Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

A special interest hearing on

THE HUMAN RIGHTS OF ASYLUM SEEKERS IN THE UNITED STATES

presented by

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INTRODUCTION

In certain jurisdictions in the United States, immigration judges and prosecutors use open and notorious sub-regulatory rules that have no normative legal legitimacy to create asylum free zones, spaces where asylum seekers are systematically denied protection. The use of these sub-regulatory rules to divest asylum applicants of a fair adjudication requires intervention by the U.S. government, which has not taken serious action to address this problem. This inaction violates regional and international human rights obligations. While the U.S. government is not required to meet quotas for protection of asylum seekers in all jurisdictions, it is responsible for designing a system that will achieve in most cases a fair adjudication grounded in rule of law principles. While the appeal process for asylum cases is designed to fix errors in case-by-case adjudication, it does nothing to address flaws in the design of the system of adjudication. Indeed, the appeal process has not corrected the abnormality in adjudications as the trend line has worsened over time in these asylum free zones. Despite a substantial body of evidence produced by academics, research institutions, and the U.S. government itself that the system of asylum adjudication produces systematically unfair results, the U.S. government has not acted. The existence of jurisdictions where asylum seekers have no hope of international protection violates the American Declaration on the Rights and Duties of Man and requires the U.S. government to design corrective actions to come into compliance with its human rights obligations.

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I. THE PROBLEM OF DISPARITIES IN ASYLUM ADJUDICATION

Jurisdictions that do not protect asylum seekers, thereby creating asylum free zones, have emerged in a complex landscape of asylum protection in the United States, and this section provides the necessary background to appreciate the gravity of the problem. This section first provides a brief overview of the U.S. asylum law framework, and then describes the U.S. system of asylum adjudication. The final part of this section presents a sample of the quantitative and qualitative studies of the disparities in the U.S. system of asylum adjudication, a situation which has normalized the injustice faced by some persons who have no hope of success on their asylum claim regardless of the merits because of where they live and which adjudicator is assigned to their case. The normalization of this injustice set the stage for the emergence of the asylum free zone phenomenon, which until now has not been scrutinized as a violation of U.S. international and regional human rights obligations.

A. The U.S. Asylum Law Framework

The United States ratified the 1967 Protocol to the 1951 Convention on the Status of Refugees (Refugee Convention) in 1968, and assumed all of the international obligations under the Refugee Convention at that time. Over the decade that followed, it became clear that implementing legislation would be necessary in order to bring U.S. law into compliance with those obligations. Accordingly, the United States passed the Refugee Act in 1980, which made substantial additions to the Immigration and Nationality Act (INA), the main law governing immigration in the United States. The 1980 Refugee Act incorporated into the INA both the refugee definition from the Refugee Convention, as well as the mandatory protection of *nonrefoulement* enshrined in that same document. The Refugee Act also provided a means to resettle refugees from foreign territories to the United States, and amended the INA to provide procedures for persons present in the United States to claim refugee status and seek the protection of asylum.

A refugee is defined under U.S. law as "any person who is outside any country of such person's nationality … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[1] A person qualifies for asylum if she meets the refugee definition, is present in the United States, and is not subject to any statutory bars.[2] The first case about asylum protection to be heard before the U.S. Supreme Court, *INS v. Cardoza Fonseca*, concerned the likelihood of persecution that would trigger asylum protection.[3] In answering the question presented, the U.S. Supreme Court looked to the Refugee Convention, acknowledging the international law roots of U.S. asylum law and recognizing the need to read that body of law in conformity with U.S. international obligations.[4]

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[1] INA § 101(a)(42)(A).
[2] INA § 208.
[3] *See INS v. Cardoza Fonseca,* 480 U.S. 421 (1987).
[4] In *INS v. Condoza Fonseca*, the U.S. Supreme Court found that a person seeking asylum must demonstrate a 1 in 10 chance of persecution in order to meet the "well-founded fear" standard for protection derived from the Refugee Convention.

Since those early years of asylum law in the United States, the INA has been revised and reformed, in some cases clarifying possible bases for relief,[5] and on other occasions increasing the grounds for exclusion from refugee protection in violation of international refugee law.[6] Moreover, there has since developed a substantial body of case law, where courts have parsed the refugee definition to find the precise extent of this humanitarian protection.[7] At the same time that this body of law, including statutes, related regulations, and jurisprudence interpreting both statutes and regulations has grown, so has the bureaucracy for the adjudication of asylum claims, making such claims even more complicated as a procedural matter.

