

Renewing U.S. Commitment to Refugee Protection

Recommendations for Reform on the 30th Anniversary of the Refugee Act

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Refugees find safety and a new home in the United States. Photo © Christophe Calais/Corbis

About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

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Introduction

The United States has a long history of providing refuge to victims of religious, political, ethnic, and other forms of persecution. This tradition reflects a core component of this country's identity as a nation committed to freedom and respect for human dignity. Thirty years ago, when Congress passed the Refugee Act of 1980, the United States enshrined into domestic law its commitment to protect the persecuted, creating the legal status of asylum and a formal framework for resettling refugees from around the world. The Refugee Act also established a standard for uniform and principled refugee eligibility, eliminating the ideological biases that had dominated prior laws, and incorporating the definition of a "refugee" from the 1951 Convention Relating to the Status of Refugees.

In the intervening years, the United States has granted asylum and provided resettlement to thousands of refugees who have fled political, religious, ethnic, racial and other persecution. These refugees have come from Burma, China, Colombia, Liberia, Iran, Iraq, Rwanda, Russia, Sierra Leone, Sudan, and other places where people have been persecuted for who they are or what they believe. Many were arrested, jailed, beaten, tortured or otherwise persecuted due to their political or religious beliefs, or their race, ethnicity, or other fundamental aspect of their identity. Over the years, these refugees and their families have been able to rebuild their lives in safety in the United States. There is no greater reflection of the Refugee Act's achievements than the many lives that have been transformed over the last 30 years, and the ways in which U.S. communities have been enriched by these new refugee arrivals.

The Refugee Act became law on March 17, 1980, with strong bi-partisan support in both chambers of Congress. To this day, the Refugee Act remains a symbol of this country's unified commitment and humanitarian leadership in addressing the plight of persecuted and displaced people around the world. The United States plays a leading role in providing humanitarian aid to the displaced, supporting the protection and assistance activities of the UN High Commissioner for Refugees, and providing durable solutions to many of the world's most vulnerable refugees through its resettlement system. But leadership is also about how this country treats refugees who seek asylum here in the United States—and whether we, here

at home, live up to the same standards we expect the rest of the world to respect.

Over the years, the United States has faltered its commitment to those who seek protection—interdicting Haitians at sea without adequate protection safeguards, allowing political preferences to undermine the objectivity of asylum adjudications in the 1980s, letting foreign policy priorities dictate decisions relating to asylum and resettlement, and nearly shutting down the resettlement system in the wake of the September 11 attacks. During the last fifteen years, a barrage of new laws, policies and legal interpretations have undermined the institution of asylum in the United States and led the United States to deny asylum or other protection to victims of persecution. These obstacles include:

- The rapid escalation of immigration detention and the failure to provide crucial due process safeguards to prevent detention from being arbitrary or unnecessary;
- A filing deadline and other barriers that have limited access to asylum for genuine refugees;
- Expansive "terrorism bars" to asylum and flawed legal interpretations that have prevented legitimate refugees from receiving asylum or other protection; and
- The deterioration of the immigration adjudication system as effectiveness and fairness were sacrificed to speed.

The U.S. resettlement system has also faced challenges, particularly as it has struggled to adapt to the needs of today's refugees. At times, the system has not moved swiftly, proactively, or robustly enough to protect the rights of refugees—including those at imminent risk. And over the years, the support provided for the resettlement of refugees has not kept pace with inflation and the evolving needs of refugees and their host communities. The challenges facing both the asylum and resettlement systems have only been compounded by the failure to promptly and effectively resolve the steady stream of inter-agency asylum and refugee issues—now involving seven U.S. government agencies and component agencies.¹

As the United States commemorates the 30th anniversary of the Refugee Act and celebrates the Act's

many accomplishments, U.S. policymakers should also examine the areas in which the Refugee Act and U.S. policies fall short, undermining not only our commitment to protect the persecuted but also our moral authority to lead the global community in addressing the plight of

persecuted and displaced people around the world. This anniversary year presents an opportunity to re-evaluate and reform provisions of law, policies, and practices that are inconsistent with U.S. commitments and values.

Summary of Recommendations

In 1980, by passing the Refugee Act, the United States affirmed not only its commitment to the Refugee Convention and Protocol, but also its commitment to help lead the global community in addressing refugee protection concerns. Thirty years later, the time is ripe to fix the areas in which U.S. laws and policies are not living up to the standards the United States has set for itself and, by extension, the bar it sets for the rest of the world. This year presents a particularly appropriate opportunity for the United States to assess its compliance with the Refugee Protocol and other human rights conventions that protect the rights of refugees, as the United States is undergoing a review by the United Nations Human Rights Council of its compliance with international human rights law.² The White House has also begun a thorough evaluation of the U.S. refugee resettlement program.

This document provides a roadmap of concrete reforms in five key areas that the United States can implement—*this year*—to renew its commitment to refugee protection. These recommendations will: (1) provide safeguards against unnecessary and inappropriate detention; (2) restore access to asylum and protection; (3) ensure a fair and effective adjudication system for asylum cases; (4) improve the resettlement system to better protect the rights of refugees; and (5) promote improved oversight and inter-agency coordination on asylum and refugee matters. These recommendations are summarized below and described in greater detail in subsequent sections of this document.

1. Provide Safeguards Against Unnecessary and Inappropriate Detention

- **Provide Prompt Court Review of Detention:** The *Departments of Homeland Security and Justice* should revise regulatory language and/or *Congress* should enact legislation to provide arriving asylum seekers and other immigrants in detention with the chance to have their custody reviewed in a hearing before an Immigration Judge.
- **Implement Reforms of Detention Conditions:** The *Department of Homeland Security* and *Immigration and Customs Enforcement* (ICE) should promptly implement detention reforms, including those announced in 2009 to make

immigration detention less penal in nature. For example, ICE should allow asylum seekers and immigrant detainees to wear civilian clothing (rather than prison uniforms), require facility officers to wear civilian uniforms (rather than correctional uniforms), and advance other reforms necessary to move away from a penal model of detention.

2. Restore Access to Asylum and Protection

- **Eliminate the Asylum Filing Deadline:** *Congress* should eliminate the one-year filing deadline that bars refugees with well-founded fears of persecution from asylum.
- **Improve Implementation of Expedited Removal:** The *Department of Homeland Security* should improve implementation of the expedited removal process that limits access to asylum by ensuring that Customs and Border Protection officers follow protection measures and that U.S. Citizenship and Immigration Services conducts in-person credible fear interviews.
- **Ensure Protection in Maritime Interdiction:** The *Department of Homeland Security* and the *White House* should revise flawed maritime interdiction policies and implement effective and non-discriminatory safeguards to ensure that the United States does not return refugees to persecution.
- **Protect Refugees from Inappropriate Exclusion:** *Congress* and the *White House* should revise the U.S. laws, policies, and legal positions that are excluding refugees from asylum protection under “terrorism” and other bars in ways that are inconsistent with U.S. commitments under the Refugee Convention and Protocol.
- **Clarify “Social Group” Basis for Asylum:** The *Departments of Justice and Homeland Security* should promulgate regulations—or if regulations do not advance promptly, *Congress* should pass legislation—clarifying the “particular social group” and “nexus” requirements for asylum so that the asylum claims of vulnerable groups, including women fleeing gender-based persecution and

refugees persecuted for their sexual orientation, are adjudicated fairly and consistently.

