless tied to an analysis of an individual’s particular claim for asylum and did not necessarily restrict an individual’s access to the asylum process. Beginning in 2018, however, DOJ and the Department of Homeland Security (“DHS”) issued two joint regulations precluding eligibility for asylum that restrict access to the process itself, generally by creating categorical bans on asylum eligibility, irrespective of individual circumstances. Both rules share a fundamental disregard for the international protection scheme that the United States embraced following World War II, and that it specifically codified into law with the Refugee Act of 1980. Moreover, each one attempts to deter

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8 See, e.g., 06M107C (Urges an administrative agency structure that will provide all non-citizens with due process of law in the conduct of their hearings or appeals, including full, fair and meaningful administrative and judicial review); 10M114D (supports the restoration of federal judicial review of immigration decisions).

9 In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546, which was the last major revision to procedures related to the asylum statute. These changes included the expedited removal provisions discussed later in this Report.

migra/on by cutting off access to asylum based on impermissible limitations on the right to apply for asylum in the United States.

A. Asylum Bar Based on Manner of Entry

The first instance of a categorical asylum bar occurred on November 8, 2018 when DHS and DOJ jointly issued an interim final rule banning immigrants from receiving asylum if they were subject to a Presidential Proclamation suspending or limiting entry across the Southern border with Mexico.\(^1\) It also required asylum officers conducting initial screenings to make a negative finding in cases where an individual was subject to such a ban. The rule set the stage for a Presidential Proclamation issued the next day, which suspended entry of individuals crossing into the United States from Mexico, except at designated ports of entry.\(^2\) According to the proclamation, such action was necessary to control growing migration flows, particularly organized caravans of migrants who had been traveling through Mexico from Northern Triangle countries. The proclamation, however, was instead the necessary prerequisite to imposing a ban on asylum for anyone who crossed the border irregularly. The regulations and proclamation invoke a general section of the Immigration and Nationality Act (INA), § 212(f), which grants the president authority to impose restrictions on entrants into the United States if he deems their entry detrimental to the United States. This is the same section of the law invoked in issuing the so-called Muslim ban.

The regulation itself became the focus of multiple lawsuits in which plaintiffs sought to establish that the categorical bar on asylum based solely on manner of entry was in direct violation of INA § 208(1), which provides that any non-citizen who is physically present in the United States, or arrives in the United States (whether or not at a designated port of arrival) may apply for asylum, irrespective of such person’s status.\(^3\) This clear statutory language recognizes the reality for many asylum seekers fleeing persecution: they frequently cannot obtain documentation that enables them to enter the protection country lawfully, precisely because they fear persecution from the very actor that would need to issue them travel documents, the government of the country from which they have fled.

The rule, which had been set to go into effect immediately, was quickly enjoined.\(^4\) Then, in August of this year, a district court in the District of Columbia vacated the interim final rule, concluding that it directly conflicts with the clear statutory right to apply for

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\(^1\) Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018).

\(^2\) Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States (Nov. 9, 2018).

\(^3\) 8 U.S.C. § 1158(a)(1).

asylum regardless of immigration status. As multiple courts now have recognized, any policy that attempts to restrict asylum eligibility based on an individual’s manner of entry into the United States is illegal.

B. Third Country Transit Bar

On July 16, 2019, DHS and DOJ issued another regulation creating a categorical bar to asylum, this time focusing on actions taken by an asylum seeker before entering the United States. This rule bars an asylum seeker—even an unaccompanied child—who enters or attempts to enter the United States at the Southern border from asylum eligibility unless he or she also applied for and was denied asylum in at least one country of transit on the journey to the United States. Other than Mexican nationals, every person fleeing over land to the Southern U.S. border necessarily transits at least one third country. While the rule appears to be aimed primarily at asylum seekers from Honduras, El Salvador, and Guatemala, asylum seekers from all over the world frequently transit through Mexico on their way to the United States. The rule carves out some narrow exceptions, but virtually all asylum seekers crossing the Southern border with Mexico may be denied asylum under this rule.