B. The U.S. System of Asylum Adjudication

Non-citizens in the United States can request asylum affirmatively in the Asylum Office or as a defense against removal in immigration court. Non-citizens who are not in removal proceedings, either because they have immigration status or because they are undocumented but have not been detected by immigration authorities, can file an asylum application affirmatively with U.S. Citizenship and Immigration Services (USCIS), a sub-agency of the Department of Homeland Security (DHS).[8] USCIS administers eight Asylum Offices in the United States, where Asylum Officers conduct non-adversarial interviews to determine an applicant's eligibility for asylum. Each Asylum Office covers an expansive area; for example, offices in Arlington, VA, Miami, FL, and Houston, TX (including a New Orleans sub-office), serve all of the southern states of the United States.[9] Individuals who are not granted asylum by an Asylum Office and do not have permission to reside in the United States are referred to removal proceedings in immigration court.

The Executive Office of Immigration Review (EOIR), a sub-agency of the U.S. Department of Justice (DOJ), administers a system of 58 immigration courts located throughout the United States and its territories.[10] All removal proceedings are initiated by Immigration and Customs Enforcement (ICE), a DHS sub-agency, against non-citizens that ICE charges as removable. Whether a removal proceeding is initiated after a case is referred to Immigration Court by the Asylum Office, or ICE identifies a potentially removable non-citizen of its own accord, the non-citizen may plead eligibility for asylum as a defense against removal from the United States. If the

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[5] *See* INA § 101(a)(42)(B), clarifying that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion …"

[6] Jaya Ramji-Nogales, "Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act," 37 Stan. J. Int'l L. 117 (2001).

[7] *See* Anker, Deborah E., *Law of Asylum in the United States*, Thompson West 5th ed. (2012).

[8] *See* USCIS, Asylum Applications Filed, January 2015, *available at*: https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-2015-01-03-NGO-Asylum-Stats.pdf.

[9] The other five asylum offices are located in New York, NY, Newark, NJ (including a Boston sub-office), Chicago, IL, Los Angeles, CA, and San Francisco, CA.

[10] *See* EOIR Immigration Court Listing, *available at*: https://www.justice.gov/eoir/eoir-immigration-court-listing.

asylum seeker is able to demonstrate her eligibility, an immigration judge has the discretion to grant asylum, which then makes the asylee eligible for certain benefits and to permanently immigrate to the United States after one year.

If an immigration judge denies an application for asylum for any reason, the asylum seeker has the right to appeal to the Board of Immigration Appeals (BIA), also administered by EOIR. The BIA reviews factual findings under a clear error standard, and legal determinations *de novo*, but it is limited to the factual record created by the Immigration Court in its review.[11] A final decision by the BIA in an asylum case may be appealed to the U.S. Court of Appeals with jurisdiction over the Immigration Court that originally decided the case.[12] The Circuit Court, like the BIA, is limited in its capacity for review, meaning that many of the discretionary actions by the immigration judge in immigration court lie beyond serious appellate scrutiny.

C. Disparities in Asylum Protection Are Well-Documented

Immigration courts in the United States are administrative courts. The Attorney General appoints immigration judges to the bench in Immigration Court, and the 58 courts vary in the number of sitting judges; indeed, some immigration courts have only a few immigration judges while others have a few dozen. An important resource for tracking the profile and performance of immigration judges is the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, which regularly compiles and analyzes immigration judge records.[13] TRAC's Immigration project completes regular reviews of the performance of immigration judges in asylum matters, and provides a searchable database that calculates denial rates for each immigration judge in the United States and compares the performance of individual judges to the national average.[14]

While TRAC Immigration provides an interactive resource with statistics that are updated on an ongoing basis, scholars have produced a number of studies that explore the disparities in the performance of immigration judges in asylum cases. Most notably, Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, published an article describing their groundbreaking study entitled *Refugee Roulette: Disparities in Adjudication and Proposals for Reform*,[15] and they subsequently published a book expanding their analysis.[16] That study analyzed decisions from "all

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[11] Notably, because the immigration courts and the BIA are entities of the EOIR, within the DOJ, they are under the authority of the U.S. Attorney General, which may certify any decision of the BIA to herself and decide the case as she deems appropriate. *See e.g. Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008) (vacating a decision of the BIA denying protection to a woman from Mali who had suffered past female genital cutting).

[12] *See* Map of U.S. Courts of Appeals, *available at*: www.uscourts.gov/file/document/us-federal-courts-circuit-map.

[13] *See* TRAC Immigration, *available at* http://trac.syr.edu/immigration/.

[14] *See* TRAC Immigration Judge Reports – Asylum, *available at* http://trac.syr.edu/immigration/reports/judgereports/.

[15] Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (November 2007).