3. Ensure a Fair and Effective Adjudication System for Asylum Cases

- **Reform the Immigration Court System:** The *Department of Justice/Executive Office for Immigration Review* should implement reforms to improve the quality and fairness of decision-making at the Immigration Courts and the Board of Immigration Appeals (BIA) including by restoring three-member panel review in asylum appeals.
- **Increase Staffing and Capacity of Immigration Courts:** *Congress* should provide the Department of Justice with the necessary resources to increase staffing, capacity, and training at the Immigration Courts and the BIA.
- **Support Expansion of Legal Presentations:** *Congress* should provide the Department of Justice with the resources necessary to expand the Legal Orientation Program (LOP) to provide detained immigrants and asylum seekers with basic legal information.

4. Improve the Resettlement System to Better Protect the Rights of Refugees

- **Develop a Fast-Track Process for Refugees at Imminent Risk:** The *White House*, working with the *Departments of State and Homeland Security*, should develop a formal global system to fast-track refugee status determinations and resettlement processing for refugees facing imminent harm in countries of first asylum.
- **Enhance Protection for Refugees at Imminent Risk:** The *Department of State* should support UNHCR to increase its capacity to protect refugees in imminent harm, through both fast-track resettlement processing and, when needed, measures to ensure at-risk refugees are safely evacuated to third countries for resettlement processing.
- **Improve Fairness and Effectiveness of Resettlement Process:** The *Department of Homeland Security* should improve the fairness of the overseas refugee resettlement process by increasing transparency and accountability,

enhancing quality assurance mechanisms, requiring written Notices of Ineligibility for Resettlement describing the basis for denial, and allowing resettlement applicants to have legal representation.

- **Improve Staffing, Coordination, and Timeliness of Security Clearances:** The *White House*, working with the *Departments of State, Justice, and Homeland Security* and the *Central Intelligence Agency*, should improve the security clearance process. Each agency should be provided the staffing it requires to complete checks accurately and expeditiously, and a point person should be charged with the authority to ensure that each case moves through the system in a timely manner.
- **Provide Appropriate Support for Refugee Integration:** The *Departments of State and Health and Human Services* should reform the refugee benefits programs to provide more appropriate support based upon an individual needs-assessment of refugees being resettled to the United States, and *Congress* should ensure that the program is properly funded to allow for meaningful post-arrival support and integration assistance.

5. Create Mechanisms Within the U.S. Government to Ensure Protection and Inter-agency Coordination

- **Strengthen National Security Council Coordination:** The *White House* should strengthen its coordination on refugee protection by increasing staffing and capacity of the National Security Council to address refugee and asylum matters among governmental agencies, including the Departments of Homeland Security, Justice, State, and Health and Human Services.
- **Accentuate Refugee Protection Within the Department of Homeland Security:** The *Department of Homeland Security* should create a Refugee Protection Office to increase coordination across DHS components and ensure implementation of directives and guidance affecting refugees and asylum seekers. It should establish mechanisms to ensure that Coast Guard, ICE, CBP, and USCIS policies and actions are in accordance with U.S. treaty obligations, working closely with DHS and U.S. agency legal offices charged with overseeing treaty compliance, such as the newly-

revived Inter-agency Working Group on Human Rights. Additionally, the Department of Homeland Security's Office of Policy should maintain a position

dedicated to refugee and asylum matters. That position should be elevated in seniority and given additional support staff.

Background: U.S. Protection of Refugees and the Refugee Act of 1980

The United States has a strong tradition of providing refuge to those who have fled from political, religious, and other forms of persecution, and has long been a leading voice for the protection of refugees around the world. Despite this tradition, U.S. policies and actions have sometimes fallen far short of both our legal commitments and our values. In 1939, for example, the United States turned away the *St. Louis*, a ship carrying over 900 refugees from Nazi persecution, many of whom later perished in concentration camps.³ When refugees are denied protection, the consequences can be tragic.

In the wake of World War II, the United States helped lead efforts to create an international refugee protection regime and became a leading supporter of the United Nations Refugee Agency (the UN High Commissioner for Refugees or UNHCR).⁴ The United States ratified the Refugee Protocol in 1968, pledging to treat refugees in accordance with the substantive provisions of the 1951 Convention Relating to the Status of Refugees (the “Refugee Protocol” and “Refugee Convention,” respectively).⁵

Refugee Admissions Post-World War II

After World War II, U.S. refugee and asylum policy reflected post-war politics and priorities, focusing almost exclusively on individuals with certain ethnic, national, and political backgrounds and primarily on individuals fleeing from communism. U.S. immigration laws did not contain provisions specifically designed to address the admission and protection of refugees in a comprehensive manner. As a result, the United States lacked the tools necessary to effectively address the various humanitarian crises that arose in the decades after World War II. Instead, the Executive Branch relied on the Attorney General’s discretionary “parole authority” to bring large numbers of refugees to the United States in response to various urgent crises. Congress, in turn, was concerned about the unmonitored use of the parole authority by the Executive Branch.⁶ By the spring of 1979, after over 187,000 Southeast Asian refugees had been admitted principally through *ad hoc* parole programs, Congress was committed to passing legislation that would establish a comprehensive U.S. refugee policy.⁷

Key Provisions of the Refugee Act

- Incorporated the Refugee Convention’s definition of a “refugee”;
- Created a legal framework for the admission of refugees;
- Called for a “normal flow” of refugees while also preserving the president’s authority to admit, after consultation with Congress, refugees of special humanitarian concern in emergency situations;
- Established the Office of Refugee Resettlement (“ORR”) in the Department of Health and Human Services to administer refugee assistance programs;
- Provided that refugees receive up to three years of financial and medical assistance;
- Established the legal status of asylum and the legal framework for the modern U.S. asylum system, allowing refugees with a well-founded fear of persecution to remain legally in the United States;
- Codified into domestic law the principle of *non-refoulement*, the cornerstone principle of refugee protection, by making mandatory the withholding of deportation of a person to a country where an individual’s life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

The Road to the Refugee Act: A Bipartisan Success

The Refugee Act⁸ reflected years of discussion about how best to establish a legal framework that would allow the United States to respond to humanitarian crises and comply with its obligations under the Refugee Convention and Protocol. The legislative history shows “the evolution of a consensus for the humanitarian, nondiscriminatory policy finally embodied in the Refugee Act.”⁹ Ultimately, this discussion focused on several key issues that informed the hallmark provisions of the Refugee Act. First among these issues was the definition of a “refugee” within the meaning of the law. During negotiations, this proved to be among the least

contentious issues as there was broad consensus that the refugee definition ought to be nondiscriminatory and based on the definition included in the Refugee Convention.¹⁰

On the issue of refugee admissions, there was similar consensus that refugees ought to have a separate allotment within the immigration admissions program. However there was also disagreement over precisely how many refugees would be admitted on an annual basis and which branch of government would exercise authority over admissions policy. Officials in the State Department and other agencies opposed a ceiling on admissions and wanted to maintain flexibility for *ad hoc* admissions driven by the Executive Branch. By contrast, the general sentiment in Congress was that refugee admissions needed to be structured and subjected to Congressional control.¹¹ What ultimately ended up in the Refugee Act was a compromise position that provided for a “normal flow” of refugees to be determined by the president before each fiscal year after consultation with Congress, while preserving the authority of the president to admit, after proper consultation with Congress, additional refugees of special humanitarian concern in response to emergency situations.¹²