The rule attempts to justify limiting asylum to those who previously applied in a country of transit by arguing that Congress has already placed certain limitations on asylum seekers who had access to protection in other countries. Under 8 U.S.C. 1158(b)(2)(A)(vi), an individual is ineligible for asylum if he or she has been firmly resettled in a third country, such that he or she has already received a permanent offer of residency or the equivalent in a country prior to arrival in the United States. This law reflects a well-settled principle of international refugee protection which recognizes that the obligation to offer safe haven does not necessarily apply where someone has already been given an offer of permanent refuge. Nowhere, however, does the principle of firm resettlement assume an obligation on an individual’s part to apply for asylum in a country of transit. Moreover, a determination of firm resettlement requires both an individualized assessment and places the initial burden on the government. The rule also violates the

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17 For the bar to apply, the country of transit must be a party to the U.N. Refugee Convention, Refugee Protocol, or CAT. Because Mexico is a party to the Refugee Convention and CAT, the bar applies to all individuals arriving at the Southern border.

18 While individuals impacted by the rule are still eligible to apply for withholding of removal and protection under CAT, see 8 C.F.R. § 208.16, migrants subjected to expedited removal will now need to demonstrate a “reasonable fear” of persecution or torture before being able to present their claim to an immigration judge, which is a higher standard than credible fear. 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(3), 208.31(c), 235.3(b)(4).

Trafficking Victims Protection Reauthorization Act of 2008, because it does not exempt unaccompanied minors, who are not subject to firm resettlement prohibitions.20

The rule remains in effect pending ongoing litigation after the Supreme Court granted the government’s application for a stay of two orders by a district judge in Northern California that enjoined the government from enforcing the interim final rule.21 Therefore, as a practical matter, it is now virtually impossible for the thousands of individuals transiting through Mexico and Guatemala to apply for asylum in the United States, despite the clear inadequacy of the asylum systems in these two countries of transit. Guatemala’s asylum system is only two years old; implementing regulations went into effect in early 2019.22 Guatemala has only three asylum officers for the entire country.23 Guatemala has decided a mere 20 to 30 asylum applications; between March 2018 and May 2019, zero of the hundreds of submitted applications were decided.24 Although Mexico’s protection system is more advanced than Guatemala’s, it remains incapable of providing the level of protection that would translate into a truly accessible asylum system. Mexico’s asylum agency has failed to grow to meet increased asylum applications—30 officers are covering a caseload that has increased 300 percent in the past several years, and yet Mexico has reduced the agency’s budget by 20 percent.25

Access for unaccompanied children is even more difficult, as only six officers are assigned to interview children.26

The impact of the rule is now being felt, and practitioners have reported a rise in negative credible fear determinations from initial asylum screening interviews. In some cases, asylum seekers are still found to have a reasonable fear of persecution or torture and so may proceed forward with a protection claim in court, but they face a higher burden of establishing their claim and fewer benefits if they are successful in doing so.27 Given

21 Barr v. East Bay Sanctuary Covenant, On Application for Stay, No. 19A230, 2019 WL 4292781, 588 U.S. ___ (Sept. 11, 2019). In her dissent (joined by Justice Ginsburg), Justice Sotomayor noted the district court’s principal reasons for finding that the rule was likely unlawful. The district court had found that the rule was likely inconsistent with the asylum statute, which already provides certain narrow exceptions to the general rule that any non-citizen physically present in the United States or who arrives in the United States may apply for asylum. Id. at *1.
23 Id.
24 Id.
25 Id. ¶ 23.
26 Id.
27 Compare 8 C.F.R. § 208.16(b)(2) (for a non-citizen to win withholding of removal based on a future threat to her life or freedom she must establish that it is more likely than not that she will be persecuted on account of her race, religion, nationality, membership in a particular social group, or political opinion) and id. § 208.16(c)(2) (non-citizen must establish that it is more likely than not that she will be tortured if removed to the proposed country of removal) with id. § 208.13(b)(2) (saying that a non-citizen has a well-founded fear
the high number of individuals, especially from the Northern Triangle, who have historically met the credible fear standard, it is virtually certain that numerous otherwise qualified individuals will be denied the chance to have their asylum cases heard in court, simply because they failed to apply for asylum on their way to the United States.