[16] Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Adjudication and Proposals for Reform* (NYU Press 2009).

four levels of the asylum adjudication process" including "140,000 decisions of 225 immigration judges over a four-and-a-half-year period." The study revealed for the first time, in a systematic way, the shocking disparities in the rates at which asylum was granted at the different levels of the system. Notably, the study showed that "Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building."[17] The study calculated a mean grant rate at the Miami Immigration Court for asylum cases from Colombia, and found that more than half of the judges deviated from that mean by more than 50%, thus revealing a troubling trend. Moreover, the study detected similar, vast disparities in performance of adjudicators at immigration courts around the country.[18]

In 2008, perhaps in reaction to the findings published in *Refugee Roulette*, the Government Accountability Office (GAO) reviewed EOIR data from October 1994 through April 2007, and reported that its analysis "showed significant variations in the outcomes across immigration courts and judges (grants versus denials) of such applications."[19] For example, the report showed that applications for asylum that were initiated affirmatively and referred to immigration court by the Asylum Office were granted by the Atlanta Immigration Court at a rate of 6%, while the New York immigration court granted asylum at a rate of 54%.[20] GAO recommended to EOIR that it take corrective measures to address disparities in asylum grant rates that may not be warranted, and EOIR responded by instituting training programs for both sitting immigration judges as well as new immigration judges. GAO also recommended that EOIR provide additional guidance to supervisory immigration judges, and EOIR responded by analyzing the duties of the Assistant Chief Immigration Judges (ACIJ) and publishing an ACIJ Handbook to assist them with their work as supervisors.[21]

The DHS Appropriations Act of 2015 included funding for the GAO to update its 2008 report, and the findings of that new study were recently released. The GAO once again found substantial variations in the rates of asylum grants among many immigration courts in the United States. Very troubling is that some jurisdictions continued to show very low levels of asylum grants, such as the Atlanta Immigration Court, where immigration judges continue to grant asylum in between 0 and 5% of the cases heard.[22] Perhaps more troubling still is that, faced with the persistent problem that has emerged in jurisdictions like Atlanta, the new GAO report makes no recommendations directed at immigration judge training to ensure that asylum seekers are getting a fair opportunity

[17] *Refugee Roulette,* 60 Stan. L. Rev. at 296 (2007).
[18] Id. at 373-374.
[19] *See* Highlights of GAO-17-72, a report to congressional committees, *available at* http://www.gao.gov/assets/690/680977.pdf.
[20] US GAO, Report to Congressional Committees: *Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges* at p. 2 (November 2016), *available at*: http://gao.gov/assets/690/680976.pdf.
[21] Id. at p. 3.
[22] Id at 27.

to present their claim for asylum and that the adjudication is being done in a fair and consistent manner.[23]

II. ASYLUM FREE ZONES – JURISDICTIONS THAT DO NOT PROTECT ASYLUM SEEKERS

In the regional courts in Houston, Texas; Dallas, Texas; Charlotte, North Carolina; and Las Vegas, Nevada, the pure statistical markers show that nearly no claimant will be granted asylum.[24] By way of comparison, the national average for asylum denials is around 52%. In the interest of brevity, this petition highlights the Atlanta, Georgia and Charlotte, North Carolina as asylum free zones.

A. The Atlanta Immigration Court

Practically speaking, there is no asylum law within the 100,000 square miles that generally comprise the physical reach of the Atlanta, Georgia Immigration Court. There is the formal, well-kept apparatus of law: there are immigration judges, there are lawyers, there are court clerks, and there are hearings. There are noncitizens who appear in immigration court every day; some with lawyers, most without. Motions are filed. Papers are processed. *Things* happen on the surface every day such that an observer could feel the daily rhythm play out and conclude that this is the manifestation of the rule of law for asylum claimants.

That conclusion would be mistaken. If the rule of law means that individual cases should be determined by the *law* rather than by the personal biases, attitudes, policies, or ideologies of the adjudicators, then, quantitatively, the asylum outcomes at the Atlanta Immigration Court are the single most important metric to show that this jurisdiction is falling short of what is required under international law. The Atlanta Immigration Court asylum denial rate is 98%. Nearly every single claim for asylum has been denied. It is anomalous that a uniform federal law applying an international standard guided by binding Supreme Court precedent would result in the denial of almost every asylum claim presented in Atlanta at twice the national rate.

It appears that the failure of the Atlanta jurisdiction infects other parts of the adjudication ecosystem. Among all non-detained immigration court dockets in the entire country, Atlanta ranks near dead-last in representation rates at twenty percentage points lower than the national average (which is already abysmal). Lawyers have begun to literally opt-out of the system for many reasons, including poor treatment by judges and the "lotto number" odds of success.[25] Among the

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[23] *See Id*. at 35-43. The recommendations in the GAO report are geared towards bolstering the Legal Orientation Program (LOP) and the Legal Orientation Program for Custodians of Unaccompanied Alien Children (LOPC). These are important programs geared toward ensuring that more asylum seekers are represented, observing that statistically, represented asylum seekers are granted asylum at higher rates.

