Better Late than Never: A Critique of the United States' Asylum Filing Deadline from International and Comparative Law Perspectives

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By MISHA SEAY*

I. Introduction

This note critiques the filing deadline for asylum applications in the United States by comparing it to relevant international standards and the practices of other countries. It first looks to international treaties governing asylum procedures and the obligations of the U.S. under international law. It then compares the asylum procedures of three countries that admit similarly large numbers of refugees – Canada, Australia, and the United Kingdom – and discusses the filing deadlines, if any, that they impose on asylum applications in their respective countries. Finally, this note examines the U.S.’s filing deadline for asylum applications (the one-year bar) and the difficulties this deadline presents for asylum seekers in the U.S. The note concludes that the one-year bar violates the U.S.’s treaty obligations and is out of step with common practices of other countries. It also concludes that the one-year bar is both unfair and unreasonable and prevents otherwise eligible refugees from obtaining asylum in the U.S., particularly impoverished asylum seekers. With the possibility of comprehensive immigration reform approaching, this note offers several recommendations for the U.S. government, either to eliminate the one-year bar entirely or adopt other measures to lessen its negative effects on bona fide asylum seekers.

* 2011 J.D. Candidate at the University of California, Hastings College of the Law; M.Sc. 2007, London School of Economics and Political Science; B.A. 2005, University of California, Santa Cruz. I would like to thank Professor Karen Musalo for her invaluable comments and support while writing this article.
II. International Law Pertaining to Refugees

Before comparing the U.S.'s asylum filing deadline with the practices of other countries, it is important to provide context about the U.S.'s obligations to refugees under international law. There are two important international treaties relating to refugees that regulate the nature of asylum procedures that states parties may adopt, in addition to other more general international treaties on civil and political rights.¹


The United Nations Convention Relating to the Status of Refugees (Refugee Convention) and the United Nations Protocol Relating to the Status of Refugees (Refugee Protocol) are the principal international instruments governing refugees. The Refugee Convention of 1951 defines a "refugee" as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²

One of the most important obligations created by the Refugee Convention is the duty of nonrefoulement.³ Article 33 of the Refugee 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."⁴ Australia and Canada

² Convention Relating to the Status of Refugees, supra note 1, art. 1(A)(2).
³ Id. art. 33.
⁴ Id. art. 33(1).
have acceded to the Refugee Convention, but the U.S. and the U.K. have not.  

Adopted by the United Nations in 1967, the Refugee Protocol eliminated the temporal and geographic limitations originally included in the refugee definition. More importantly, however, the Refugee Protocol reaffirmed a commitment to the principles of the Refugee Convention when it stated “States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” As a result, any state party that accedes to the Refugee Protocol, whether or not it has ratified the Convention, thereby assumes the obligations imposed by Articles 2 through 34 of the Refugee Convention, including the duty of nonrefoulement. Canada, Australia, and the U.S. have acceded to the Refugee Protocol – thereby adopting Articles 2 to 34 of the Refugee Convention – but the U.K. has not.

The U.S. modified its domestic laws to bring them into compliance with the Refugee Convention and Protocol through the Refugee Act of 1980 (Refugee Act). The Refugee Act modified the U.S. definition of a refugee to conform to the definition in Article 1 of the Refugee Convention. It also amended its provisions on withholding of deportation to conform to Article 33 of the Refugee Convention, stating that “[t]he Attorney General shall not deport or return any alien... to a country if the Attorney General determines that such alien’s life or freedom would be threatened...”

7. Id. art. 1, ¶ 1.
8. U.N. High Commissioner for Refugees, supra note 5.
10. Ramji, supra note 9, at 122.
11. 8 U.S.C. § 1253(h) (1994) (emphasis added); see Leena Khandwala et al., The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law, 05-08 IMMIG. BRIEFINGS 1 (2005).
B. Other International Treaties

Other international instruments also create a duty of nonrefoulement for those facing torture if returned to their home country. Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) prohibits contracting states from refouling any person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The U.S. assumed a duty of nonrefoulement of potential torture victims when it ratified CAT in November 1994. The United Nations Human Rights Committee (Human Rights Committee) has also interpreted the International Covenant on Civil and Political Rights (ICCPR) as prohibiting the refoulement of certain individuals who may be subjected to torture or similar treatment. Article 7 of the ICCPR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Human Rights Committee stated that State Parties are thus obligated not to expose individuals to the danger of torture "by way of their extradition, expulsion or refoulement." The U.S. also assumed these obligations when it ratified the ICCPR in June 1992. Finally, many international scholars believe that nonrefoulement has reached the status of customary international law.

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 1, art. 3; International Covenant on Civil and Political Rights, supra note 1, art. 7.
13. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 1, art. 3.
14. Ramji, supra note 9, at 123.
16. International Covenant on Civil and Political Rights, supra note 1, art. 7.
19. See e.g., Elizabeth Brundige, Too Late for Refuge: An International Law Analysis of IIRAIRA’s One-Year Filing Deadline for Asylum Applications, 7 BENDER’S IMMIGR. BULL. 778 (2002) (discussing this issue in more extensive detail).
III. A Comparative Analysis of Asylum Procedures

The next Section briefly summarizes relevant asylum procedures in Australia, Canada, and the U.K., and the types of filing deadlines, if any, that they impose on asylum seekers in their respective countries. It also looks at the European Union's approach to filing deadlines. These three countries were chosen as comparators for two reasons. First, on a practical level, information about their laws and practices are widely available in English and thus more accessible to the author for comparison. Second, with the exception of Australia, they receive some of the highest number of asylum applications annually according to recent statistics. The U.S. continues to be the largest recipient of new affirmative asylum claims among industrialized countries; it received almost 24,000 applications in the first half of 2009. Canada and the U.K. are not too far behind, receiving nearly 19,000 and 18,000 asylum applications, respectively, in the first half of 2009. Australia received approximately 2,500 applications in the first half of 2009. In light of such large numbers of refugees applying for asylum each year, it is not surprising that countries undertake measures to ensure that only the most-deserving refugees are able to obtain asylum. The next section will discuss how Australia, Canada, and the U.K. have chosen to deal with the large number of refugee applications they receive on a yearly basis, particularly those that are received long after a refugee has entered the country.