Another issue addressed by the Refugee Act was the need to assist refugees and their host communities as refugees arrived and transitioned into their new lives. As the late Senator Edward M. Kennedy—a key champion of the Refugee Act—said at the time, “The federal government has a clear responsibility to assist communities in resettling refugees and helping them become self-supporting.”¹³ The Refugee Act afforded refugees financial and medical assistance for up to three years, and established the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services to administer various refugee assistance programs.¹⁴

When the Refugee Act came out of the conference committee, it reflected a broad, bi-partisan consensus that had been led by Senator Kennedy and his counterparts in the House, Congressman Peter Rodino and Congresswoman Elizabeth Holtzman. In the end, despite divisions over some of the key provisions in the bill, the Refugee Act gained overwhelming support in the Senate, where it passed unanimously with a vote of 85-0, and strong support in the House, where the Senate’s bill was passed with a vote of 207-192.¹⁵

The Refugee Act and Its Legacy

Over the years, through the systems established by the Refugee Act, the United States has welcomed refugees from some of the world’s most desperate refugee crises. Some examples of populations the United States has resettled include:

- 387,700 Vietnamese refugees from 1983 to 2004, many of whom were escaping the fallout of the Vietnam War;¹⁶
- 152,500 Bosnians, Kosovars, and other refugees from the former Yugoslavia from 1994 to 2001, when the Balkans region was undergoing massive civil war and ethnic cleansing;¹⁷
- 21,000 refugees from Rwanda, Burundi, and the Democratic Republic of Congo since 1990 as the region suffered through years of extreme ethnic and political violence, including the 1994 genocide in Rwanda and ongoing killings and rape in the Democratic Republic of the Congo;¹⁸
- 10,700 Sudanese refugees since 2003¹⁹ during a time when Sudan has suffered from civil war, political repression, and the brutal attacks on minority populations in the Darfur region, causing 420,000 refugees and over a million internally displaced persons to flee from their homes;²⁰
- 21,000 refugees from Burma in 2007 and 2008, helping to address a protracted refugee crisis and provide protection to some of the many refugees displaced due to the Burmese military regime’s persecution of pro-democracy activists, ethnic and religious minorities, and others;²¹ and
- 32,600 Iraqi refugees during FY 2008 and 2009, a significant improvement sparked in part by the successful bi-partisan efforts of the late Senator Edward Kennedy, former Senator Gordon Smith (R-OR) and others to pass the Refugee Crisis in Iraq Act of 2008²² to increase the pace of resettlement for Iraqi refugees, including those targeted due to their ties to the U.S. military or government.²³

While some of these (and other) resettlement efforts could have been more robust and moved more quickly, there is no question that the U.S. resettlement system has transformed the lives of refugees by giving them a durable solution to often unendurable situations.

The Refugee Act became law on March 17, 1980, with strong bi-partisan support in both chambers of Congress. In the intervening years, the United States has granted asylum and provided resettlement to thousands of refugees who have fled political, religious, ethnic, racial, and other persecution.

The Journey Continues: Successes and Challenges

Since 1980, the United States has admitted more than 2.4 million refugees through the refugee resettlement system and granted asylum to approximately 500,000 other refugees.²⁴ Many fled war, ethnic or sectarian conflict, genocide, or other persecution. The list of their home countries reflects the arc of recent world history and conflict—Laos, Afghanistan, the former Yugoslavia, the former Soviet Union, Ukraine, Vietnam, Cuba, Somalia, Sudan, Liberia, Russia, Burma, Bhutan, Iran, and Iraq—as well as the pernicious presence of persecution in so many other places. Some have been victims of honor killings or domestic violence in countries that refuse to protect women from harm; others were targeted because of their political or religious beliefs; some have fled from forced abortions; and others have fled persecution due to their sexual or gender identities. Refugees come from all walks of life. They are journalists, teachers, preachers, human rights advocates, farmers, parents, and political dissidents. Many of them—and their children—are now U.S. citizens and thriving members of their communities.

The road has not always been a smooth one. It took more than ten years to set up a system for adjudicating asylum cases with the establishment of the Asylum Corps, a team of professional, uniquely trained officers to adjudicate asylum claims.²⁵ For too many years, ideology dominated asylum decision-making, leading to higher approval rates for those fleeing communist regimes and lower approvals for those fleeing governments friendly to the United States—regardless of the governments' human rights records.²⁶ In the 1980s, political preferences tainted the objectivity of asylum adjudications for asylum applicants from Central America.²⁷ The United States has also allowed domestic political considerations to trump its commitment to refugees. The United States took the position—affirmed by the U.S. Supreme Court in its 1993 decision *Salé v. Haitian Centers Council*²⁸—that neither the Refugee Act nor the Protocol protected Haitian refugees interdicted on the high seas, a position that sparked international

Refugees in America

Since the Refugee Act was enacted, millions of refugees have been given the opportunity to leave conflict, war, oppression, and protracted displacement and restart their lives in the United States. While the United States gives these refugees new beginnings, this country is also enriched by the contributions refugees and their children have made to their communities and the diverse fabric of American society.

- Lewiston, Maine, once a vibrant mill town, was largely abandoned when Somali refugees began moving there in 2001. Within several years, the city's crime rate had dropped and per capita income has greatly increased, largely due to the influx of refugee families. In fact, the National Civil League named Lewiston an "All-American City" in 2007, the first Maine town to be so designated in 40 years. "It's been an absolute blessing in many ways," one local official said of the refugee resettlement. "Just to have an infusion of diversity, an infusion of culture and of youth."²⁹
- Hmong refugees are helping to stabilize communities in Minneapolis and St. Paul, Minnesota, by purchasing homes and starting businesses. In 2000, more than half of Hmong refugee families were homeowners, up from 12 percent a decade before, and refugee entrepreneurship has increased exponentially. The influx of families and capital has revitalized many of the Twin Cities' poorest neighborhoods.³⁰
- The introduction of refugee children into local school systems has generated innovative approaches to multicultural education in Denver and in Decatur, Georgia. In Denver, the public school system transformed an under-enrolled middle school into an elementary school focused on refugee children. There, teachers tend to English and counseling needs in addition to academic lessons.³¹ In Decatur, refugee children attend a charter school where more than 50 languages are spoken. The educational model has been so successful that non-refugee families are enrolling their children as well.³²

criticism including from the Inter-American Commission on Human Rights.³³ Current maritime interdiction policies lack safeguards necessary to prevent the United States from returning refugees to persecution. They are also discriminatory, providing less protection to Haitians than to those who flee by sea from Cuba or China.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act³⁴ imposed new barriers to asylum—a one-year filing deadline that has barred refugees with well-founded fears of persecution from asylum and an expedited removal process that has limited access to asylum for those who seek protection at U.S. airports and borders. The 1996 law also created mandatory detention for “arriving aliens” until they pass through a screening process. But these “arriving” asylum seekers are not given access to prompt court review of the need for their continued detention. Overly broad definitions relating to “terrorism” in various immigration laws, and expansive legal interpretations of these definitions, have led the U.S. to deny or delay protection to many refugees, mislabeling the victims and distant associates of armed groups as supporters of “terrorism.”