[24] *See* TRAC Immigration Judge Reports – Asylum, *available at* http://trac.syr.edu/immigration/reports/judgereports/.

[25] Chico Harlan, *In an immigration court that nearly always says no, a lawyer's spirit is broken*, Washington Post, (Oct. 11, 2016), https://www.washingtonpost.com/business/economy/in-an-

small number of cases that are represented, few lawyers represent asylum claimants and an even smaller few provide pro bono services to asylum claimants. Law school immigration clinics, which exist in every other large city, have yet to develop in Atlanta. This creates a vicious cycle whereby asylum claims are, increasingly, not even brought forward for individuals with meritorious claims. Therefore, the brutal nearly universal denial of asylum claims almost certainly understates the extent of the asylum crisis in Atlanta.

The existence of an asylum law-free zone in Atlanta has serious national implications. The Atlanta asylum law-free zone creates a severe regional inequality within what is supposed to be a national asylum scheme with international humanitarian roots. In essence, families in states outside of the jurisdiction live under a different legal regime than families in Atlanta. This differential treatment of Atlanta asylum seekers has no legitimate basis and is arbitrary and capricious, denying them equal protection before the law.[26] And a jurisdiction where asylum law has all but ceased to operate becomes an attractive jurisdiction for intense immigration enforcement against refugee claimants that tends to negate the legal principle of *nonrefoulement*. For example, the direct experience of the undersigned attorneys and other credible reports have shown that immigration enforcement against asylum claimants is particularly onerous and chilling in Atlanta.[27]

Qualitative reports from the undersigned attorneys and others working in the field describe the situation as a combination of factors that are unrelated to the governing law and instead appear to originate in the national government's inability or unwillingness to supervise asylum adjudications in these jurisdictions. The result of this inability or unwillingness to supervise asylum adjudications in these jurisdictions has been the creation of rogue immigration judges who serve as a second prosecutor instead of a neutral fact-finder. In fact, five of the six Atlanta immigration judges have a law enforcement background and four of these five immigration judges served in a

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immigration-court-that-nearly-always-says-no-a-lawyers-spirit-is-broken/2016/10/11/05f43a8e-8eee-11e6-a6a3-d50061aa9fae_story.html?postshare=8701476271087334&tid=ss_tw&utm_term=.1e7d11c97f3a

[26] *See* 1I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4, p. 104, para. 54.

[27] Letter to Sec. Jeh Johnson and Atty General Loretta Lynch from 156 organizations, AILA Doc. No. 16061601 (June 16, 2016) at 1 (explaining that "serious errors committed by government officials would have resulted in the wrongful deportation of children and their mothers to the life-threatening conditions from which they fled."); *id.* at 2 ("All but two of the families were arrested in four states: Georgia, North Carolina, South Carolina, and Texas -- where the local immigration courts have among the lowest asylum grant rates in the country."); American Immigration Lawyers Association, *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States* at 22 (June 16, 2016), AILA Doc. No. 16061461; Elise Foley, *Here's Why Atlanta Is One Of The Worst Places To Be An Undocumented immigrant*, The Huffington Post (May 25, 2016) ("ICE is set to ramp up its raids in coming months on Central Americans who came to the U.S. in or after a 2014 surge in border apprehensions of mothers and children. Officials won't say where they'll focus their efforts, other than that they will target people who were already denied asylum or other deportation relief in the courts. In Atlanta, that's almost everyone.")

prosecutor role prior to becoming immigration judges.[28] Without the national government's active supervision and training of such a group, it is expected that the default position is one of prosecution.

Credible reports indicate that refugee claims based on gender violence and other persecution perpetrated by non-state actors, such as gangs and other criminal organizations, are disfavored. Undersigned attorney Sarah Owings has spent the last 10 years practicing removal defense before the Atlanta Immigration Court. She has witnessed instances of prejudice against gang- and gender-based Central American asylum claims by the immigration judges and the ICE trial attorneys in the form of commentary on and off the record. These comments suggest the belief that gang- and gender-based Central American cases are not viable asylum claims contrary to legal precedent, BIA unpublished decisions, and the USCIS Central American Minors (CAM) Refugee/Parole Program. A large-firm pro bono attorney representing a Central American asylum-seeker recently issued the following comments following her first experience before the Atlanta Immigration Court:

> "I am not sure I can muster words in writing beyond saying it was outrageous. We are still in shell shock and have many thoughts we'd love to share with like minds about the situation in the Atlanta courts. It was clear to us that the decision was made well before we entered that courtroom. There was a lot of mention of this case was 'priority 1,' for example."[29]