A. Australia

Australia's treatment of refugees is divided between offshore refugees and onshore refugees. Within the group of offshore refugees, there are two kinds of protection available for people

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21. Id.

22. Id.

23. Id.

24. Dean Lusher et al., Australia's Response to Asylum Seekers, in YEARNING TO BREATHE FREE: SEEKING ASYLUM IN AUSTRALIA 9, 11 (Dean Lusher & Nick Haslam eds., 2007).
fleeing persecution and gross violations of human rights. Offshore refugees who meet the definition of a refugee under the Refugee Convention can be resettled in Australia and granted refugee status.\(^\text{25}\) The majority of these applicants are identified and referred by the United Nations High Commissioner for Refugees (UNHCR), and their claims are processed by Australian diplomatic missions abroad.\(^\text{26}\) The government also has a Special Humanitarian Program, which offers resettlement to other individuals who do not meet the definition of refugee outlined in the Refugee Convention, but who are subject to substantial discrimination amounting to a gross violation of their human rights.\(^\text{27}\)

Onshore refugees, on the other hand, are divided between those who arrive with a valid entry visa and those who do not.\(^\text{28}\) The majority of asylum seekers without a visa arrive by boat to land areas outside of Australia’s Migration Zone, and they are referred to as Irregular Maritime Arrivals (IMA).\(^\text{29}\) In 2001, Australia’s Federal Parliament excised certain external territories – Ashmore and Cartier Islands, Christmas Island, and Cocos Islands – from the Migration Zone to allow the government to address the high numbers of refugees arriving to these areas by applying a different set of procedures.\(^\text{30}\) IMA are detained and transferred to Christmas Island until their claims for protection have been completed through a separate process called the Protection Obligation Assessment.\(^\text{31}\) By

\begin{itemize}
\item\(^{25}\) Id.
\item\(^{26}\) Id.; INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM, AND REFUGEES, ASYLUM PROCEDURES: REPORT ON POLICIES AND PRACTICES IN IGC PARTICIPATING STATES 28 (2009) [hereinafter ASYLUM PROCEDURES].
\item\(^{28}\) Lusher et al., supra note 24, at 11.
\item\(^{31}\) The Protection Obligation Assessment procedure for onshore refugees
contrast, refugees who arrive by boat or plane, with a visa, and who subsequently seek asylum at a port of entry or from within the country are subjected to a different set of procedures.\textsuperscript{32} This note is primarily concerned with filing deadlines imposed on onshore asylum seekers who are applying for asylum after entering Australia on a valid visa.

Under the Migration Act, Australia offers asylum to immigrants who meet the refugee definition of Article 1(A) of the Refugee Convention.\textsuperscript{33} Onshore refugees can apply for asylum from the Department of Immigration and Citizenship (DIAC) at either a port of entry from within Australia.\textsuperscript{34} Applications are reviewed for eligibility based on the Refugee Convention's definition of a refugee, as incorporated into Australian law, and on Australia's additional health and character requirements.\textsuperscript{35} While their applications are pending, applicants are eligible for a Bridging Visa (BV) which allows them to remain in the country for the duration of the asylum process.\textsuperscript{36} Once a refugee is found eligible for asylum, the individual is granted a Protection Visa (PV), which affords them permanent residence in the country.\textsuperscript{37}

In the past, Australia has been criticized for various restrictive policies towards arriving refugees, including mandatory detention,\textsuperscript{38} the prior system of Temporary Protection Visas,\textsuperscript{39} and the "Pacific

\textsuperscript{32} Lusher et al., supra note 24, at 11 – 12.


\textsuperscript{34} ASYLUM PROCEDURES, supra note 26, at 25, 27.

\textsuperscript{35} Schloenhardt, supra note 33, at 308.

\textsuperscript{36} ASYLUM PROCEDURES, supra note 26, at 29.


\textsuperscript{38} Australia's mandatory detention was introduced in 1992 and states that all people who arrive by boat without a valid entry visa must be detained indefinitely in immigration detention centers until granted a visa or removed from the country. Exceptions include the elderly, sick, and children under 18. Lusher et al., supra note 24, at 12-13.

\textsuperscript{39} In 1999, Australia created a new visa regime for asylum seekers arriving by boat called Temporary Protection Visas (TPV). Once granted TPV status, a refugee had to wait thirty months before being eligible to apply for permanent protection.
Despite this restrictive history, however, Australia has no formal filing deadline for asylum applications. Instead, the timeliness of an application may relate to an applicant's credibility. Applications made soon after arrival are considered as "evidence to support the conclusion that the applicant has a genuine fear, but this factor cannot be regarded as determinative of that issue." For example, in *Selvaduri v. Minister for Immigration and Ethnic Affairs*, the Federal Court of Australia stated that a twenty-month delay could be taken into account "in assessing the genuineness, or at least the depth, of the applicant's alleged fear of persecution." Australian courts also recognize that refugees come from varied cultural backgrounds and have varying degrees of familiarity with the language and legal system of the country. They are aware that it is not uncommon for immigrants to feel fear and distrust towards the authorities, all of which may cause a refugee to delay in filing an application for asylum.

Australia did, however, have a time limitation as to when asylum applicant can apply for work permission. Before July 2009, refugees who filed asylum applications more than forty-five days after arriving to Australia lost the right to obtain work permission. As of July 2009, however, the forty-five-day rule was replaced with more lenient work permission policies. All asylum applicants now waiting for a

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40. In 2001, the Australian government entered an agreement with the island nation of Nauru in which any unauthorized immigrants in the "migrant zone" who were coming to Australia but had not yet landed on shore were sent to Nauru to have their asylum applications processed. Known as the "Pacific Strategy," this allowed Australia to circumvent its nonfoulement obligations under the Refugee Convention because Naura is not a signatory to the Convention. Lusher et al., *supra* note 24, at 16.