The U.S. resettlement system has also faced challenges. As Human Rights First (then the Lawyers Committee for Human Rights) observed in 1991, “The

overseas admissions process not only continues to be a product of the infusion of foreign policy into refugee policy, but also is constrained by numerical and categorical limitations imposed by immigration policy concerns.”³⁵ And over the years, as refugee populations shifted, the program did not quickly adapt to meet the new challenges.³⁶ The entire program was nearly shut down in the wake of the September 11 attacks, and its resuscitation was delayed by the failure to address the impact of the overly broad “terrorism bars” on legitimate refugees. The United States has also, at times, failed to move swiftly, proactively, or robustly enough to use the resettlement system to protect the rights of refugees—including those at imminent risk. Of particular concern in today’s economy, the support provided for the resettlement of refugees has not kept pace with inflation and the needs of refugees and their host communities.

Recommendations for Reform: A Closer Look at Five Key Areas

1. Provide Safeguards Against Unnecessary and Inappropriate Detention

In an April 2009 report, “U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison,”³⁷ Human Rights First found that asylum seekers—arriving at a U.S. airport or border point in search of this country’s protection—are regularly handcuffed, transported in shackles, and detained in jails or jail-like facilities where they are forced to wear prison uniforms, are guarded by officers in prison attire, visit with families and friends through glass barriers, and have essentially no freedom of movement within the facility.³⁸ Despite U.S. human rights commitments, these asylum seekers are mandatorily detained upon arrival with inadequate procedural safeguards protecting them from prolonged and unnecessary detention. In fact, they are not even given access to Immigration Court custody hearings, a basic due process safeguard available to most other detained immigrants that, if in place, would help protect asylum seekers from being unnecessarily detained for months or years. As detailed in Human Rights First’s report, over 48,000 asylum seekers were held in detention between 2003 and April 2009 at a cost of over \$300 million.³⁹

Provide Prompt Court Review of Detention

Refugees arriving at the U.S. border or points of entry seeking asylum are detained under the “expedited removal” provisions of U.S. immigration law.⁴⁰ The initial determination to detain an asylum seeker is not based on an individualized assessment of factors such as threat to security or risk of flight; rather, it is a blanket “mandatory” determination based on whether a person possesses valid documents or expresses an intention to apply for asylum at a port of entry.⁴¹ After a U.S. Asylum Officer makes a finding that the asylum seeker has a “credible fear of persecution,” U.S. Immigration and Customs Enforcement (ICE)—which is the detaining authority—can assess whether to release the asylum seeker on parole.⁴² But if ICE denies parole, the decision cannot be appealed to a judge—even an Immigration Judge. While Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing

the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points.⁴³

The lack of prompt court review is not only inconsistent with U.S. traditions of fairness, but it also inconsistent with U.S. commitments under the Refugee Protocol and the International Covenant on Civil and Political Rights (ICCPR). Article 9(4) of the ICCPR provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁴⁴ Article 31 of the Refugee Convention exempts refugees from being punished because of their illegal entry or presence and also provides that states shall not restrict the movements of refugees more than is “necessary.”⁴⁵ The UNHCR Executive Committee, of which the United States is a member, has recommended that detention “be subject to judicial or administrative review,”⁴⁶ and UNHCR guidelines on the detention of asylum seekers make clear that there should be “automatic review before a judicial or administrative body independent of the detaining authorities.”⁴⁷ After a 2007 mission to the United States, the UN Special Rapporteur on the Human Rights of Migrants concluded that the U.S. detention system lacks safeguards that prevent detention from being arbitrary within the meaning of the ICCPR, and recommended that the Departments of Homeland Security and Justice “revise regulations to make clear that asylum-seekers can request [their] custody determinations from immigration judges.”⁴⁸

While DHS and ICE have announced plans to reform some aspects of the highly flawed immigration detention system, they have not yet committed to work with the Department of Justice to change the regulatory language that deprives arriving asylum seekers of access to Immigration Court custody hearings. Reforms to ICE’s own parole procedures that went into effect in January 2010,⁴⁹ while a welcome improvement, did not address the lack of prompt independent court review of ICE’s detention decisions or help address the lack of compliance with Article 9(4) of the ICCPR.

RECOMMENDATION: Provide Prompt Court Review

- The **Departments of Homeland Security and Justice** should revise regulatory language and/or **Congress** should enact legislation to provide arriving asylum seekers and other immigrants in detention with the chance to have their custody reviewed in a hearing before an Immigration Judge.

Seeking Protection, Finding Prison

Human Rights First has documented the cases of many refugees who were subsequently granted asylum by the United States but were not provided with Immigration Court custody hearings and were held in U.S. immigration detention for prolonged periods of time.⁵⁰

- A Baptist Chin woman from Burma was detained in an El Paso, Texas, immigration jail for over two years.
- An Afghan teacher who fled threats by the Taliban spent 20 months in detention at three county jails in Illinois and Wisconsin.
- A Tibetan man, who was detained for more than a year and tortured by Chinese authorities after putting up posters in support of Tibetan independence, was detained again for 11 months in a New Jersey immigration detention facility.

Implement Reforms of Detention Conditions

In addition to providing the basic safeguard of an Immigration Court custody hearing, the Department of Homeland Security, ICE, and Congress should work together to ensure that the announced detention reforms are actually implemented, and should continue to advance additional reforms. For example, ICE needs to make significant progress towards creating an effective nationwide program of alternatives to detention, releasing individuals who would otherwise be detained as opposed to imposing rigorous restrictions on individuals who are otherwise eligible for release—like asylum seekers who meet the criteria for release on parole.

ICE also needs to move forward on its commitment—announced by Assistant DHS Secretary John Morton in August 2009 and outlined by DHS Secretary Janet

Napolitano in October 2009—to move away from a penal model of detention.⁵¹ As soon as possible *this year*, ICE should take steps to ensure that when asylum seekers and others are detained, they are allowed to wear their own clothes (rather than prison uniforms) and that their guards are dressed in civilian uniforms (rather than correctional uniforms). The use of handcuffs and shackles should be discontinued except in exceptional and necessary circumstances. Detainees should be provided with contact visits with family, greater freedom of movement, and regular outdoor access. ICE should reduce its use of penal facilities to detain immigrants, and transition to a more limited use of non-penal facilities when detention is necessary. ICE must also move forward on crucial reforms to improve the medical care in detention.

RECOMMENDATION: Implement Reforms of Detention Conditions

- The **Department of Homeland Security and Immigration and Customs Enforcement** should promptly implement detention reforms including those announced in 2009 to make immigration detention less penal in nature. For example, ICE should allow asylum seekers and immigrant detainees to wear civilian clothing (rather than prison uniforms), require facility officers to wear civilian uniforms (rather than correctional uniforms), and advance other reforms necessary to move away from a penal model of detention.