Credible reports indicate that without adequate national supervision, these immigration courts have developed policies and practices that discourage claims on the merits and erect non-statutory and onerous procedural barriers. The immigration judges discourage presentation of legal claims on the merits by providing short time periods between the preliminary hearing during which counsel submits the asylum application and the final merits hearing during which counsel presents the asylum case. For example, instead of providing the required minimum of 45 days in between hearings, only 14 days were allowed.[30] Even *pro se* asylum seekers—children included—are routinely granted only two-week continuances to complete and file their asylum applications. Written motions to continue the hearing to allow for additional case preparation are denied right before the scheduled hearing. In one well-publicized case an attorney requested a continuance of the hearing because she was scheduled to give birth just three weeks following the hearing and the immigration judge denied the motion three days prior to the hearing citing "no good cause" shown for the continuance. When the attorney attended the hearing with her nursing baby, the

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[28] See TRAC Immigration Judge Reports – Asylum, *available at* http://trac.syr.edu/immigration/reports/judgereports/.

[29] "Priority 1" is a reference to the November 20, 2014 Memo entitled "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," issued by DHS Secretary Johnson in which he established 3 priorities for removal, including "Priority 1 (threats to national security, border security, and public safety)"; *available at*: https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

[30] *B.H., et al. v. United States Citizenship and Immigration Services*, et al., No. CV11-2108-RAJ (W.D. Wash.).

immigration judge berated her.[31] Examples of non-statutory and onerous procedural barriers include the routine and blanket denial of telephonic appearances by expert witnesses such that providing expert witness testimony in support of a claim becomes financially impossible for impoverished and low income asylum seekers.

Credible reports indicate that without adequate national supervision, these immigration courts have policies and practices that limit access to counsel and representation. The few pro bono attorneys who volunteer to take these cases are treated with such disrespect by the Immigration Judges that they often refuse to take additional cases. This is reflected in the very low rate of attorney representation in the Atlanta court.[32] Those asylum-seekers who seek a change of venue to another immigration court because, *inter alia*, they are unable to find low or pro bono counsel are limited in accessing counsel elsewhere by the Immigration Judges' pattern and practice of denying change of venue motions or withholding a ruling on the motion thus forcing out-of-state counsel to appear and seek local counsel to substitute. These practices have led to out-of-state attorneys declining representation on Atlanta-based cases as there is no guarantee that the immigration judge will grant the change of venue. For indigent asylum seekers, these policies and practices force them to use their savings on preliminary court matters that are unnecessarily complex and resulting in their inability to pay for representation on the merits of their asylum claim.

B. The Charlotte Immigration Court

The Charlotte Immigration Court has jurisdiction over North Carolina and South Carolina. Much like Georgia, in recent years North Carolina and South Carolina have become one of the highest "receiver states" for Central American asylum seekers due to, in part, its low cost of living and agricultural jobs.[33] Despite the higher number of asylum applications, the percentage of asylum approvals has declined from 29% in 2012, to 18% in 2013, 16% in 2014, and 13% in 2015.[34] Undersigned attorney Atenas Burrola's experiences, as well as those of other practitioners before the three Charlotte Immigration Judges help explain this plummeting number of asylum approvals.

Similar to its neighbor to the south, the Charlotte Immigration Court has displayed bias against Central American gang and gender-related asylum claims. Attorneys have witnessed immigration judges going off the record to say that the applicable case law is "wrong," telling *pro se* asylum seekers that they do not qualify for asylum if they fled their country on account of gang violence, and challenging counsel who represent these cases by saying that a complaint will be filed against them or implying that they are putting their professional reputation on the line by bringing such asylum claims. Whereas immigration judges in other courts entertain a claims based on persecution

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[31] *When judge refuses to delay hearing for attorney's maternity leave, she brings infant to court*, The Associated Press (Oct. 16, 2014), http://www.foxnews.com/us/2014/10/16/when-judge-refuses-to-delay-hearing-for-attorney-maternity-leave-brings-infant.html.

[32] Direct representation to asylum-seekers by area NGOs is often prohibited by the terms of the government grants that these NGOs receive thereby limiting the availability of low and pro bono options.

[33] *See* EOIR Statistical Yearbooks from 2011-2015, available at https://www.justice.gov/eoir/statistical-year-book.

[34] *Id*.; The Charlotte immigration court was not among those studied in the recent GAO report.

on account of a particular social group, the Charlotte immigration judges refuse to consider certain particular social groups upheld by the BIA or the U.S. Court of Appeals for the Fourth Circuit, the federal appeals court with jurisdiction over North Carolina and South Carolina. *Pro se* respondents are often not even given the chance to proffer a particular social group that may qualify them for asylum, because they are never given the opportunity to submit an application. This applies particularly to those cases that judges view as related to gender violence or violence by non-state actors, such as organized crime actors.