42. ROZ GERMOV & FRANCESCO MOTTA, REFUGEE LAW IN AUSTRALIA 526 (2003).


44. GERMOV & MOTTA, *supra* note 42, at 526.

45. Id.

46. Id. at 525.

47. See *Bridging Visa A*, AUSTRALIAN GOVERNMENT DEPARTMENT OF
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decision from the Refugee Review Tribunal can obtain work permission by applying for a BV "with permission to work." This change in policy—which obviously provides greater access to work for refugees awaiting resolution of their asylum applications—should be contrasted to the U.S. approach which prohibits asylum seekers from obtaining work permits until applications for asylum have been pending without decision by the United States Citizenship and Immigration Services or the Executive Office for Immigration Review for more than 180 days.

B. Canada

Refugee determination in Canada is divided into an overseas program, conducted abroad by visa officers, and an inland program, conducted within Canadian territory. As part of the inland program, asylum seekers can apply for asylum (refugee protection) at a port of entry upon arrival or at an immigration office inside Canada. There are two stages to any refugee protection application. First, an individual conducts an interview with an immigration officer at the Canada Border Services Agency (at a port of entry) or the Department of Citizenship and Immigration Canada (inside Canada) who determines whether the applicant is eligible to make a claim for refugee protection. This initial screening mechanism is intended to weed out individuals who are barred from applying for refugee protection for any of reasons enumerated in the Canadian immigration statutes. Applicants who pass this screening have their

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49. Asylum seekers can submit an application for a work permit 150 days after filing their asylum application, but it cannot be granted until 180 days has passed from the application date. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208.7(a)(1) (2010).


51. Id.


53. Applicants ineligible to submit a claim for protection include those who: 1) are under a final removal order; 2) have already received refugee protection in
claims referred to the Refugee Protection Division of the Immigration and Refugee Board (IRB), an independent administrative tribunal that assesses all refugee protection claims in Canada, to submit an asylum application (personal information form).  

Like Australia, there is no formal filing deadline placed on asylum applications in Canada; instead, a delay in filing can be considered when assessing the credibility of the applicant. Canadian courts appear to review an applicant's explanation for delay in filing for asylum on a case-by-case basis, and whether the applicant's explanation is credible in light of the surrounding circumstances. The Federal Court of Appeal stated that a “delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.” For example, in a case involving domestic violence, the Federal Court of Canada found that a lack of awareness that spousal abuse was a basis for asylum was an “entirely credible” explanation.

Canada or elsewhere; 3) have previously applied and been denied refugee status in Canada, or made claims that were ineligible, withdrawn, or abandoned; 4) are inadmissible on grounds of security, violating human or international rights, organized criminality or serious criminality; or 5) have come directly or indirectly from a country designated as a “safe third country.” Process for Making a Claim for Refugee Protection, Immigration and Refugee Board of Canada (IRB), http://www.cic.gc.ca/english/refugees/inside/apply-after.asp (last modified Feb. 15, 2010).

54. Saufert, supra note 50, at 33; see also Refugee Claims in Canada – After Applying, CIC, supra note 52.

55. ASYLUM PROCEDURES, supra note 26, at 90.

56. See, e.g., Diluna v. Canada (Minister of Employment and Immigration), 1995 CarswellNat 339, para. 8 (Can. F.C.) (WL) (finding that a doctor’s letter showing the applicant suffered from post-traumatic stress symptoms could support an explanation for the delay); Elcock v. Canada (Minister of Citizenship and Immigration), 1999 CarswellNat 1864, para. 17 (Can. F.C.) (WL) (finding that an applicant “had every reason, given their fear of returning to Grenada, to keep a low profile”); Diallo v. Canada (Minister of Citizenship and Immigration), [2002] F.C. 1676, para. 9 (Can.) (finding that applicant’s explanation that she was on a student visa and had a physician’s letter showing she was suffering from depression “seem quite reasonable”); and El Balazi v. Canada (Minister of Citizenship and Immigration), [2006] F.C. 80, para. 7 (Can.) (finding that the possession of a student visa, which the applicant believed would expire at a later date than it actually did, is a factor supporting a determination that a delay was reasonable).

for the applicant's delay in filing. 58 By contrast, spousal abuse would not fall under the two exceptions to the U.S.'s one-year bar to asylum (see Section IV).

In 2004, the IRB Legal Services issued a guidance paper, titled *Assessment of Credibility in Claims for Refugee Protection*, which summarized the relevant law for the Refugee Protection Division and reiterated that the timeliness of an application is relevant to credibility determinations, although it is not necessarily conclusive. 59 Section 2.3.9 of the guidance paper analyzes recent case law and suggests how cases involving long delays in claiming refugee status should be handled. 60 The paper clearly states that "[d]elay seeking and applying for refugee protection is not an automatic bar to a claim for protection." 61 Nevertheless, delay in claiming refugee status "is an important factor which the Board is entitled to consider in weighing a claim for refugee status." 62 The paper also reaffirms the holdings in various cases suggesting that a delay in filing could indicate a lack of subjective fear of persecution because someone with a genuine fear of persecution would apply as soon as possible. 63 Therefore, the timeliness of an application may factor into the merits of an application, rather than be treated as a strict procedural barrier. Furthermore, the paper recognizes that there may be special circumstances contributing to delay, such as those faced by abused women or asylum applicants with psychological conditions. 64


58. Williams v. Canada (Secretary of State), [1995] F.C. 1025, para. 7 (Can.).
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
and Refugee Policy and Legislation. The report laid out potential changes to Canada’s refugee policy and specifically proposed a thirty-day-deadline for making a refugee protection claim, subject to exceptions in certain compelling circumstances. The thirty-day-time limit proposal was never adopted or implemented. Also interesting is that the proposal came three years after the U.S. adopted the one-year filing deadline for asylum claims. Although it is unclear whether the U.S. experience had any impact on the Canadian proposal, the failure of the Canadian government to adopt the proposal is instructive because it shows that Canada considered implementing filing deadlines for asylum applications but has rejected the idea.