2. Restore Access to Asylum and Protection**Eliminate the Asylum Filing Deadline**

Passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the deadline bars a refugee from asylum if she cannot demonstrate by “clear and convincing evidence” that her application was filed within one year of arrival in the United States, absent changed or extraordinary circumstances.⁵² In the 13 years since the deadline went into effect, more than 79,000 asylum applicants have had their cases rejected by U.S. asylum adjudicators under the deadline.⁵³

There are many reasons why a refugee might file a request for asylum protection more than a year after arriving in the United States. Many asylum seekers do not speak English, have suffered physical or emotional

trauma, and struggle upon arrival simply to meet their basic needs. Some potential applicants might not understand asylum law procedures or even know they are eligible for asylum. Others may face delays in securing counsel given the lack of government-funded representation and the limited availability of *pro bono* representation.

Too Late for Asylum

Through its research and *pro bono* legal representation of asylum seekers, Human Rights First has learned of many cases of genuine refugees who have had their asylum requests rejected, denied, or significantly delayed due to the filing deadline.

- A young woman from Eritrea was forcibly conscripted into military service, where she was tortured for her Christian beliefs. She applied for asylum four months after arriving in the United States, but her request was rejected by the Asylum Office because she did not have a passport showing her date of entry. In Immigration Court, the young woman provided three affidavits and documentary evidence to prove that she had been in the United States for less than a year before she filed her application. The Immigration Judge told her that she fit the definition of a refugee, but she was only extended withholding of removal after three years of litigation. Even though she faced a probability of persecution if returned, she was denied asylum because the court concluded she had not shown that she timely filed.⁵⁴
- A Burmese student fled to the United States after being jailed for several years for his pro-democracy activities. The student did not know anyone in the United States, did not speak English, and did not learn about asylum until several years later when he met other Burmese refugees who told him how to apply. The Immigration Court ruled that the student's extreme isolation did not constitute an exception to the filing deadline. The student was denied asylum even though he was found to be credible and to face a clear probability of persecution, requiring the withholding of his removal. The Board of Immigrant Appeals and the Sixth Circuit upheld the decision.⁵⁵

Recognizing these realities, when Congress instituted the deadline in 1996, leaders emphasized that it should not disqualify bona fide refugees.⁵⁶ Sen. Orrin Hatch, one of the main proponents of the deadline, promised “[I]f the time limit and its exceptions do not provide adequate protections to those with legitimate claims of asylum, I will remain committed to revisiting this issue in a later Congress.”⁵⁷ Similarly, on the day he signed the filing deadline into law, then-President Bill Clinton said he would “seek to correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid deadlines for asylum applications.”⁵⁸ However, as demonstrated in the examples, the exceptions for changed or extraordinary circumstances have not prevented legitimate refugees from being denied asylum.⁵⁹

The filing deadline is also inefficient for the government. It diverts time and resources at both the Asylum Office and the Immigration Courts—time that could be spent assessing the merits of asylum cases rather than litigating technicalities relating to the filing deadline. The deadline also shifts the cases of asylum seekers—including many genuine refugees—into the Immigration Court system. Furthermore, the deadline undermines governmental interests in promoting integration; while some refugees found to be ineligible for asylum under the deadline are eventually extended a limited protection from removal (withholding of removal), these refugees are not afforded the ability to bring their children and spouses to the United States or to become lawful permanent residents or citizens.

In other cases, refugees who have well-founded fears of persecution but cannot meet the higher standard under U.S. law for withholding of removal are ordered deported back to their countries of persecution under the one-year bar. While the differing standards have a long history under U.S. law,⁶⁰ this anomaly can lead the United States to deport back to persecution refugees with well-founded fears of persecution—including in cases implicating the asylum filing deadline.

A filing deadline that prevents asylum cases from being adjudicated on their merits is inconsistent with U.S. commitments under the Refugee Protocol. Article 33 of the Refugee Convention prohibits the return of refugees to persecution, and Article 34 requires the United States to facilitate the assimilation and naturalization of refugees.⁶¹ The UNHCR Executive Committee, of which the United States is a member, has specified that failure

to comply with technical requirements such as filing deadline “should not lead to an asylum request being excluded from consideration.”⁶²

RECOMMENDATION: Eliminate the Asylum Filing Deadline

- **Congress** should eliminate the one-year asylum filing deadline that bars refugees with well-founded fears of persecution from asylum.

Improve Implementation of Expedited Removal

Under expedited removal, immigration officers have the power to order the immediate, summary deportation of people who arrive in the United States without proper travel documents. That authority had previously been entrusted to the Immigration Courts. When the expedited removal process was first implemented, the former Immigration and Naturalization Service (INS) applied it only to those who sought admission at a U.S. airport or border entry point without valid documents. Between 2004 and 2006, expedited removal was expanded to apply to those encountered within 100 miles of any U.S. border if they have been in the country for less than 14 days. The number of individuals subject to this summary process has increased significantly—in 2002, 34,624 individuals were deported through expedited removal, but this number more than tripled to 113,462 in fiscal year 2008.⁶³

Those who fear persecution are not supposed to be summarily deported under expedited removal. Instead, they are supposed to be referred for screening interviews with U.S. Asylum Officers to determine if they have a “credible fear of persecution,” defined as a significant likelihood of establishing a claim to asylum. If an asylum seeker passes that screening interview, or a subsequent review, he or she will be placed into removal proceedings before the Immigration Court to apply for asylum. Those who do not meet the credible fear standard are deported. The expedited removal process lacks sufficient safeguards to ensure that asylum seekers are not mistakenly deported, and the law should be revised to limit its use to migration emergencies.⁶⁴

Given the dire consequences of improper removal for those facing persecution, U.S. immigration authorities tried to inject some measures into the process to guard against the mistaken deportation of refugees. But the bipartisan U.S. Commission on International Religious Freedom (USCIRF), which conducted a comprehensive

study of expedited removal, found serious flaws in the implementation of these measures. For example: immigration officers failed to inform individuals that they could ask for protection if they feared returning to their countries in about half of the cases observed by USCIRF experts, failed to ask critical questions relating to fear of return in about 5 percent of cases, and actually ordered the deportation of individuals who expressed a fear of return in about 15 percent of the cases observed by USCIRF experts.⁶⁵ Immigration inspectors have also subjected individuals who arrive on valid passports and otherwise valid visas to the expedited removal process—and its mandatory detention provision—if they expressed a fear of return.⁶⁶

Despite the increase in the number of individuals placed into expedited removal, the number of individuals identified as potential asylum seekers by U.S. Customs and Border Protection officers has dropped significantly. Nearly 10,000 individuals were referred by immigration inspectors for “credible fear” interviews in 2002 (and therefore sent to U.S. detention facilities for these screenings instead of being immediately deported). In fiscal year 2007, however, only 5,285 individuals were referred for these asylum screening interviews. In addition, the rate at which U.S. Citizenship and Immigration Services Asylum Officers have found asylum seekers to meet the “credible fear” standard has also fallen sharply. From 2000 to 2004, the average pass rate of those referred for a credible fear interview was 93 percent as reported by USCIRF. By fiscal year 2008, the pass rate had dropped to 59 percent. In some parts of the country, these pass rates are significantly lower than the national average.⁶⁷

