

Asylum Priorities for the Next Presidential Term

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Center for
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INTRODUCTION

The **Center for Gender & Refugee Studies** (CGRS) was proud to co-author the [2021 Immigration Action Plan](#), now endorsed by over 230 organizations. The Plan sets out ten steps to transform and modernize America's immigration system, including restoring the right to seek and receive protection from persecution and torture.

Inspired by the Plan, CGRS recommends six specific non-partisan priority actions to rebuild the U.S. asylum system in the next presidential term.

The United States should:

1. Honor its treaty obligations
2. Ensure that all asylum seekers are treated humanely and with respect, and can live in safety and dignity while their applications are under consideration
3. Provide a fair and efficient system for determining claims to asylum
4. Respect family unity and the best interests of the child
5. Restore the refugee resettlement program and build other pathways to protection
6. Resume its role as a global leader in refugee protection

We ground these recommendations not only in our legal expertise but in our outrage and grief at the lives lost and hopes shattered during the past several years, when asylum seekers who put their faith in United States were turned away. Most of these people are Black, Indigenous, and People of Color; we see the fight for asylum as an integral part of the movement for racial justice. We have been working tirelessly alongside asylum seekers, advocates, and allies to bring U.S. actions back into line with our legal and moral obligations to refugees. We call upon our political leaders and public servants to do the same.

We recognize that while many harmful, unjust policies can and should be reversed immediately, the damage already inflicted is long-lasting, and the system before 2017 was far from perfect. Re-envisioning an asylum system worthy of America's best traditions and responsive to today's needs will take a sustained commitment, beyond the length of a single presidential term. But we must start now. Here we lay out the fundamental principles needed to guide the United States in reconstituting the asylum system for the challenges of the 21st century.

1 THE UNITED STATES SHOULD HONOR ITS TREATY OBLIGATIONS

For over seventy years, there has been bipartisan support for the United States' critical leadership role in the global system of refugee protection. The United States has helped write international treaties to protect people fleeing from persecution or torture, has resettled millions of refugees through our overseas refugee admissions program, and has played a vital role in funding and governing the Office of the United Nations High Commissioner for Refugees (UNHCR). Members of both parties in Congress supported the Refugee Act of 1980 and subsequent legislation to implement our treaty obligations and to ensure that immigration enforcement and border security measures take account of our responsibilities toward refugees. In one of its first decisions interpreting the 1980 Act, the Supreme Court emphasized that Congress intended to bring the United States into compliance with international refugee law.

Because the United States is party to international treaties including the Protocol Relating to the Status of Refugees and the Convention Against Torture, we have pledged not to return refugees to persecution or torture, a legal obligation known as the principle of *non-refoulement*. U.S. law defines "refugee" and "torture" in language taken almost verbatim from these treaties. Because U.S. law tracks international law so closely, the United States should be guided by the expertise of UNHCR and the best practices of other countries of asylum.

Specific steps that the United States should take include:

- Restoring timely asylum processing at the border by ending the following programs and practices:
 - Metering
 - The CDC Rule and Order under Title 42
 - The Migrant Protection Protocols
 - The Asylum Cooperative Agreements with Guatemala, El Salvador and Honduras
 - The bans on asylum for those who enter between ports of entry, and those who transit another country before reaching the United States
- Eliminating all bars to asylum eligibility that are not listed in the Refugee Protocol, along with other penalties and limitations on people exercising their right to seek asylum.
- Ending criminal prosecutions of asylum seekers for their manner of their entry.
- Limiting the use of discretionary denials of asylum, while supporting an amendment to the law to make asylum mandatory for those who meet the refugee definition, in line with our treaty obligations.
- Withdrawing the numerous proposed rules and rescinding recently finalized rules that will further undermine the asylum system by eliminating procedural safeguards at every step from credible fear screenings, to asylum office interviews, to immigration court hearings, and to appeals to the Board of Immigration Appeals; adding large numbers of bars to asylum and other obstacles to protection; redefining basic terms in the refugee definition that will result in almost no one being recognized; and adding to the vulnerability of asylum seekers by preventing their timely access to employment authorization.

2 THE UNITED STATES SHOULD ENSURE THAT ALL ASYLUM SEEKERS ARE TREATED HUMANELY AND WITH RESPECT, AND CAN LIVE IN SAFETY AND DIGNITY WHILE THEIR APPLICATIONS ARE UNDER CONSIDERATION

Seeking asylum is a human right, not a crime. A person who seeks asylum is not a criminal whether they ultimately qualify for protection or not. The entire immigration system is civil in nature and, with only a very few exceptions, an infringement of the immigration law is not a criminal act. Within that civil law framework, much of the asylum adjudication system is specifically designed to be non-adversarial.