For example, an excerpt of a recording of a preliminary master calendar hearing documents one Charlotte immigration judge as prejudging the asylum claim:

> "Unfortunately based upon what you've told me the law doesn't allow me to grant asylum under those facts. While I understand that there are problems with gangs, serious problems in El Salvador, I have to still consider what the law allows me to grant on applications for asylum. And from what you've told me and what you've said in your credible fear interview, the fear that you have of the gangs is related to their demands that your husband pay the money. And unfortunately, ma'am, that's not a basis for which I can grant asylum."

On another occasion, after hearing how a *pro se* respondent had fled after members of her family were kidnapped, and her daughters were threatened with kidnapping, the immigration judge told the asylum seeker:

> "I can only let people stay here in the United States for limited reasons… And being afraid of the general violence and being afraid of kidnapping is not one of the reasons I have to let you stay here…. The only thing I'm going to be able to do for you today is order you and your children deported from the United States."

This determination was not made by the immigration judge after an evidentiary hearing and after the asylum seeker had submitted an application for asylum, despite her saying that she came to the United States to apply for asylum, but rather after a very brief line of questioning after which the Judge simply decided that she did not qualify for asylum.

When those few asylum cases that move forward get to the final merits hearing stage and obtain coveted expert testimony, they often fare no better than those without expert testimony. The immigration judges routinely undermine expert testimony by referring to the expert as "so-called experts." The immigration judges reject general expert affidavits on issues such as domestic violence, that do not make specific reference to the asylum seeker, but provide important country conditions evidence, and which are commonly admitted by immigration judges in other immigration courts. Allowing such general declarations is of paramount importance especially for indigent and low income asylum seekers, who have no other resources to provide specific expert evidence. One Charlotte immigration judge declined to give an attorney more time to obtain expert testimony because the immigration judge "lives the conditions in Central America every day," thereby suggesting that he was an expert and the only expert needed.

The Charlotte immigration judges all have a prosecutor background, like their Atlanta counterparts. The national government's inability or unwillingness to supervise asylum

adjudications leads to this prosecutor experience infiltrating the process. The judges' attitude leads to an absence of fundamental fairness and due process. For example, an Immigration Judge asked an asylum seeker the cross-examination question of "well, if they really wanted to kill you, don't you think they would have?" On another occasion, an immigration judge threatened to bring a dog from his office to bite a small child if the child did not be quiet. To a courtroom full of *pro se* asylum seekers and violence survivors, these words did not paint the immigration judge as a neutral and just arbiter. Instead, these words likely reminded them of the DHS Customs and Border Protection agents and the dogs they encountered at the U.S.-Mexico border.

Like in Atlanta, the atmosphere in the Charlotte immigration court leads to very low levels of representation and lower levels of *pro bono* representation. There are no NGO's in the Charlotte area that take *pro bono* defensive asylum cases. The reputation of the Charlotte Court amongst practitioners is such that many attorneys do not want to take cases because they know that they will be disparaged and mistreated by the judges and that, more likely than not, they will lose their case at the immigration court level. Like in Atlanta, this leads to a vicious cycle whereby asylum claims are, increasingly, not even brought forward for individuals with meritorious claims.

C. The Corrosive Effects of Asylum Free Zones

Former U.S. Supreme Court Justice Benjamin Cardozo said "Due process is a growth too sturdy to succumb to the infection of the least ingredient of error."[35] The Houston, Texas; Dallas, Texas; Charlotte, North Carolina; and Las Vegas, Nevada immigration courts lack due process and have succumbed to the infection of error thus becoming asylum free zones. The creation and persistence of the sub-regulatory rules by immigration judges in these jurisdictions are proof of the infection of error. These immigration courts have succumbed to the infection of error because no one has nurtured due process, not the immigration judges and not the U.S. government. Although the 2007 study *Refugee Roulette: Disparities in Adjudication and Proposals for Reform*[36] warned the U.S. government that systematic disparities in asylum adjudications meant due process was weak and infected, the national government continued to neglect its nurturing of due process duties. In fact, since 2007 the national government has imposed priority dockets and speed at all costs policies instead of nurturing due process.