Since 2005, there has also been a significant increase in the number of credible fear screening interviews conducted by video conference. The Asylum Office began using video conferencing to conduct credible fear interviews in late 2005. In fiscal year 2007, the Asylum Office conducted over 60 percent of all credible fear interviews by video conference. If an asylum seeker does not “pass” this interview or a subsequent review (also increasingly conducted by video), the asylum seeker is not even allowed to file an application for asylum in this country. According to statistics provided by the Asylum Office for fiscal year 2007, the pass rate for credible fear interviews conducted by video conference and those conducted in-person was comparable. Other Asylum Office statistics show that the

credible fear pass rate fell from 94 to 59 percent between 2004 and 2008.⁶⁸

RECOMMENDATIONS: Improve Implementation of Expedited Removal

- The **Department of Homeland Security** and **Customs and Border Protection (CBP)** should (i) ensure that procedures designed to protect asylum seekers from being returned to persecution are followed; and (ii) stop detaining asylum seekers who arrive with valid visas solely because the individual requests asylum or indicates a fear of return.
- The **Department of Homeland Security** and **Citizenship and Immigration Services** should (i) ensure that all credible fear interviews are conducted in a timely manner and request and allocate appropriate funding so that these interviews are conducted in person; and (ii) conduct an assessment of the decline in the credible fear grant rate, the decline in referrals for credible fear interviews, and the impact of video conferencing on the conduct and outcomes of credible fear interviews.
- **Congress** should authorize the U.S. Commission on International Religious Freedom to conduct a review of expedited removal and its expansion, building on the Commission's previous comprehensive study in 2005 on the impact of expedited removal on asylum seekers.

Ensure Protection in Maritime Interdiction

The United States has a long history of interdicting asylum seekers and migrants at sea—a history that has triggered international criticism including from the Inter-American Commission on Human Rights.⁶⁹ U.S. interdiction policies do not ensure U.S. compliance with its commitments under the Refugee Protocol and other human rights conventions. The UNHCR Executive Committee made clear in 2003 that “interception measures should not result in asylum seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.”⁷⁰

Over the years, U.S. maritime interdiction policies have been developed in response to situations regarded as crises—crises involving persecution, human rights abuses, political violence, economic deprivations, or some combination of the above. The United States currently does not have effective, fair, transparent and non-discriminatory interdiction standards to guide its actions and ensure compliance with its commitments under the Refugee Protocol and other human rights conventions.

In the last three years alone, according to the U.S. Coast Guard, the United States has repatriated nearly 5,000 Haitians and 6,000 Cubans.⁷¹ U.S. interdiction policies are flawed for all who attempt to come to the United States by sea—Haitians, Cubans, Chinese, and others. But they are particularly flawed for Haitians. Haitians are not informed, either in writing or verbally, that they can express any fear or concern about repatriation. By contrast, Cubans are at least told that they can raise any concerns with a U.S. officer. The United States should conduct short interviews with each individual it interdicts. Not only would these interviews help identify anyone who may require a protection interview, but they are also essential to identify urgent medical concerns and whether children are unaccompanied or at risk of trafficking.

The United States also does not require that Creole-speaking officers or translators are present during interactions with Haitians. As a result, if a Haitian should want to advise a Coast Guard officer about a fear of return, the Haitian may not be able to communicate verbally with the officer. This non-process is known as the “shout test”—because the only way for a Haitian migrant to communicate a fear of return (which might lead a U.S. officer to refer the Haitian for a screening interview with an Asylum Officer) is to shout or wave his or her hands or somehow make a fear of return known by physical action. Without effective communication, there can be no assurance that a refugee would be able to communicate his or her fears of return to U.S. officials conducting interdiction or rescue operations.

RECOMMENDATION: Ensure Protection in Maritime Interdiction

- The **White House** should direct that the **Department of Homeland Security** revise flawed interdiction policies and develop transparent, non-discriminatory, and written standards to ensure

protection in the course of interdiction and rescue operations. Important reforms include abandoning the “shout” test, requiring translators and individual interviews during interdiction, and implementing effective safeguards to ensure that those with protection concerns are referred for protection screening interviews. Those who are ultimately found to be refugees should be resettled in places where they have family or other ties.

Protect Refugees from Inappropriate Exclusion

U.S. immigration laws have for many years barred from the United States people who pose a danger to our communities or threaten our national security, even if they have a well-founded fear of persecution and otherwise qualify as refugees under INA § 101(a)(42). Bars to refugee protection also penalize people who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law. These important and legitimate goals are consistent with the U.S. commitment under the Refugee Convention and its Protocol, which exclude from refugee protection perpetrators of heinous acts and serious crimes, and provide that refugees who threaten the safety of the community in their host countries can be removed.⁷²

Over the past eight years, however, the provisions of the immigration law relating to “terrorism”—as that term is defined in the Immigration & Nationality Act (INA)—have undergone rapid legislative expansion. These recent amendments also drew attention to previously unnoticed over-breadth of the immigration law’s underlying definition of “terrorist activity.”⁷³ While these provisions were intended to target people who threaten U.S. national security and those who have engaged in or supported acts of wrongful violence, Congress has written several of these provisions so broadly, and the Departments of Homeland Security and Justice have interpreted and applied them so expansively, that in recent years thousands of refugees—who do not pose a danger to the United States and have not committed any acts that should bar them from protection under the Refugee Convention—have had their applications for asylum, permanent residence, and family reunification denied or delayed. The “terrorism”-related provisions in the INA—particularly the definition of “terrorist activity,” the definition of a “Tier III” or “non-designated” “terrorist organization” under 8 U.S.C. § 1182(a)(3)(B)(vi)(III), and

Refugees Who Have Been Characterized as Inadmissible on “Terrorism”-Related Grounds Under Current Legal Definitions and Interpretations⁷⁴

- A refugee from Burundi was detained for 20 months in a succession of county jails because ICE and the Immigration Judge, who would otherwise have granted him asylum, took the position that he had provided “material support” to a rebel group because armed rebels robbed him of four dollars and his lunch. This man was only released after the Board of Immigration Appeals (BIA) ruled in his favor. While the BIA’s decision in that case recognized both that this asylum seeker had committed no act of “material support” and that the “support” involved was in any case not “material,” the BIA has declined to publish this decision, and other asylum seekers, refugees, and asylees continue to face severe difficulties over minimal contributions to groups deemed to be “terrorist organizations” under the immigration law.
- A young man—who arrived in the United States as an unaccompanied minor in 1988, was previously granted asylum, and has been living here peacefully and productively for over 20 years—has been told his application for permanent residence (pending since 1999) is on hold because he had explained in his asylum application that between the ages of 12 and 16 he had carried supplies for the National Islamic Front of Afghanistan (NIFA). The NIFA was aided in this struggle by the U.S. government; the group, generally viewed as the most moderate of the various Afghan movements fighting the Soviet invasion in the 1980s, had dissolved before the immigration law’s “Tier III” definition was first enacted in 2001, and its former leaders went on to become key U.S. allies in rebuilding Afghanistan after the fall of the Taliban.
- A mother from Cameroon who was granted asylum based on her peaceful political activism for the rights of Cameroon’s English-speaking majority petitioned for her children to join her in the United States. Her petitions were placed on hold based on DHS’s concern that the Southern Cameroons National Council should be considered a “Tier III” group. In the three years these petitions have been pending, as DHS has failed to resolve this issue, one of this woman’s children has died of natural causes.

the other statutory provisions that reference those definitions—are far more expansive than the grounds of exclusion or the exceptions to the *non-refoulement* obligation contemplated by the Refugee Convention.