Routine, long-term, arbitrary, detention of asylum seekers is inconsistent with these basic legal precepts and is a moral stain on the United States. Existing law allows for release of the vast majority of asylum seekers while their cases are adjudicated with exceptions for those who, on the basis of an individualized assessment, pose a flight or security risk. Nevertheless, far too many asylum seekers are arbitrarily kept behind bars for long periods of time in substandard conditions, even though community-based programs have been shown to be extremely successful in assisting applicants to appear in court at a far lower cost.

Detention is unnecessary, expensive, and inhumane, especially under the prison-like conditions in U.S. immigration detention facilities. Even when there is no pandemic, detention harms the physical and mental health of asylum seekers. It is exceptionally dangerous now when basic public health practices such as wearing masks, washing hands, and social distancing are difficult if not impossible in such settings. Detained asylum seekers also face nearly insurmountable obstacles to obtaining legal information, much less representation, and to acquiring necessary corroborating documents from their home country, making it nearly impossible to fully present a claim.

The United States should shift from an enforcement model to a reception model. All government officials and contractors must treat asylum seekers respectfully in every encounter. These authorities must give asylum seekers the information they need in a language they understand. They must tell asylum seekers what to expect and how to obtain assistance. They must answer questions promptly and accurately as well as affirmatively providing correct and timely information.

Asylum seekers need prompt employment authorization so that they can be self-supporting and/or they need access to public support while their claims are under consideration. Many other countries of asylum provide free legal representation and/or social services to asylum seekers. The United States provides neither. Harsh new restrictions on employment eligibility that turn a blind eye to asylum seekers' need to support themselves have only exacerbated their vulnerability to labor trafficking and other workplace abuses, food insecurity, and homelessness, a policy that serves no one's interests.

Specific steps that the United States should take include:

- Moving immediately to a practice of detaining asylum seekers only if required to do so by statute or for clearly documented reasons of public safety and even then for the least amount of time possible.
- Ensuring rigorous use of public health measures to protect the health and safety of asylum seekers, government employees, and contractors in situations where asylum seekers must be detained.
- Redirecting funds toward alternatives to detention, including community-based case management systems to ensure that applicants can pursue their claims, while providing them with information on available resources and assistance.
 - Training government staff and contractors on the rights of asylum seekers, the requirement to treat them humanely and respectfully, and the consequences they will face for infractions.
- Ensuring prompt investigation, accountability, and redress for abuses suffered by asylum seekers while in custody.
- Restoring prompt employment authorization and ending public charge penalties for using these support services when needed.
- Ensuring that asylum seekers have the means to live with dignity and contribute to the economy by allowing access to health care, education, and social services.
- Including asylum seekers in all COVID-19 relief and assistance plans.



3 THE UNITED STATES SHOULD PROVIDE A FAIR AND EFFICIENT SYSTEM FOR DETERMINING CLAIMS TO ASYLUM

A fair and efficient asylum system serves both the American public and those seeking asylum. People who meet the refugee definition should be recognized promptly without waiting for months or years for their initial decision, and without the need for lengthy and expensive appeals thereafter. Those who have been found not to be in need of protection after a fair procedure can be returned to their home countries. The asylum system should inspire confidence that qualified, impartial adjudicators are making decisions in good faith based on the correct legal standards, and are not responding to political pressures from above or working under unrealistic time constraints. Expedited removal procedures, if used at all, must be thoroughly revised to ensure that asylum seekers are not erroneously returned to persecution or torture.

Adjudicators must interpret the refugee definition and the definition of torture in a manner consistent with the authoritative views of UNHCR and the United Nations Committee Against Torture, both as a matter of U.S. treaty obligations and as a basic component of due process. People who meet the refugee definition must benefit from the principle of *non-refoulement*, and should not be denied asylum based on discretionary considerations. The U.S. legal category of withholding of removal to persecution does not comport with international law and should be eliminated. It requires a higher likelihood of harm to engage the obligation of *non-refoulement* yet deprives the applicant of the benefits of asylum status including, crucially, family reunification. It is inconsistent with the Refugee Protocol, illogically mandates a heightened showing to receive a lesser form of

protection, and needlessly complicates asylum adjudication. Instead, most of the bars and limitations that render people ineligible for asylum should be eliminated.