A final instance in which filing deadlines have been discussed in Canada – albeit indirectly – is in a case challenging the Canada-United States Safe Third Country Agreement (STCA). In Canadian Council of Refugees v. The Queen, a Colombian national was denied asylum in the U.S. for failing to apply within one year. He subsequently sought asylum in Canada, but his claim was denied based on the STCA between the two countries. The applicants (or plaintiffs) argued that Canada’s Cabinet exceeded its statutory authority by designating the U.S. as a safe third country because the U.S. implementation of the one-year bar rule meant that it did not adequately protect asylum seekers from refoulement. Writing for the Federal Court, Justice Phelan found that his court had authority

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66. Id.
67. Id.
69. Although it is not uncommon that part of these proposals fail to make it into the draft legislation, the author is unaware of the specific reasons that the filing deadline was rejected.
70. The Safe Third Country Agreement is an agreement between the United States and Canada in which individuals seeking asylum in either country must apply in the first country they arrived in. In other words, asylum applicants cannot travel through either country to apply for asylum in the other. Agreement for Cooperation in the Examination of Refugee Status Claims From Nationals of Third Countries, U.S.-Can., Dec. 5, 2002, 2002 U.S.T. LEXIS 125.
72. Id.
73. Id. para. 144; see also SUSAN KNEEBONE, REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 111 (2009).
to review the Cabinet’s designation and concluded that the U.S. was not in “actual” compliance with the requirements of the STCA.\textsuperscript{74} He writes, “the weight of the expert evidence is that the higher standard for withholding [of removal] combined with the one-year bar may put some refugees returned to the U.S. in danger of refoulement. This creates a real risk.”\textsuperscript{75} He further states that the one-year bar rule as applied in the U.S. is inconsistent with the Convention Against Torture and the UN Refugee Convention.\textsuperscript{76} Upon review, the Federal Court of Appeals reversed, finding that Justice Phelan’s decision failed to give proper deference to Cabinet’s designation of the U.S. as a safe third country.\textsuperscript{77} However, the Court’s decision did not directly address the merits of Justice Phelan’s criticisms of the one-year bar based on the expert evidence he reviewed. It merely held that the courts did not have the power to supplant the Cabinet’s designation with its own investigation and conclusion that the U.S. was not a safe third country for purposes of the STCA.\textsuperscript{78} Despite the ultimate outcome of this case, Justice Phelan’s condemnation of the U.S. one-year bar rule is instructive because it demonstrates a real concern regarding the rule’s compliance with international law.

\textit{C. United Kingdom}

The U.K.’s refugee program is divided into the Gateway Protection Programme, conducted at diplomatic missions abroad, and the normal asylum process for refugees at ports of entry or within the U.K.\textsuperscript{79} Individuals who wish to make an application through the normal asylum process must visit the office of the United Kingdom Border Agency (UKBA) in Croydon (London) to be screened.\textsuperscript{80} The UKBA is the body responsible for processing all asylum claims from their start to their resolution.\textsuperscript{81} Upon completion of screening,
applicants are then routed through one of three processes: the normal asylum procedures, the Detained Fast-Track procedure, or through Third Country procedures.\(^\text{82}\)

Regardless of which process the applicant’s asylum claim is placed in, there are no specific time limits for making an asylum application.\(^\text{83}\) Similar to Australia and Canada, however, “an unexplained delay in applying for asylum following arrival in the U.K. is likely to damage an applicant’s general credibility.”\(^\text{84}\) For instance, Section 8 of the Asylum and Immigration Act 2004 lists a number of factors that go to an applicant’s credibility, including “any behaviour by the claimant that the deciding authority thinks . . . is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.”\(^\text{85}\) Paragraph 339N of the Immigration Rules now incorporates Section 8 “[i]n determining whether the general credibility of a person has been established.”\(^\text{86}\) Courts have interpreted Section 8 as requiring applicants who delay before filing an application to “credibly explain” why they did not do so promptly.\(^\text{87}\) Nevertheless, Paragraph 339M of the Immigration Rules states that “[a]pplications for asylum shall be neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.”\(^\text{88}\)

\(^{82}\) Id. at 368.

\(^{83}\) Id. at 377.

\(^{84}\) Id.

\(^{85}\) Asylum and Immigration Act, 2004, c. 19, § 8 (U.K.) (emphasis added).

\(^{86}\) Immigration Rules Part 11 – Asylum, U.K. BORDER AGENCY, http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/ (last visited Apr. 6, 2011). Paragraph 339L states that asylum claims based on statements that are not supported by documentary or other evidence do not need confirmation as long as five conditions are met, one of which is that the claim was made at “the earliest possible time, unless the person can demonstrate good reason for not having done so . . . .” Id. Additionally, Paragraph 339M provides that the Secretary of State may consider an asylum claim to be unsubstantiated and deny the application if the applicant “fails, without reasonable explanation, to make a prompt and full disclosure of material facts . . . this includes, for example . . . failure to complete an asylum questionnaire or failure to comply with a requirement to report to an immigration officer for examination.” Id.