III. Restriction on Access to United States Protection Process

Asylum seekers have also been prevented from even accessing U.S. asylum proceedings due to government policies implemented at the Southern border. In addition, the Trump administration has pressed for “Safe Third Country” Agreements with Mexico and Central American countries in order to shift responsibility for asylum protection to other countries in the region. These practices are different in nature, but both represent efforts to prevent asylum seekers from accessing available U.S. protection.

A. Metering

In recent years, the government increasingly has relied on the practice of “metering” to turn away asylum seekers at the Southern border of the United States through regulation of the number of individuals processed at ports of entry during any given time period.28 “Metering” describes CBP’s practice of limiting the number of individuals who can seek to be inspected and apply for asylum at a port of entry during a given time period.29 CBP officers stand at the international line in the middle of international bridges connecting the United States with Mexico. Before a non-citizen without proper travel documents can cross onto U.S. soil, even if seeking to apply for asylum, the officers turn the individual away if the limit on the number of persons to be processed that day or that week has been reached.30

While the government claims that the decision is based on operational capacity to process applications for admission in accordance with federal law,31 this practice has turned away many asylum seekers from the border and has forced thousands of individuals to wait months in Mexico for their opportunity to present claims for protection. During this time, individuals of very limited means must keep themselves safe in Mexican

of persecution in her country of nationality for purposes of asylum eligibility if she can show a reasonable possibility of suffering persecution on account of race, religion, nationality, membership in a particular social group, or political opinion).


30 Special Review at 6; The Office of U.S. Senator Jeff Merkley, Shattered Refuge: A U.S. Senate Investigation into the Trump Administration’s Gutting of Asylum 32 (Nov. 2019); Metering Update at 1.

31 Govt. Al Otro Lado Brief at 6.
border cities plagued by rampant crime, and try to find legal assistance. It has been reported that, as of November 2019, there are more than 20,000 names on unofficial “waitlists.” This means that, while the government encourages asylum seekers not to enter the United States between ports of entry, it is likely that the practice of metering has led more non-citizens who would otherwise seek to enter the Southern border legally to cross unlawfully between ports of entry.

And while the numbers of family units who were apprehended at the Southern border reached historic highs in 2019, overall apprehensions did not reach a level that would justify heavy reliance on a practice not used before 2016. Because the United States is legally obligated to allow asylum seekers into the United States to present a claim for relief, the government’s recent use of metering at the Southern border improperly minimizes the number of individuals who are able to present claims for relief by limiting the number of individuals who are able to cross the international line into U.S. territory to seek protection.

B. Improper Use of Safe Third Country Agreements to Shift Responsibility

Under U.S. law, a person may be ineligible for asylum if he or she transited through a country that has signed a “safe third country” agreement with the United States. Such agreements are an acknowledgement by both parties that the countries have fair and accessible asylum systems that afford an asylum seeker full protection and the opportunity for permanent resettlement. The United States entered into such an agreement with Canada in 2002. The Trump administration has repeatedly pressed Mexico to sign such an agreement, which has thus far been declined, but on July 25, 2019 the Administration announced that it had signed a safe third country agreement with Guatemala. Honduras and El Salvador followed suit in September 2019, although the details of those agreements are not known. These agreements permit the United States

33 Metering Update at 1. These lists generally are not kept by the U.S. or Mexican government, contributing to confusion and the potential for unfairness and corruption. Metering Update at 5-15 (describing different practices for keeping wait lists in border cities); Strangers in a strange land.
34 Special Review at 7 (noting evidence that metering leads to increased illegal border crossings).
35 See note 1, supra.
37 Id. § 1158(a)(2)(A).
38 Id.
to send asylum seekers from the Southern border to Central America and force them to apply for asylum there.\textsuperscript{41}