Adjudicators should have adequate staff support and other resources to do their jobs in a timely manner, rather than being subject to arbitrary and unrealistic case completion quotas. Adjudicators should treat asylum seekers humanely and respectfully, mindful that they are the embodiment of American justice to a foreign national.

To promote both efficiency and fairness, asylum seekers should be given all the necessary information required to present their claim, in a language that they understand. All asylum seekers should receive appointed counsel if they cannot afford an attorney. While moving quickly to put such a system in place, all asylum offices and immigration courts should provide frequent know-your-rights presentations, legal orientation programs, and attorney referral services.



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Specific steps that the United States should take include:

- Scaling back the use of expedited removal as quickly as possible, with the goal of eliminating it entirely unless and until well-documented problems with its implementation are resolved.
- Simplifying and shortening the asylum application form including its instructions, and translating it into the languages used by asylum seekers.
- Giving the asylum office jurisdiction over all initial asylum applications, including those where the applicant is already in immigration court proceedings.
- Hiring additional asylum officers and providing increased administrative support.
- Providing appointed counsel to all asylum seekers who cannot afford an attorney, and expanding the Legal Orientation Program to asylum offices in the interim.
- Vacating Department of Justice opinions that have limited protection for survivors of domestic violence and other gender-based persecution and for families escaping gang brutality, and that have otherwise improperly narrowed the refugee definition and the definition of torture.
- Vacating Department of Justice opinions that have deprived asylum seekers of procedural protections and a fair chance to present their claims in immigration court.
- Eliminating discretionary denials of asylum except in the most exceptional cases, while working to amend the statute to clarify that those who meet the refugee definition must benefit from *non-refoulement*.
- Withdrawing all pending proposed regulations on asylum and rescinding all recently finalized regulations on asylum, withholding of removal, or protection under the Convention Against Torture.
- Supporting passage of the Refugee Protection Act or similar legislation in favor of refugees and asylum seekers.
- Promulgating regulations consistent with the Refugee Protection Act and international law.





4 THE UNITED STATES SHOULD RESPECT FAMILY UNITY AND THE BEST INTERESTS OF THE CHILD

The idea that families belong together is so basic to American values that it should not have to be said. Yet the United States has lost sight of this core principle in responding to families in need of protection. Separating families seeking asylum must never again be a policy chosen by the U.S. government. Detaining children, with or without their parents, should never be a policy chosen by the U.S. government.

For the same reason - that families belong together - asylum protection for families must conform with our treaty obligations. Under U.S. law, an adult granted asylum may extend that status to his or her spouse and unmarried children, in recognition of their right to remain together or to be reunited promptly to live together in safety and dignity. However, a child granted asylum cannot convey that status to his or her parents and siblings, thus violating their right to family unity.

Worse still, even this limited form of family unity is available only for those who obtain asylum, not for those who are granted withholding of removal. But asylum under U.S. law is unavailable to a large number of applicants due to a long list of bars and limitations imposed over the years, the vast majority of which are not based on the Refugee Protocol and are thus inconsistent with international law. Even those applicants who are not barred for these unjustified reasons, and who show they meet the refugee definition, may still be denied asylum in the exercise of discretion. In both cases - applicants barred from receiving asylum, and applicants who meet the refugee definition but are denied as a matter of discretion - the only other available category of protection from persecution under U.S. law is withholding of removal.

Withholding of removal requires showing an even greater risk of harm but paradoxically does not allow for any form of family unity, even from a parent to a child. This means each family member must show that he or she qualifies individually, which is often an impossible burden, especially for young children who cannot articulate their risk. This harsh approach violates the Refugee Protocol and the principle of the best interests of the child.

Unaccompanied children seeking asylum must be given the full protection of existing law, including the Trafficking Victims Protection Reauthorization Act. Meanwhile, the United States must move swiftly to implement a broad range of more protective procedures for unaccompanied children including special advocates and appointed counsel in all cases, to ensure that the best interests of the child are at the heart of any action taken by the United States.



Specific steps that the United States should take include:

- Committing never to separate family members seeking asylum unless done in the best interests of the child and consistent with the principles of due process.
- Redoubling efforts to reunite those already separated.
- Ending criminal prosecution of asylum seekers for their manner of entry, which leads to family separation.
- Ending detention of children, with or without their parents.
- Providing for family unity when a child is granted asylum and, until asylum is made mandatory for those who meet the refugee definition, when a parent or child qualifies for withholding of removal.
- Working to expand procedural protections for unaccompanied children seeking asylum, including as a first step, appointed counsel in all cases.