\(^{88}\) See Immigration Rules Part 11 – Asylum, U.K. BORDER AGENCY, supra note 86.
Although the U.K. has no strict time deadline for filing asylum applications, organizations representing asylum seekers have still expressed concern that Section 8 results in adjudicators "ignoring the underlying trauma of fleeing persecution and instead seeking evidence of deceit by focusing on behaviours outside the country of persecution, behaviour which is often in fact indicative of persecutory experience."\(^9\) In other words, in cases in which there has been a delay in filing, Section 8's analysis of credibility creates the risk that a bona fide claim for asylum will not be given objective consideration.\(^9\)

Delay in filing for asylum can also affect the provision of public benefits to asylum-seekers under the National Asylum Support Service (NASS). The U.K. Secretary of State has the authority to provide accommodation and social assistance to refugees that appear destitute or are likely to become destitute within a fourteen-day period after arrival.\(^9\) However, under the Nationality, Immigration and Asylum Act of 2002, the Secretary of State may not provide such support to a person who "the Secretary of State is not satisfied that [their asylum] claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom."\(^9\) None of these provisions bar an individual from applying for or obtaining asylum because of the applicant's failure to apply within a specified period of time after arrival.\(^9\)

**D. European Union Directives**

While members of the European Union each have their own national legislation establishing asylum protection in their respective countries, in 1999 the European Union Council pledged to develop "common standards for a fair and efficient asylum procedure" in the E.U. Member States.\(^9\) To that end, the E.U. issued a Council Directive in 2005 outlining minimum standards for Members States to

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90. Id. at 59.
91. Asylum Procedures, supra note 26, at 379.
93. Id.
follow in granting and withdrawing refugee status. Article 8(1) of the Council Directive, which deals with requirements for asylum applications, states that such applications are to be “neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible.” This article is subject to Article 23(4)(i), which states that failure to apply earlier “without reasonable cause . . . having had opportunity to do so” is one of the grounds upon which E.U. Member States can use accelerated procedures to process the applications. Taken together, the E.U. Directive allows Member States to process delayed applications through separate accelerated procedures; however, it does not permit the rejection or exclusion of such applications solely on the basis of their being untimely.

IV. Asylum Procedure in the United States

In 1980, Congress enacted the Refugee Act which created two main pathways by which refugees could obtain protection in the U.S. The first is the Overseas Refugee Program for individuals still outside the U.S. The second is asylum and withholding of removal for individuals who are seeking entry at the border or who are already within the territory of the U.S. As discussed above, a significant feature of the Refugee Act was its incorporation of the U.S.’s treaty obligations under the Refugee Convention and Protocol. The Refugee Act adopted the definition of a refugee under Article 1 of the Refugee Convention. Under this new law, a refugee may be granted asylum in the U.S. if he or she is unwilling or unable to return to his or her home 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.”

The Refugee Act contained no filing deadline on asylum

96. Id. art. 8(1).
97. Id. art. 23(4)(i); see also Costello, supra note 94, at 9.
99. Id.
100. Immigration and Nationality Act §§ 207-208, 8 U.S.C. §§ 1157-1158 (1980); see also MUSALO, supra note 98, at 74.
101. Ramji, supra note 9, at 122.
102. Id.
applications.\textsuperscript{104} This changed in 1996 when Congress passed another statute called the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\textsuperscript{105} One of the most significant reforms contained in the IIRIRA was what is now commonly known as “the one-year bar” to asylum.\textsuperscript{106} The rule states that an individual is ineligible for asylum “unless the alien demonstrates by clear and convincing evidence that the application has been filed within one year after the date of the alien’s arrival in the United States.”\textsuperscript{107} There are two exceptions to the rule which may be granted at Attorney General’s discretion: (1) “changed circumstances which materially affect the applicant’s eligibility for asylum,” or (2) “extraordinary circumstances relating to the delay in filing.”\textsuperscript{108}

\textbf{A. History of the IIRIRA and the One-Year Bar}

The passage of the IIRIRA took place during a wave of anti-immigrant sentiment in the mid-1990s.\textsuperscript{109} Immigrants – including refugees – were blamed for a range of social problems, including drugs, crime, and high unemployment.\textsuperscript{110} As sometimes happens when the U.S. experiences a large influx of undocumented immigrants, new calls were made for immigration reform.\textsuperscript{111} During that time the asylum system was attacked by critics claiming that it was “out of control” with frivolous asylum applications.\textsuperscript{112}

One concern was that immigrants were not seeking asylum in order to find safe haven, but merely to obtain work permits.\textsuperscript{113} The

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  \item \textsuperscript{104} Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).
  \item \textsuperscript{105} Illegal Immigration Reform and Immigrant Responsibility Act of 1996; see also Karen Musalo & Marcelle Rice, Center for Gender and Refugee Studies: The Implementation of the One-Year Bar to Asylum, 31 Hastings Int’l & Comp. L. Rev. 693, 693 (2008).
  \item \textsuperscript{106} Musalo & Rice, supra note 105, at 693.
  \item \textsuperscript{107} Immigration and Nationality Act § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B).
  \item \textsuperscript{108} 8 U.S.C. § 1158(a)(2)(D).
  \item \textsuperscript{109} Ramji, supra note 9, at 133; Michele R. Pistone & Philip G. Schrag, The New Asylum Rule: Improved but Still Unfair, 16 Geo. Immig. L. J. 1, 1 – 2 (2001).
  \item \textsuperscript{110} Ramji, supra note 9, at 133.
  \item \textsuperscript{111} Michele R. Pistone, Asylum Filing Deadlines: Unfair and Unnecessary, 10 Geo. Immig. L. J. 95, 101 – 02 (1996).
  \item \textsuperscript{112} Id. at 102.
  \item \textsuperscript{113} Susan S. Blum, Note & Comment, The Illegal Immigration Reform & Immigration Responsibility Act’s One-Year Filing Deadline on Applications for Asylum: The Narrow Interpretation and Application of Exceptions to the Filing
former Immigration and Naturalization Service (INS) even amended the regulations which previously granted immediate work permits to all asylum applicants so that an applicant now has to wait 180 days while the application is pending before they can obtain work authorization.\textsuperscript{114} INS Commissioner Doris M. Meissner described this and other reforms as a "dramatic success," and later data confirmed a sharp decrease in the number of affirmative asylum applications.\textsuperscript{115} Several years later, however, Ms. Meissner would state that the one-year bar was an "overreaction" which was "born of assumptions about a system in the past."\textsuperscript{116}