These countries have nascent asylum systems that are incapable of handling the thousands of asylum applicants that could be returned under this agreement. There also is no evidence that the governments of Central America can ensure the safety of asylum seekers, many of whom are Central Americans themselves and are fleeing persecutors who could pursue them into neighboring countries. Rather, the agreements ignore the fact that, in the last year, the majority of asylum seekers arriving at the U.S. Southern border are from the three countries that have signed these agreements—El Salvador, Guatemala and Honduras.\textsuperscript{42} Many of these individuals are fleeing persecution from which these Central American governments have been unable to protect them, demonstrating the inability of these countries to protect nationals of other states who are likely to be even more vulnerable.\textsuperscript{43}

The administration continues to pressure other countries to enter into safe third country agreements, irrespective of the asylum frameworks in those countries. As such, these agreements do not protect asylum seekers or create genuine regional solutions to address migration, but instead simply allow the United States to shift its responsibility to protect vulnerable asylum seekers onto countries that are ill-equipped and unable to ensure protection.

IV. Migrant Protection Protocols

Finally, in January 2019\textsuperscript{44} the government began implementing MPP, a policy that purportedly allows asylum seekers to apply for protection in the United States, but in reality, cuts off any meaningful access by forcing them to remain in Mexico while their claims are pending. MPP deprives asylum seekers of due process, fails to live up to


domestic and international law obligations, and places asylum seekers in grave personal
danger.

Traditionally, asylum seekers who enter the United States via the Southern border,
whether at or between official ports of entry, are either detained by Immigration &
Customs Enforcement (ICE) while they are screened and then present their claims for
relief, or released into the United States while their claims are pending in court.\textsuperscript{45} Under
MPP, DHS officials have the discretion to return to Mexico non-Mexican nationals who
seek to enter the United States via the Southern border without proper documentation.\textsuperscript{46}
CBP issues individuals processed under MPP a Notice to Appear (“NTA”) in an
immigration court in the United States, but asylum seekers must remain in Mexico during
their court proceedings, which generally involve multiple hearings and many months of
waiting.\textsuperscript{47}

If an individual placed in MPP expresses a fear of return to Mexico, that individual
is supposed to be interviewed by an asylum officer to determine whether she is more
likely than not to be persecuted or tortured in Mexico; but these interviews are not always
conducted when requested.\textsuperscript{48} Attorneys are not always allowed to be present during
these interviews. If the asylum officer determines the individual does not show she is
more likely than not to be persecuted or tortured in Mexico, which is the result in the vast
majority of cases, the asylum seeker is returned to Mexico. As of September 2019, more
than 55,000 individuals have been subjected to MPP.\textsuperscript{49} The legality of MPP is currently
being litigated, but the policy remains in effect.\textsuperscript{50}

\textsuperscript{45} See generally 8 U.S.C. § 1225(b). Traditionally, many asylum seekers also have been eligible to request
release from detention while their cases are pending. However, the government takes the position that MPP
asylum seekers are not eligible to request bond from an immigration judge, because they are “arriving
aliens.” By regulation, arriving aliens—or migrants who seek admission at a port of entry—are not eligible
to request bond from an immigration judge. 8 C.F.R. § 1003.19(h)(2)(i)(B). This means that, even if a
migrant is subjected to MPP after entering the United States unlawfully between ports of entry, she is not
eligible to seek release. Some advocates have been successful in challenging this interpretation, but the
great majority of MPP asylum seekers do not have legal representation. See infra page 13.

\textsuperscript{46} Nielsen Policy Guidance at 1.

\textsuperscript{47} DHS, Migrant Protection Protocols, \url{https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols}
(last visited Nov. 6, 2019); Nielsen Policy Guidance at 3-4; Nathalie R. Asher, Migrant Protection Protocols
Guidance 3 (Feb. 12, 2019), \url{https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-

\textsuperscript{48} Nielsen Policy Guidance at n.4; ERO MPP Guidance at 3-4; U.S. Immigration Policy Ctr., Seeking
Asylum: Part 2 4 (Oct. 29, 2019) (“Seeking Asylum”) (Only 40% of individuals who were asked whether
they feared return to Mexico, and responded in the affirmative, were interviewed by an asylum officer, and
only four percent of individuals who were not asked whether they feared return to Mexico, but nevertheless
expressed a fear, were interviewed).