5 THE UNITED STATES SHOULD RESTORE THE REFUGEE RESETTLEMENT PROGRAM AND BUILD OTHER PATHWAYS TO PROTECTION

The United States should resume its preeminent position as the world's leader in refugee resettlement by returning to our customary levels of overseas refugee admissions. This honors U.S. traditions as a haven for the persecuted, recognizes the unprecedented number of refugees worldwide, increases the humanitarian space available in other countries of asylum, and is a key method of sharing responsibility among States.

While the Refugee Protocol remains the cornerstone of international protection, the refugee definition as originally drafted in 1951 no longer encompasses all those in need of protection. Many other countries have expanded their refugee definition to include people fleeing from generalized violence, armed conflict, massive violation of human rights, or other circumstances which have seriously disturbed public order. The United States should consider following suit. One such definition is found in the [Cartagena Declaration on Refugees](#), which has been adopted in domestic law by many countries in the Americas.

The effects of climate change are becoming increasingly apparent. While most people displaced in the context of disasters and climate change stay within their own country, the United States should join in international efforts to determine how best to respond to those who must cross a border. Existing U.S. law recognizes that foreign nationals who are already in the United States and are unable to return to their home country due to an environmental disaster should receive temporary protected status. This category should be used commensurate with the need for it, and it should be amended to be a more flexible and useful tool.

Specific steps that the United States should take include:

- Increasing the refugee resettlement goal to 125,000 within the administration's first year in office and rebuilding the domestic refugee resettlement network to allow for even higher levels of admissions in the future.
- Resuming and expanding the Central American Minors program and other forms of in-country processing as an addition to, not a replacement for, seeking asylum at the U.S. border.
- Working in a spirit of true cooperation with governments in the Americas to address regional protection needs.
- Restoring Temporary Protected Status (TPS) to those who have lost it in recent years and designating new countries as envisaged by the statute, while providing permanent status for long-term TPS holders.
- Exploring expansion of the refugee definition under U.S. law along the lines of the Cartagena Declaration.
- Considering as an initial step how to expand the usefulness of Temporary Protected Status to respond to people fleeing from the effects of climate change, for example by extending it to those seeking entry to the United States not just those who are already here.
- Joining international efforts to protect and assist people displaced as a consequence of climate change.



6 THE UNITED STATES SHOULD RESUME ITS ROLE AS A GLOBAL LEADER IN REFUGEE PROTECTION

Protecting refugees is a global challenge requiring a global solution. The United States should once again lead international efforts to protect refugees, find solutions to their plight, and address the root causes that force people to flee.

The United States hosted the 2016 Leaders' Summit on Refugees to rally nations to step up their efforts in response to the largest forced displacement crisis since the Second World War. The United States joined in the 2016 New York Declaration for Refugees and Migrants, which laid the groundwork for the 2018 Global Compact on Refugees, a non-binding agreement to strengthen cooperation and solidarity with refugees and affected host countries. Despite its previous leadership role, the United States voted against the Global Compact on Refugees when it came before the United Nations General Assembly. This missed opportunity should be made up. The Global Compact on Refugees has four main objectives, all of which are fully consistent with our tradition of humanitarian leadership: to ease pressures on the small number of countries that host the majority of refugees, to enhance refugee self-reliance, to expand access to third-country solutions, and to support conditions in countries of origin for return in safety and dignity.

It is in the national interest of the United States to honor our treaty obligations and to work cooperatively with countries in the Americas and around the world in a good faith effort to address problems of forced migration. We should set an example by improving our own asylum system in accordance with these fundamental principles and should assist other countries of asylum in building their capacity to receive refugees. Most importantly, we should address the root causes that force people to flee by promoting human rights and invest in sustainable development around the world, so that people can live in safety and dignity in their home countries.

Specific steps that the United States should take include:

- Increasing funding to UNHCR and other organizations assisting refugees around the world.
- Joining the Global Compact on Refugees.
- Undertaking robust collaborative efforts to respond to forced migration in the Americas and in other regions of the world, working cooperatively with governments, the United Nations, the Organization of American States and other regional bodies, as well as civil society organizations to address root causes, ensure protection and assistance for those who are forced to flee, and provide durable solutions.

CENTER FOR Gender & Refugee STUDIES

The [Center for Gender & Refugee Studies](#) is a national organization that provides legal expertise, training, and resources to attorneys representing asylum seekers, litigates to expand protections for refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.



All photos by Brooke Anderson.