Nevertheless, the IIRIRA was passed amid strong opposition by refugee advocates as well as the Clinton Administration.\textsuperscript{117} The UNHCR warned Congress that time limits on asylum claims would violate obligations under international law.\textsuperscript{118} Just before the IIRIRA was passed, a UNHCR Representative wrote to then Senator Orrin Hatch that

failure to submit an asylum request within a certain time limit should not lead to an asylum request being excluded from consideration, as outlined in UNHCR Executive Committee Conclusion No. 15 (1979). The United States is obliged to protect refugees from return to danger regardless of whether a filing deadline has been met.\textsuperscript{119}

Upon signing the IIRIRA into law, President Clinton promised to "correct provisions in this bill that are inconsistent with international principles for refugee protection, including the imposition of rigid deadlines for asylum applications."\textsuperscript{120} That promise remains unfulfilled.
B. Application and Interpretation of the One-Year Bar

Several years after the IIRIRA was enacted, the Department of Justice promulgated regulations interpreting the new one-year bar provision. It elaborated on the two exceptions to the rule: changed circumstances and extraordinary circumstances. Specifically, the regulations provided a nonexhaustive list of examples that would fit under the two exceptions and clarified that an asylum application must be submitted within a "reasonable period of time" of such changed or extraordinary circumstances. Finally, it required that a changed circumstance be material to the claim for asylum and any extraordinary circumstances could not be intentionally created by the applicant. A year later, in its Asylum Officer Training Manual (Manual), the INS further interpreted the two exceptions. The Manual prescribed a "flexible and inclusive" approach to examining exceptions to the one-year bar. It also indicated that a delay greater than six months would likely be considered unreasonable.

Unfortunately, however, there is evidence that such a "flexible and inclusive" approach has not always been followed. Organizations that represent asylum seekers report that many claims by bona fide refugees have been denied based on the one-year bar where one of the statutory exceptions should have applied. Numerous studies have also shed light on the extent to which the one-year bar has affected asylum applicants. The same year that

121. 8 C.F.R. § 208.4(a)(4); see also Musalo & Rice, supra note 105, at 696 – 97. After 9/11, responsibility for immigration functions was transferred to the newly created Department of Homeland Security.

122. 8 C.F.R. § 208.4(a)(4)-(a)(5).

123. Id.

124. Id.


126. INS, supra note 125, at 15.

127. Id. at 17; see also HUMAN RIGHTS FIRST, supra note 115, at 39.


129. Adjudicators often failed to apply one of the exceptions if the applicant's circumstances were not explicitly listed in the regulations, even though the regulations were intended to be "non-exhaustive." HUMAN RIGHTS FIRST, supra note 115, at 30.

130. Id.; Philip G. Schrag et al., Rejecting Refugees: Homeland Security's
IIRIRA was passed, Human Rights First (formerly the Lawyers Committee for Human Rights) reported that only 38 percent of bona fide asylum applicants applied for asylum within one year.131 Based on information provided by the former INS, approximately 6,198 asylum applications made between October 2000 and October 2001 were deemed “rejectable” based on the one-year bar.132 Of those, approximately 51 percent or 3,141 were actually rejected for failing to fit in one of the two exceptions to the one-year bar.133 It is hard to believe that all 51 percent who failed to meet the one-year bar did not have potentially legitimate claims to asylum, meaning that many bona fide refugees were probably denied on a mere procedural ground.

In 2010, Human Rights First revealed that, between 1998 and 2009, approximately 53,400 applicants’ (which comprises 15 percent of all asylum seekers) requests for asylum were denied by the asylum office due to the one-year bar.134 The data also showed that denials based on the one-year bar “increased sharply during the first several years of its implementation – from 37% in 1998, to 39% in 1999, 42% in 2000, and 51% in 2001 – leading to concerns that the filing deadline was being applied in an increasingly narrow manner . . .”135

Another 2010 study analyzed the outcome of all affirmative asylum applications since the one-year bar took effect in 1998 through 2009.136 It found that but for the one-year bar, the asylum office would likely have granted 15,792 additional cases, impacting more than 21,000 refugees when including their immediate families.137 The authors of the study state “[n]one of this would matter, however, if the late applicants who were rejected were undeserving of asylum; that is, if they would have been ineligible for asylum in any event because they did not have bona fide cases, or worse, had fraudulent claims.”138 But that was not the case. Instead, they found that the

131. Pistone & Schrag, supra note 118, at 1566.
133. Id.
134. HUMAN RIGHTS FIRST, supra note 115, at 7.
135. Id. at 29.
136. Schrag et al., supra note 130.
137. Id. at 659.
138. Id. at 745.
grant rate for timely applicants and the grant rate for late applicants who overcame the one-year bar was exactly the same. This data powerfully challenges the (mistaken) assumption that late applicants generally have weaker or less legitimate claims for asylum than timely applicants.

The risk of refoulement due to the one-year bar is further compounded by the way that courts interpret asylum and withholding of removal. In *INS v. Cardoza-Fonseca*, the U.S. Supreme Court held that the burden of proof for asylum is a "well-founded fear," rather than the higher and more burdensome "would be threatened" or "clear probability" standard that is required for withholding of removal. *Cardoza-Fonseca*, 480 U.S. at 443. Ironically, the benefits of asylum are much greater than those for withholding; but the one clear disadvantage in cases affected by the one-year bar is that the nonfoulement language incorporated into the Refugee Act of 1980 attaches only to withholding of removal and not to asylum. *Khandwala et al.*, supra note 11, at 12. Thus, the only option left for individuals who fail to obtain asylum because of the one-year bar is withholding of removal. Yet, in order to qualify for withholding, the applicant must meet the higher burden ("would be threatened") to be protected from refoulement. *HuMAN RIGHTS FIRST*, supra note 115, at 40. This causes refugees who may have established a well-founded fear of persecution – which is all that is required under the Refugee Convention & Protocol – to be denied protection, in contradiction to the intent and letter of international law.