The sub-regulatory rules that exist in Houston, Texas; Dallas, Texas; Charlotte, North Carolina; and Las Vegas, Nevada, are well-documented and well-known to the public, asylum seekers, the immigration bar, DHS, and EOIR. These sub-regulatory rules include, *inter alia*, the denial of expert testimony, telephonic appearances, recording the hearings, continuances despite good cause, change of venues, the right to present evidence, written orders, oral orders, and legal precedent. Taken together, the sub-regulatory rules run afoul with the fundamental guarantee of due process in removal proceedings, which requires that proceedings be conducted with "fundamental fairness." There is no fairness in a system where the immigration judge acts like a second, hostile prosecutor and the asylum seeker is unable to present the case. Myriad complaints against individual immigration judges have been filed yet those same immigration judges remain

[35] *Roberts v. New York*, 295 U.S. 264, 278 (1935).
[36] Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (November 2007).

on the bench without any known reprimands. Numerous BIA appeals are filed in the hope that the BIA will right the wrongs of the sub-regulatory rules, but the BIA does not right all the wrongs. Stakeholder meetings with national government representatives in these jurisdictions are few though stakeholders appear to document their grievances. The stories from attorneys in these jurisdictions like those of Ms. Owings and Ms. Burrola are so shocking and indicative of a pattern and practice of due process violations that the media has taken notice. Whether through individual complaints, appeals to the BIA, stakeholder meetings, media accounts, or studies dating back to 2007, the U.S. government is unquestionably aware these jurisdictions have become asylum free zones where asylum proceedings are fundamentally unfair.

III. ASYLUM FREE ZONES VIOLATE U.S. HUMAN RIGHTS OBLIGATIONS

Asylum free zones, where asylum seekers are prevented from exercising their right under the law to pursue their claim for protection from persecution violates the American Declaration on the Rights and Duties of Man (American Declaration) Article XXVII (right of asylum), in conjunction with Articles XVII (right to a fair trial) and XXVI (right to due process of law).

Article XXVII of the American Declaration provides "the right to seek and receive asylum … in accordance with the laws of each country and with international agreements." The Commission has interpreted this right to include "two cumulative criteria that must be satisfied."[37] The first criterion is that the right to seek and receive asylum must comply with the laws of the country in question, and the second is that the right to seek asylum must comply with "international agreements." Accordingly, in order to be in compliance with its obligations under Article XXVII of the American Declaration, the United States must protect asylum under its own internal law, and in accordance with applicable international legal norms and instruments.

The Immigration and Nationality Act (INA) is the relevant internal framework in the United States, and it provides protection for asylum seekers and is accompanied by a robust body of regulations and case law that implement and interpret this protection. The United States has also ratified the 1967 Protocol, which binds the United States to all of the substantive provisions of the Refugee Convention. Accordingly, the United States must ensure that its practice under the INA comports with its obligations under the Refugee Convention in order to meet its obligations under Article XXVII of the American Declaration. Moreover, when interpreting the scope of the protection enshrined in XXVII, the Commission takes "into account the important evolution of the rules and principles of international refugee law, as well as relying on guidelines, principles, and other official pronouncements put forth by bodies such as the UNHCR."[38]

The Commission previously found the United States to have violated Article XXVI in the *Haitian Boat People Case*, in which it denounced the practice of summary interdiction and repatriation of Haitian refugees to Haiti without granting them a hearing to ascertain whether they qualified as

[37] IACHR, Human Mobility Inter-American Standards, para. 424 (2016) (citing IACHR, Report on Merits No. 51/96, Case 10.675, Haitian Interdiction – Haitian Boat People (United States), March 13, 1997, para. 154).
[38] *Id*. para. 423.

"refugees."[39] Notably, the U.S. Supreme Court had upheld this practice of interdiction and repatriation in *Sale v. Haitian Centers Council*, illustrating how the United States can act in compliance with its own internal laws on asylum, and violate the right to asylum enshrined in the American Declaration.

Not long after it issued the *Haitian Boat People Case*, in its *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, the Inter-American Commission found that: "The obligation of non-return means that any person recognized or seeking recognition as a refugee can invoke this protection to prevent their removal. This necessarily means that such persons may not be rejected at the border or expelled without an adequate and individualized analysis of their requests."[40]

In the case of asylum free zones, while asylum seekers do receive hearings in immigration court as a formal matter, the procedure does not adequately meet the requirements of international law, inasmuch as their cases do not receive adequate individualized analysis. Indeed, the accounts included above from Atlanta and Charlotte immigration courts describe situations where judges are dismissive of claims, insisting that people will not qualify for asylum based largely on where they come from, and before an evidentiary hearing. Moreover, in those cases in which an evidentiary hearing is allowed, important evidence is excluded and the judge often comes to the hearing unwilling to seriously consider the evidence presented.

For more guidance on what constitutes adequate individualized analysis, Article XXVII should be analyzed in conjunction with right to a fair trial (Article XVII) and the right to due process of law (Article XXVI) of the American Declaration. In doing so, it is appropriate for the Commission to look to the substantial body of jurisprudence under analogous rights protected by the American Convention on Human Rights.