\textsuperscript{49} MPP Assessment at 2 (saying that, in nine months, DHS returned more than 55,000 non-citizens to
Mexico under MPP).

\textsuperscript{50} The U.S. Court of Appeals for the Ninth Circuit heard oral argument on October 1, 2019 in the lawsuit
challenging MPP. See Innovation Law Lab v. McAleenan, No. 19-15716 (9th Cir.). In their lawsuit, the
plaintiffs argue that MPP is unlawful because it violates the plain language of the INA, violates the United
Those asylum seekers who are returned to Tijuana, Mexicali, and Juarez, Mexico have their cases heard at immigration courts in San Diego, California and El Paso, Texas. For asylum seekers returned to Nuevo Laredo and Matamoros, cities in the state of Tamaulipas, Mexico, the hearings take place in soft-sided tents or “port courts” that are adjacent to the International Bridges that connect Laredo and Brownsville, Texas to the Mexican cities of Nuevo Laredo and Matamoros, respectively. Immigration judges are not physically present for hearings that occur at the port courts; in such hearings the immigration judge and government counsel appear via video conference. Unlike regular immigration courts, the tent courts are closed to the public, including members of the media. Attorneys may enter the port courts only to appear at a hearing for an asylum seeker the attorney already represents. Attorneys are not permitted to enter the port courts to screen potential clients or provide general legal information. Nor are asylum seekers permitted to enter the United States to consult with their attorneys, other than for one hour preceding their scheduled hearings. Attorneys who have appeared at MPP hearings in the tent courts report that simultaneous interpretation is not provided for asylum seekers who are not fluent in English. Generally, the interpreter, who is present with the immigration judge via video conference, interprets only procedural matters and questions directed to the asylum seeker by the immigration judge. Even for those MPP hearings held in regular immigration courts, lawyers have been prohibited from offering legal information or meeting with unrepresented individuals, or even meeting with individuals they represent prior to hearings.

While individuals subjected to MPP wait for their hearings, they are forced to fend for themselves in Mexican border cities, which are notoriously dangerous. The Department of State advises citizens not to travel to Tamaulipas state, where Matamoros and Nuevo Laredo are located, due to “crime and kidnapping.” It has assigned Tamaulipas the highest travel advisory level, Level 4—the same level assigned to countries such as Syria and Yemen. Multiple organizations have documented hundreds

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53 ERO MPP Guidance at 3.

54 Faux Process.


56 United States Department of State—Bureau of Consular Affairs, Mexico Travel Advisory, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last
of cases of violence suffered by asylum seekers forced to return to Mexico. Many asylum seekers subjected to MPP also lack basic necessities such as shelter, food, clean water, toilet facilities, and medical care.

While the government contended that MPP would be “consistent with applicable domestic and international legal obligations,” the implementation of the policy has prevented MPP asylum seekers from accessing a full and fair adjudication that comports with U.S. and international law. First, because asylum seekers are forced to remain in Mexico for the duration of their proceedings, they do not have meaningful access to counsel to advise them regarding their legal rights and obligations. The same barriers prevent MPP asylum seekers from accessing assistance in completing applications for relief in English, and translating any evidence they may have to support their claims. DHS provides MPP asylum seekers with lists of U.S.-based non-profit organizations, but their resources were already stretched beyond capacity before MPP and most of the non-profits do not represent individuals subject to MPP. Private attorneys and non-profit organizations have formed groups of volunteers to provide workshops and other forms of pro se assistance in some Mexican border cities, but these groups do not have the capacity to assist everyone, and do not provide direct representation. The situation in these cities also forces volunteers to work in conditions that are not conducive to confidential communications. And many MPP asylum seekers are afraid to travel from their temporary shelter to the location of these workshops, because of the dangers they face in many Mexican border cities. The data confirms that the barriers MPP places on

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57 Orders from Above at 3-8 (discussing violence suffered by hundreds of asylum seekers living in Mexican border cities, including rape, kidnapping, and assault); Seeking Asylum at 2 3-5, 9-10 (based on interviews with over 600 asylum seekers subjected to MPP, finding that approximately one out of four had been threatened with physical violence, and that over half of those who had been threatened with physical violence had experienced physical violence). The numbers reported by the U.S. Immigration Policy Center likely underestimate the dangers faced by asylum seekers subjected to MPP because security conditions in Tijuana and Mexicali, Mexico, where the interviews were conducted, are less dangerous than other parts of the border. Seeking Asylum at 9.