Thousands of refugees who were victimized by armed groups, including by groups the United States has officially designated as “terrorist organizations,” have been treated as “supporters of terrorism.”⁷⁵ Any refugee who ever fought against the military forces of an established government is being deemed a “terrorist.” Refugees who voluntarily helped any group that used armed force are suffering the same fate—regardless of who or what the group’s targets were and regardless of whether the assistance the refugee provided had any logical connection to violence.

These provisions are being applied to many refugees who were associated with groups that the U.S. government does not consider to be “terrorist organizations” in any other context. As a result, refugees who pose no threat to the United States, and are not guilty of any conduct for which the United States would legitimately want to exclude them, are being denied the protection they need or are unable to obtain permanent residence or reunited with their spouses or children. Any non-citizens who *do* pose a threat to the United States or who *are* guilty of actual terrorist acts or other crimes are *already covered* by other provisions of the immigration law, so that the “Tier III” definition is being used overwhelmingly against people who were not its intended targets. In fact, many of the refugees affected by the “Tier III” definition’s over-breadth were involved only in peaceful political activity in connection with groups that are now deemed to be “terrorist organizations” for immigration-law purposes.

The federal immigration agencies charged with applying these laws—the Department of Homeland Security, the Department of Justice, and the Department of State—have also been interpreting all these provisions in a very expansive way. The immigration law’s “material support” bar, for example, is being applied to minimal contributions, to people who were forced to pay ransom to armed groups, to doctors who provided medical care to the wounded in accordance with their medical obligations, and to persons who engaged in other forms of lawful activity.⁷⁶ These interpretations have exacerbated the impact of the law’s overbroad definitions.

The Secretaries of State and Homeland Security have discretionary authority to decline to apply these “terrorism”-related provisions in individual cases, and for nearly five years, this has been the Administration’s primary approach to addressing these problems. Unfortunately, this approach is not working. By the end of 2008, a consensus had emerged among those working most closely on these issues that the previous approach to granting “waivers” to deserving applicants who had had voluntary associations with groups now deemed to be “Tier III terrorist organizations” was not viable. After reviewing alternative approaches for over a year, the new Administration appears poised to return to the group-based approach to implementing such waivers, the same approach whose inadequacy had prompted this year-long review.⁷⁷ This is a dismaying development for the many refugees whose physical safety, stability, and family unity depend on prompt resolution of this problem.

Examples of Groups Who Have Been Labeled “Tier III Terrorist Organizations”

- Iraqi groups who rose up against Saddam Hussein in the 1990’s, including those who took part in the failed uprising at the end of the Gulf War of 1991 that was encouraged by the first President Bush;
- The Democratic Unionist Party and the Ummah Party, two of the largest democratic opposition parties in Sudan, many of whose members were forced to flee the country in the years after the 1989 military coup that brought current President Omar Al-Bashir to power;
- Groups that fought the ruling military junta in Burma and were not included in the 2007 legislation that removed the Chin National Front and other Burmese insurgent groups from the scope of the Tier III definition;
- Virtually all Ethiopian and Eritrean political parties and movements, past and present; and
- Groups that fought for the independence of Bangladesh—in 1971.

For many years, DHS and its predecessor agency the Immigration and Naturalization Service, as well as the Board of Immigration Appeals (BIA), had also been applying the immigration law’s “persecutor bar” to applicants who had been forced under duress to assist in acts of persecution against other people. Victims of this interpretation have included former child soldiers and other refugees who were forced by their own persecutors to take part in the persecution of others. Both agencies argued that their interpretation was required by a 1981 Supreme Court decision interpreting provisions of the Displaced Persons Act. In March 2009, the Supreme Court clarified that its earlier precedent did *not* dictate the interpretation of the INA’s persecutor bar, and has remanded the issue for the BIA for reconsideration.⁷⁸ This provides an opportunity for the Departments of Justice and Homeland Security to revise their interpretations of the persecutor bar so as to ensure that those who are not legally responsible for the persecution of others are not unfairly targeted by provisions aimed at those who knowingly and voluntarily persecute their fellow human beings.

RECOMMENDATIONS: Protect Refugees from Inappropriate Exclusion

- **Congress** should revise the overly broad definitions in INA §212(a)(3)(B) that are excluding legitimate refugees from asylum (and refugee resettlement) and mislabeling them as supporters of “terrorist organizations,” including by eliminating the statutory definition of a “Tier III” undesignated terrorist organization, which has led to numerous unintended consequences but is not needed as an enforcement tool against its intended targets.
- The **Departments of Homeland Security, Justice, and State** should interpret existing law consistently with its text and purpose to target those who advance terrorist activity, and adopt a more effective and fair approach to granting “waivers”—one that allows people initially applying for asylum, refugee status, or other relief to be considered for waivers based on an individualized assessment of their actions, that permits prompt adjudication of the large mass of applications for permanent residence and family reunification of people already granted asylum or refugee status, and that ensures that no refugee is deported without being considered for a waiver if eligible for waiver consideration under the statute.
- The **Departments of Homeland Security and Justice** should promptly revise their interpretation of the INA’s “persecutor bar” so as to ensure that this bar is applied only to those who knowingly and voluntarily persecuted other people.

Clarify “Social Group” Basis for Asylum

To be eligible for asylum, applicants must show that they have suffered persecution or have a well-founded fear of persecution *on account of* one or more of the protected characteristics of the refugee definition, including *membership in a particular social group*. The interpretation of the “on account of” (or “nexus”) and “particular social group” elements in U.S. law has posed particular challenges for refugees fleeing gender-based harm, such as rape, forced marriage, honor killings, domestic violence, and female genital mutilation, as well as for some refugees who have fled on account of their sexual orientation or gender identity. Refugees fleeing these forms of harm, whose persecutors often do not articulate the reasons for their actions, can face difficulties in obtaining direct evidence that their persecutors harmed them on account of their gender or other protected grounds. Gender-based asylum claims have also often borne the brunt of misunderstandings of the concept of “social group,” and given rise to misplaced concerns about defining large groups of people within a society as “particular social groups” for asylum purposes.

Despite the pressing need for legal guidance on the particular social group and nexus elements, the Departments of Homeland Security and Justice have yet to act in promulgating long overdue regulations, though they have indicated an intention to re-launch the rulemaking process in a December 2009 announcement in the Federal Register.⁷⁹ In 2000, the then-INS issued a proposed rule—which has never been finalized—that sought to clarify these aspects of the refugee definition, particularly as they relate to gender-based harms.⁸⁰ Meanwhile, without that guidance, Immigration Judges and the Board of Immigration Appeals (BIA) have issued inconsistent and, in some cases, incoherent decisions, further convoluting the law and making it more difficult for asylum applicants with gender-based claims to prove that they fit within the refugee definition. Under decisions issued by the BIA in 2007 and 2008, asylum applicants who base their claim on their membership in a particular social group, in addition to providing evidence that the members of the group share a common immutable

characteristic, have also been required to show that the group is both “discrete” and visible to society at large such that they can be distinguished from others in the eyes of the persecutor.⁸¹

As a result of the ten-year delay in resolving these issues, asylum applicants have been denied protection and returned to the hands of their persecutors, or have remained in legal limbo, postponing their ability to reunite with their children and bring them out of harm’s way. For examples, after fourteen years of legal proceedings, the highly publicized case *Matter of R-A*⁸² was finally resolved on December 16, 2009, when an Immigration Judge granted Rodi Alvarado asylum. Ms. Alvarado had fled her home country of Guatemala in 1995 after suffering over a decade of brutal domestic violence while receiving no protection from the Guatemalan police or courts, though she repeatedly asked for help. Finally achieving resolution in *Matter of R-A* is relief for Ms. Alvarado. However, the struggle to ascertain a clear standard of protection for other female asylum seekers like Ms. Alvarado—and in other cases in which particularly vulnerable individuals are fleeing persecution due to their membership in a particular social group—continues.