Another reform introduced by the IIRIRA in 1996 was the preclusion of federal judicial review of asylum claims related to the one-year bar. *Cardoza-Fonseca*, 480 U.S. at 443. Although judicial review was partially restored by the REAL ID Act of 2005, review was limited to "constitutional claims" and "questions of law." *Khandwala et al.*, supra note 11, at 12. Only the Second and Ninth Circuits currently allow judicial review of one-year bar claims where they raise a constitutional claim or question of law. *HuMAN RIGHTS FIRST*, supra note 115, at 40. Although judicial review is limited, these courts serve an important role in protecting bona fide refugees from refoulement because on improper denials of asylum

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139. *Id.*
140. *Cardoza-Fonseca*, 480 U.S. at 443.
141. *Khandwala et al.*, supra note 11, at 12.
142. *Id.*
143. *Id.*
144. *HuMAN RIGHTS FIRST*, supra note 115, at 40.
145. *Id.*
146. *Id.*
due to the one-year bar. Yet most other circuit courts interpret one-year bar issues as questions of fact, falling outside the realm of judicial review.

C. Other Consequences of the One-Year Bar

Since the IIRIRA was passed, many individuals in academic and refugee advocacy communities have been arguing that the one-year bar is both unfair and unnecessary. Although they will not be discussed in detail here, a few of the most common arguments are worth mentioning. First, asylum seekers are often unprepared to apply for asylum shortly after their arrival because they may be unaware of asylum itself, unaware of their eligibility for asylum, and/or are focused on securing the basic necessities in order to survive. Second, many asylum seekers are victims of abuse or torture and suffer from emotional or psychological trauma for which they need time and assistance to overcome. Third, some asylum-seekers have valid reasons for waiting to apply for asylum, including, for example, to wait and see if conditions improve in their home country before deciding between returning home or remaining in the U.S. for an extended period or permanently. Lastly, the asylum process is a demanding and lengthy process, and one year is often an insufficient amount of time for newly arrived refugees to secure representation and/or to prepare a comprehensive application with the necessary supporting documents.

Some groups of applicants have been disproportionately affected by the one-year bar due to their status or the special nature of their past persecution. For example, applicants applying for asylum based on sexual orientation, transgender identity, or HIV status often have difficulty “coming out” and sharing their stories with complete strangers; this is not surprising given the shame and mistreatment

147. Id.  
148. Id.  
150. HUMAN RIGHTS FIRST, supra note 115, at 5, 35.  
151. Id. at 30.  
152. Id. at 34.  
153. Id. at 36 – 37.
many of them experienced in their home countries. Furthermore, such individuals often live under so much repression that they arrive in the U.S. with little knowledge that their status may be a basis for asylum. Similar problems often arise in cases of women fleeing domestic violence or other gender-related persecution, who also often suffer from high rates of post-traumatic stress disorder, making it extremely difficult for them to talk about their abuse and revisit painful memories so soon after arriving in the U.S.

The one-year bar creates special obstacles for impoverished asylum seekers. It is not uncommon for refugees and asylum-seekers to arrive in the U.S. with nothing but the clothes on their backs. Expecting asylum seekers to pay potentially thousands of dollars for an attorney to represent them less than a year after arriving to the U.S. is unrealistic and unreasonable. Free legal aid is a scarce resource that simply cannot, at present, be provided to every potential asylum applicant. Unfortunately, there is no right to free legal counsel for the indigent in civil immigration court as there is in criminal proceedings, even though the stakes and need for free legal representation are similarly high. A news report by the American Bar Association stated that more than half of respondents in removal proceedings and 84 percent of detained respondents do not have legal representation. Yet studies show that access to representation is the "single most important factor in determining whether an individual will be granted asylum..." For example, one study found that represented asylum seekers were three times as likely as unrepresented asylum seekers to be granted asylum in immigration

155. Id. at 262–63.
156. Musalo & Rice, supra note 105, at 716 – 17.
158. Pistone, supra note 157, at 824; see also Musalo & Rice, supra note 105, at 718-19.
159. See e.g., HUMAN RIGHTS FIRST, supra note 115, at 36.
160. See Musalo & Rice, supra note 105, at 718.
Another study found that only 11 percent of asylum seekers without legal representation were granted asylum, whereas the figure rose to 54 percent for those with representation. In contrast to the U.S., Australia, Canada, and the U.K. all provide varying forms of free legal aid and/or representation to asylum-seekers.

The one-year bar has had other indirect effects on the ability of refugees to bring an asylum claim. For instance, if an attorney is worried that a client may be denied asylum based on the one-year bar, and the client appears to have little or no other options for immigration relief, the attorney may advise the client not to apply for asylum because a negative decision could result in the start of removal proceedings and possible deportation. This means that some bona fide refugees may be pressured out of applying for a benefit to which they are statutorily eligible and entitled. Additionally, the one-year bar adds further stress on attorneys who fear malpractice claims for "ineffective assistance of counsel" by wrongly advising a client not to pursue a claim—even though pursuing a claim and failing because of the one-year bar may risk removal of their client.

The one-year bar not only burdens bona fide asylum seekers, but it strains government resources. The rule has increased inefficiency in the asylum adjudication process by pushing more cases from the Asylum Offices into already overburdened Immigration Courts. Refugees are also appealing negative one-year bar determinations by immigration judges to the Board of Immigration Appeals (BIA). From 2005 to 2008, over 19 percent of the BIA's caseload contained

163. Id.
164. HUMAN RIGHTS FIRST, supra note 115, at 36.
165. Australia provides a publicly funded "migration agent" to persons at a port of entry who, after an entry interview, appear at face value appear to meet Australia's protection requirements. The migration agent then helps the refugee prepare and make their asylum application. ASYLUM PROCEDURES, supra note 26, at 28. Asylum seekers in Canada may receive assistance from the legal aid office in the province where their claim is being heard. Id. at 91. The United Kingdom's National Asylum Support Service offers legal aid for all destitute asylum seekers. Id. at 378.
166. Neilson & Morris, supra note 149, at 277 – 78; see also HUMAN RIGHTS FIRST, supra note 115, at 36.
167. Neilson & Morris, supra note 149, at 278.
168. Id.
169. One-year bar cases are extremely time-consuming and sometimes require separate witnesses, briefings, or even hearings before a court can reach the merits of an asylum claim. HUMAN RIGHTS FIRST, supra note 115, at 14 – 15.
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cases appealed in part because of the one-year bar.\textsuperscript{170} Moreover, in approximately half of the cases ultimately denied by the BIA due to the one-year bar, this rule was the only ground cited for denial.\textsuperscript{171}

In sum, the negative consequences of the one-year bar far outweigh any potential benefits, and it unjustly prevents bona-fide refugees from obtaining asylum for failure to meet a mere procedural requirement.