58 Seeking Asylum at 5, 10 (based on interviews with over 600 asylum seekers subjected to MPP, finding that more than one out of every three had experienced homelessness); Acacia Coronado, the Texas Tribune, “Conditions deteriorating at makeshift camp on the Rio Grande where thousands await U.S. asylum” (Oct. 25, 2019), https://www.texastribune.org/2019/10/25/conditions-deteriorating-migrant-camp-thousands-await-asylum/ (discussing worsening humanitarian conditions for an estimated 2,000 migrants living at a makeshift refugee encampment in Matamoros, Mexico, steps away from the International Bridge).

59 Nielsen Policy Guidance at 2.

60 Orders from Above at 15.

61 Seeking Asylum at 8-9 (only 17% of interview respondents said they were given information by U.S. immigration officials about how to access legal services, and that most who had been given this information were given a list of providers located in San Diego).
meaningful access to counsel are nearly insurmountable. As of September 2019, only two percent of asylum seekers subjected to MPP had secured legal representation.62

MPP also places U.S.-licensed attorneys in untenable situations. Attorneys are either forced to subject themselves to dangerous conditions in Mexican border cities, or risk compromising their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients.

The manner in which MPP hearings are conducted also does not comport with fundamental notions of due process. MPP asylum seekers are handed NTAs before being returned to Mexico, but because most do not have stable shelter in Mexico, the government is not able to reliably serve them with notice if their hearing date changes or is cancelled. NTAs served on MPP asylum seekers often contain addresses of shelters that asylum seekers never access, or no address at all.63 Paperwork that accompanies the NTA instructs MPP asylum seekers to present themselves at International bridges four hours before their hearings. For asylum seekers with early morning hearings, this means traveling through dangerous border cities and waiting at bridges in the middle of the night. If they are unable to make the dangerous journey, they risk being ordered removed in absentia.64

If MPP asylum seekers do make it safely to their hearings, they likely will find it difficult to understand what occurs, because many of these hearings lack simultaneous interpretation. The ABA has long supported the use of in-person language interpreters in all courts, including in all immigration proceedings, to ensure parties can fully and fairly participate in the proceedings.65 This is especially important for non-citizens, who are unfamiliar with the U.S. legal system, and face additional unique barriers to accessing information regarding their legal rights and responsibilities. Video conferencing technology can also be unreliable, leading to disruptive delays that can further harm vulnerable asylum seekers.66

It is also problematic that hearings in the tent courts are not open to the public or the press. Public access to judicial proceedings is a cornerstone of the First Amendment. It also helps to further public confidence in proceedings, as well as the appearance of

63 Orders from Above at 15; “Immigration Judge Slams ‘Remain in Mexico’ Tent Courts”.
64 Orders from Above at 15.
65 90M131 (calling on adopting of recommendations for providing complete and accurate interpretation of all immigration court proceedings, including all testimony); 02M110 (resolving that courts and agencies should provide live in-person interpreters in all cases, except in exigent situations, when technology-based interpretation may be provided); 97A109 (recommending that all courts be provided with qualified language interpreters so that parties and witnesses with no or limited command of English may fully and fairly participate in court proceedings).
66 Orders from Above at 14; Faux Process.
fairness. Proceedings in the tent courts are closed because the facilities are controlled by DHS, rather than the Executive Office for Immigration Review ("EOIR"). EOIR is part of DOJ, and runs the immigration court system. It is problematic enough that DOJ runs the immigration court system. It is even more troubling, however, that DHS, which is charged with apprehending, detaining, and removing non-citizens, controls who can access tent court facilities.