In this regard, the Inter-American Commission and Court had occasion to review the sufficiency of asylum procedures under Article 22(8) of the American Convention, which guarantees a right to asylum analogous to Article XXVII of the American Declaration, in *Pacheco Tineo Family* (Bolívia).[41] In that case, both the Commission and the Court analyzed the right to asylum under the American Convention in conjunction with the fair trial protections enshrined in that same document. Specifically, the Commission emphasized that "fair trial guarantees are not limited to judicial remedies, including ... proceedings for the determination of refugee status and any proceeding that might culminate with an individual's expulsion or deportation. From that perspective, the object and purpose of the protections recognized in articles 22(7) and 22(8) of the

[39] IACHR, Report on Merits No. 51/96, Case 10.675, Haitian Interdiction – Haitian Boat People (United States), March 13, 1997.
[40] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian System for Determining Refugee Status*. OEA/Ser.L/V/II.106 doc.40 rev., February 28, 2000, para. 25.
[41] *See* IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolívia). October 31, 2011; I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational States of Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013.

American Convention, introduces certain specific aspects in satisfying the right to fair trial guarantees in the framework of proceedings to do with the scope of those provisions."[42]

The Inter-American Court agreed with the Commission on review, and held that the right to seek and to receive asylum enshrined in Articles 22(7) and (8) of the American Convention, read in conjunction with Articles 8 and 25 thereof, ensures that the person applying for refugee status must be heard by the State, with the basic guarantees of due process.[43] The Court further found that these guarantees must be observed generally in immigration proceedings, and that they were relevant to the request for recognition of refugee status in the process of expulsion or deportation. In this regard, the Court highlighted the following obligations:

> [1] They must guarantee the applicant some necessary conditions, including the services of a competent interpreter, as well as, if appropriate, access to legal assistance and representation for submitting the application to the authorities … ;
>
> [2] The request must be examined, objectively, within the framework of the relevant procedure, by a competent and clearly identified authority … ;
>
> [3] The decisions adopted by the competent organs must be duly and expressly founded.[44]

The Court emphasized that all of this was to protect the right of those seeking asylum to be ensured a proper assessment by the national authorities of their requests and of the risk that they may suffer in case of return to the country of origin.[45] The open and notorious rules listed above, and discussed in the specific contexts of the Atlanta and Charlotte immigration courts violate these standards and therefore fall short of proper assessment required under Articles XVII (right to a fair trial) and XXVI (right to due process of law) of the American Declaration, which are analogous to the American Convention protections elaborated in *Pacheco Tineo Family.*

Indeed, by abusing legal counsel and creating an environment where private and pro bono attorneys alike are disinclined to represent asylum seekers, immigration judges in Atlanta and Charlotte violate the American Declaration. Similarly, by discouraging viable claims and encouraging asylum seekers to simply take removal orders rather than pursue their cases, immigration judges in these jurisdictions violate the American Declaration. Moreover, by

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[42] IACHR, Report on Merits No. 136/11, Case 12.474, *Pacheco Tineo Family* (Bolívia). October 31, 2011, para. 154.

[43] IACHR, Human Mobility Inter-American Standards, para. 431 (2016) (citing I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 155).

[44] I/A Court H.R., Case of the Pacheco Tineo Family v. Plurinational Statesof Bolivia. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 159.

[45] I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia.* Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2013, para. 139, citing ECtHR, *Case of Jabari v. Turkey*, No. 40035/98. Judgment of 11 July 2000, §§ 48 to 50.

excluding pertinent evidence and pre-judging cases based on the country of nationality and the specific context of violence feared, immigration judges violate the American Declaration. These and other sub-regulatory open and notorious practices are used by immigration judges to ensure that certain jurisdictions remain asylum free zones, and this violates protections enshrined in Article XXVII (right of asylum), in conjunction with Articles XVII (right to a fair trial) and XXVI (right to due process of law).

Considering the well-publicized nature of this problem, and the U.S. government's apparent disinclination to take any serious action to meet its international and regional human rights obligations to asylum seekers in these jurisdictions, the Petitioners request the intervention of the Inter-American Commission in this matter.

IV. PETITIONERS' REQUESTS TO THE INTER-AMERICAN COMMISSION

1. Issue a public statement expressing concern about jurisdictions, like Atlanta and Charlotte, that have exceedingly low levels of asylum grants, and highlight that this troubling phenomenon raises fundamental human rights concerns.
2. Conduct a visit to immigration courts in the United States, including the Atlanta and Charlotte immigration courts, to investigate the low grant rates and to raise awareness about the importance of fair asylum adjudications that adhere to human rights standards.
3. Produce a report on the disparities in asylum adjudications, based in part on the visits to the most problematic jurisdictions, and elaborate on the human rights implications of a system that does not address these grievous disparities.
4. Prioritize the processing of a contentious case on this matter, which petitioners intend to file against the United States if this situation is not remedied internally.

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