\textbf{V. Recommendations}

To ensure that the U.S. comes closer to fulfilling its obligations under international law, the author recommends a series of reforms which would afford greater protections to individuals seeking asylum in the U.S.

First, the clear preference is that Congress eliminates the one-year filing deadline entirely. Several legislative proposals would do just that; these and other similar proposals should be supported in any way possible.\textsuperscript{172} If full elimination of the one-year bar does not secure enough legislative support, the author recommends a number of other alternatives. It should be noted, however, that many of these alternative proposals would still not cure the U.S. of its failure to meet its international treaty obligations and would continue to set the U.S. apart from the more flexible practices of Australia, Canada, and the U.K.

Second, Congress should eliminate the one-year bar and replace it with a provision stating that the timeliness of an application may be considered as one factor when making a credibility determination (similar to Australia, Canada, and the U.K.). Nonetheless, it should be noted that the issue of whether a delay in filing an asylum application is indicative of a lack of credibility is itself contested; indeed, some psychological evidence would suggest the exact opposite, that bona fide refugees will often be traumatized and suffer from psychological problems that prevent them from coming forward and talking about their past persecution.\textsuperscript{173}

\textsuperscript{170} Id. at 7.

\textsuperscript{171} NATIONAL IMMIGRANT JUSTICE CENTER ET AL., supra note 130, at 2.

\textsuperscript{172} See \textit{e.g.}, Refugee Protection Act of 2010, S. 3113, 111th Cong. § 3 (2010); Comprehensive Immigration Reform Act of 2010, S. 3932, 111th Cong. § 255 (2010); Restoring Protection to Victims of Persecution Act, H.R. 4800, 111th Cong. (2010).

\textsuperscript{173} Musalo & Rice, supra note 105, at 703.
Third, the Department of Homeland Security or Congress should issue further regulations or pass legislation that builds in more explicit exceptions to the one-year bar. This would help prevent bona fide refugees from being refouled to a country where they face persecution merely because they failed to meet a procedural requirement. For example, failure to apply within one year because an impoverished asylum seeker was unable to secure legal representation should be a recognized exception.

Fourth, extend the filing deadline to a period longer than one year. This would recognize that many asylum applicants suffer from continuing trauma and mental health problems, have language and cultural barriers, and cannot easily secure legal representation, all of which affect their ability to apply within one year.

Fifth, Congress should restore judicial review to asylum claims with one-year bar issues. This would resolve the current circuit split and prevent courts from avoiding judicial review by characterizing one-year bar claims as questions of fact. It will also ensure greater accuracy in asylum adjudications with one-year bar issues, thereby minimizing the risk of refoulement of bona fide refugees in breach of international law.

Sixth, although not addressing the issue of the rule itself, the government, at the very least, should conduct an investigation into the number and types of cases being denied under the one-year bar. All asylum offices, immigration courts, and the BIA should be required to record and report the number of cases that are referred or denied because of the one-year bar in order to establish accurate statistics. The agencies should coordinate efforts so the same cases can be tracked as they transfer between the three agencies.\textsuperscript{174} This data would shed light on the extent to which asylum applicants are affected by this rule, perhaps eventually garnering enough legislative support to change it.

Seventh, although this also does not impact the rule itself, the government should consider creating a system whereby impoverished asylum seekers unable to secure legal representation are offered free legal assistance in filing their application for asylum, similar to what is provided in Australia, Canada, and the U.K. This would help alleviate the significant disadvantages impoverished asylum seekers

\textsuperscript{174} See suggestions for better data collection in \textit{Schrag et al.}, supra note 130, at 768 - 69.
face in presenting their claims, which is exacerbated by their inability to work legally in the U.S. until 180 days after their application has been submitted to the U.S. Citizenship and Immigration Services or the Executive Office for Immigration Review.\textsuperscript{175}

VI. Conclusion

The U.S. one-year bar rule is problematic on many levels. It is inconsistent with the Refugee Convention and Protocol and violates the duty of nonrefoulement. Such a rigid filing deadline is out of step with the practice of other countries that, like the U.S., admit large numbers of refugees into their territories each year. Canada, Australia, and the U.K., for example, impose no filing deadlines on asylum applications in their respective countries, but they do allow the timeliness of an application to factor into credibility determinations. Furthermore, critics have shown that the one-year bar is unfair, unnecessary, and creates an unreasonable burden on arriving refugees. It disproportionately affects applicants with claims based on sexual orientation or transgender identity, HIV-positive individuals, women fleeing gender-related persecution, and impoverished asylum seekers who are unable to secure legal representation. When the IIRIRA was passed, Senator Hatch stated that “if the time limit and its exceptions do not provide adequate protection to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress.”\textsuperscript{176} Now is a good time to revisit this issue. The possibility of comprehensive immigration reform is increasing and several legislative proposals have already been put on the table (some even eliminating the one-year bar altogether).\textsuperscript{177} Congress should take this opportunity to reaffirm our commitment to international refugee law and provide meaningful protection to our nation’s refugees.

\textsuperscript{175} 8 C.F.R. § 208.7(a)(1).
\textsuperscript{176} 142 CONG. REC. S11, 491 (1996).
\textsuperscript{177} See Refugee Protection Act of 2010, supra note 172; and Comprehensive Immigration Reform Act of 2010, supra note 172; and Restoring Protection to Victims of Persecution Act, supra note 172.
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