Finally, MPP does not contain sufficient safeguards to comply with the United States’ non-refoulement obligations. Despite widespread danger faced by asylum seekers in Mexico, DHS does not affirmatively ask individuals subjected to MPP whether they fear persecution or torture if returned there. Asylum seekers are afforded a screening interview only if they affirmatively express a fear of return. Many individuals subjected to MPP do not know that they have a right to a screening interview or that they must request one if they have such fear.

Where asylum seekers do express a fear of return to Mexico, they are afforded only short, telephonic screening interviews, without the right to consult with counsel before the interview, or have an attorney represent them in the interview itself. In addition, to be removed from the MPP program, an individual must demonstrate that she is more likely than not to be persecuted or tortured in Mexico. This is the same standard as the individual would be required to meet to be granted withholding of removal or relief under the Convention Against Torture by an immigration judge.

The standard applied in these “non-refoulement” interviews is also higher than the standard used to determine asylum eligibility, as well as for screening interviews in

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68 For this reason, the ABA, among other entities, has called for the creation of an independent court to adjudicate immigration cases. See Letter to Members of Congress from the American Bar Association, the American Immigration Lawyers Association, and the Federal Bar Association (July 11, 2019) (calling on Congress to establish immigration court system that is independent from the Department of Justice).


70 Orders from Above 8-10. The ACLU Foundation of San Diego & Imperial Counties recently filed a class-action lawsuit demanding that MPP asylum seekers who have expressed a fear of return be given access to retained counsel before and during these screening interviews. See Doe et al. v. McAleenan, 3:19cv2119-DMS-AGS (S.D. Cal.). On November 12, 2019, U.S. District Judge Dana Sabraw granted the individual plaintiffs’ request for a temporary restraining order, but he has not ruled on the class claims. See Order Granting Motion for Temporary Restraining Order, Doe et al. v. McAleenan, 3:19cv2119-DMS-AGS (S.D. Cal. Nov. 12, 2019).

71 MPP Assessment at 5.

72 See supra note 27.
expedited removal and reinstatement of removal proceedings, where asylum seekers are screened to determine whether they will be able to present their protection claim before an immigration judge. In those screening interviews, a DHS official must ask the individual whether she has a fear of being returned to her home country or removed from the United States. Individuals also receive notice in advance of the screening interviews, are permitted to consult with an attorney, can be represented at the interview, and are entitled to immigration judge review of any negative determination. None of these due process protections are afforded those in MPP non-refoulement interviews.

Interviews with asylum seekers subjected to MPP demonstrate that the screening process used falls far short of the United States' obligations under international law. MPP asylum seekers report that, even when they express a fear of return to Mexico, they often are not provided with the screening interviews required under MPP. MPP asylum seekers also routinely fail to pass these interviews even when they already have been victims of violent crime, including rape, kidnapping, and robbery in Mexico. According to DHS only 13% of the individuals who have received these screenings have been given positive determinations.

V. Conclusion

The policies discussed above are fundamentally inconsistent with due process, unduly restrict asylum seekers' access to counsel, and fail to live up to the United States' obligations under international law. For these reasons, the ABA urges the federal government to rescind these policies, and to ensure that any future policies addressing the processing of asylum seekers do not: (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United States during the adjudication of their asylum claims.

Respectfully submitted,

Wendy S. Wayne
Chair, ABA Commission on Immigration
February 2020

73 8 C.F.R. § 235.3(b)(2)(i) (discussing form I-867B).
74 8 C.F.R. §§ 208.30(d)(4), (g); 208.31(c), (g).
75 See Seeking Asylum at 4.
76 Orders from Above at 10.
77 MPP Assessment at 5.
1. **Summary of Resolution(s).**

The resolution urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law. This Resolution also expresses opposition to the following recent government policies: (1) the Migrant Protection Protocols, or Remain in Mexico policy; (2) metering, or turning away asylum seekers at ports of entry because of limits imposed on the number of individuals processed through the ports of entry; (3) restrictions on eligibility for asylum for those individuals who did not apply for protection in countries of transit; and (4) the development of international agreements that allow the U.S. to avoid its international protection obligations by transferring individuals to third countries without conducting an asylum adjudication in the United States.

2. **Approval by Submitting Entity.**

The resolution content was discussed and approved by Commission Members at the Commission’s fall business meeting on November 2, 2019. Mimi Tsankov, a Liaison to the Commission from the National Association of Immigration Judges, did not participate in the discussion or vote on whether to approve this Resolution.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

Yes.

- **90M131:** Expresses support for improving the asylum process and facilitating exercise of the right to counsel consistent with Section 292 of the Immigration Act, as amended, by calling upon the Immigration and Naturalization Service and the Executive Office of Immigration Review to implement certain recommendations of the ABA Coordinating Committee on Immigration Law, including three specified principles. Support a humane and enforceable safe-haven mechanism to provide protection to persons who are unable to return to their home countries because of conditions that endanger their safety.

- **06M107F:** Supports the establishment of laws, policies, and practices that ensure optimal access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge, including: (1) the elimination of unduly restrictive limitations that prevent asylum seekers from initiating claims; (2) the establishment of practices that ensure the prompt identification of asylum seekers; (3) the creation of fair screening procedures for refugees intercepted or interdicted in order to quickly identify refugees, asylum seekers, and torture
victims; and (4) the development of refugee visa and pre-clearance policies to assist refugees in coming to the United States.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

90M131, 06M107F (above). The adoption of the proposed policy would support and complement existing policy by encouraging the government to rescind recent policies that restrict access to counsel and legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

n/a

6. Status of Legislation. (If applicable)

n/a

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of the recommendations and effect legislative change or updated policies that reflect due process and fairness in the asylum system.

8. Cost to the Association. (Both direct and indirect costs)

Adoption of the resolution will not result in expenditures for the ABA.

9. Disclosure of Interest. (If applicable)

No known conflict of interest exists.

10. Referrals.

Section of Civil Rights and Social Justice
Section of International Law
Working Group on Unaccompanied Minor Immigrants
Center on Children and the Law
Standing Committee on Pro Bono and Public Service
Commission on Hispanic Rights and Responsibilities
11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Meredith A. Linsky  
Director, Commission on Immigration  
1050 Connecticut Ave NW, Suite 400  
Washington, DC 20036  
tel 202-662-1006  
meredith.linsky@americanbar.org

12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting.) *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*

Wendy S. Wayne  
Chair, Commission on Immigration  
wwayne@publiccounsel.net
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution urges the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law. This Resolution also expresses opposition to the following recent government policies: (1) the Migrant Protection Protocols, or Remain in Mexico policy; (2) metering, or turning away asylum seekers at ports of entry because of limits imposed on the number of individuals processed through the ports of entry; (3) restrictions on eligibility for asylum for those individuals who did not apply for protection in countries of transit; and (4) the development of international agreements that allow the U.S. to avoid its international protection obligations by transferring individuals to third countries without conducting an asylum adjudication in the United States.

2. **Summary of the Issue that the Resolution Addresses**

   The resolution expresses opposition to several recent government policies which have operated together to severely restrict the ability of asylum seekers to access the asylum system and to receive the due process protections to which they are entitled. The resolution also expresses concern regarding any future government policies that would operate to (1) restrict eligibility for asylum based on the place or manner of arrival at the U.S. border or submission of applications for protection in countries of transit; (2) allow U.S. immigration authorities to refuse to process asylum seekers arriving at the border or to transfer asylum seekers to other countries for processing of their asylum claims, without regard to the safety situation or the adequacy of the asylum process in those third countries and without regard to individual circumstances that may favor adjudication in the United States; or (3) prevent migrants from remaining in the United States during the adjudication of their asylum claims.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**

   The proposed Resolution will address the issue by expressing the ABA’s opposition to recent government policies and asserting the ABA’s position that the government should maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**

   There are no minority views.