Two basic regulatory—or statutory—fixes would ameliorate many of these problems. First, direct or circumstantial evidence should be admissible to fulfill the nexus requirement, including evidence that the persecution suffered fits into a generally accepted pattern of violence in the home country. This framework is consistent with the Supreme Court’s nexus analysis in *INS v. Elias-Zacarias*.⁸³ Second, the definition of particular social group should be guided by the “fundamental and immutable characteristics” standard, as articulated in the BIA’s precedential decision *Matter of Acosta*,⁸⁴ without additional requirements. This standard requires that members of a particular social group demonstrate that they share a common characteristic they either cannot change, or should not be required to change because the characteristic is fundamental to their identity or conscience. Reversion to the BIA’s long-established and well-regarded *Acosta* standard would eliminate the need for a particular social group be “socially visible,” a requirement that is posing severe obstacles to a broad range of meritorious asylum claims, and has been criticized by federal court judges such as Judge Posner of the Seventh Circuit Court of Appeals, who recently observed that “if you are a member of a group that has been targeted for

assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible.”⁸⁵

RECOMMENDATION: Clarify “Social Group” Basis for Asylum

- The *Departments of Justice and Homeland Security* should promulgate regulations clarifying the interpretation of the “particular social group” category and “nexus” requirement. These regulations should provide that the definition of a “particular social group” is guided by the “fundamental and immutable characteristics” standard without additional requirements, and that “nexus” can be established by either direct or circumstantial evidence. If these changes are not made promptly through regulation, **Congress** should pass legislation.

3. Ensure a Fair and Effective Adjudication System for Asylum Cases

The quality of decision-making by the Immigration Courts and the Board of Immigration Appeals (BIA) has been widely criticized by federal court judges, the Government Accountability Office, members of Congress, legal scholars, and other experts in recent years. Studies of the Immigration Court process, including the recently published report by the American Bar Association Commission on Immigration, “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases”⁸⁶ and *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*,⁸⁷ have highlighted serious concerns related to the adjudication system’s ability to provide fair, legally accurate, and well-reasoned decisions in a timely manner. The *Refugee Roulette* study found that significant disparities exist in asylum adjudications, both regionally between courts and among judges within the same court.⁸⁸ These disparities in asylum adjudications create the significant possibility that the United States is returning refugees to countries where they face persecution and, thereby, failing to live up to its obligations under the Refugee Convention and Protocol.

Reform the Immigration Court System

The Immigration Court system is comprised of 57 Immigration Courts and 231 Immigration Judges under the Executive Office for Immigration Review (EOIR).⁸⁹ These courts hear several hundred thousand matters each year. In 2008, the Immigration Courts received over 47,000 asylum applications, cases that are factually and legally complicated and often carry life or death consequences.⁹⁰ Despite the high stakes, EOIR is underfunded and Immigration Judges are overwhelmed. During the same year, Immigration Judges completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions per judge, an average of 19 decisions per week or 4 per weekday.⁹¹ As recent studies have found, staffing shortages and insufficient resources at the Immigration Court level do not allow sufficient time for judges to properly consider evidence and formulate well-reasoned opinions.⁹²

In addition to lacking resources, the quality of appellate review by the BIA has been significantly diminished since the Department of Justice implemented procedures designed to “streamline” the administrative review process in 2002. These “streamlining” procedures have resulted in decisions being made by a single Board member rather than by a panel of three (as had been the standard for many years), summary affirmances of Immigration Court decisions without issuing any analysis or basis for doing so, and three-member panels issuing precedent decisions rather than requiring participation of the entire Board in setting precedent decisions. These changes have led to precedent decisions being issued based on misinterpretations of long-standing precedent and international standards. The changes also led to a substantial drop in the grant rate of asylum appeals, coinciding with the rise in asylum claims brought to the federal circuit courts of appeals, often with insufficient treatment by the BIA for the appellate court’s adequate review. These flawed decisions have inappropriately denied asylum to many refugees with a genuine need for protection.⁹³

These problems persist even after former Attorney General Alberto Gonzales promised Immigration Court and BIA reform—including increased funding, additional personnel, enhanced *pro bono* programs, and improved training and oversight—in August 2006.⁹⁴ In fact, a June 2009 report found that many of these reforms have not been implemented.⁹⁵ Similarly, while the BIA has begun

to issue fewer summary decisions, approximately one-third of its decisions were appealed to the federal circuit courts in 2008, indicating that many BIA decisions still lack meaningful review or analysis.⁹⁶

RECOMMENDATION: Reform the Immigration Court System

- The **Department of Justice/Executive Office for Immigration Review** should take steps to improve the quality and fairness of the asylum adjudication process by restoring three-member panel review in asylum appeals at the Board of Immigration Appeals (BIA) and requiring the BIA to issue written decisions that provide the legal basis for the decision and address the arguments made by the parties.
- The **Department of Justice/Executive Office for Immigration Review** should expand staffing at the Immigration Courts and BIA and provide for adequate training of all BIA members, Immigration Judges, and legal support staff. **Congress** should provide the necessary resources to do so.

Support Expansion of Legal Presentations

In a September 2008 report, the Government Accountability Office found the likelihood of an asylum claim being granted by an Immigration Judge increased significantly for those who had legal representation.⁹⁷ The *Refugee Roulette* study found that represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients.⁹⁸ A 2005 report by the U.S. Commission on International Religious Freedom (USCIRF) similarly found that arriving asylum seekers with legal counsel were granted asylum at a rate of 90 percent more than those who did not have counsel.⁹⁹ In response to the USCIRF report, the Executive Office for Immigration Review (EOIR) commented, “Non-represented cases are more difficult to conduct. They require far more effort on the part of the judge.”¹⁰⁰ Nevertheless, the ABA study found that less than half of immigrants in proceedings during the last several years had the benefit of representation, and for those in detention, about 84 percent were unrepresented.¹⁰¹

While not a substitute for legal representation, a successful EOIR program managed through a contract with the Vera Institute for Justice—which subcontracts with local non-profit legal service providers—has succeeded in providing basic legal information to some

of the 84 percent of detained immigrants who are unrepresented. The Legal Orientation Program (LOP) offers basic legal information to immigrant detainees so that they can understand their legal options, and helps connect them to *pro bono* resources. LOP has received widespread praise for promoting the efficiency and effectiveness of the removal process from Immigration Judges, who have lauded LOP for better preparing immigrants to identify forms of relief. Despite its success, LOP is available in only 25 of more than 300 detention facilities nationwide.¹⁰²

RECOMMENDATION: Support Expansion of Legal Presentations

- **The Department of Justice/Executive Office for Immigration Review** should expand the LOP to provide detained immigrants and asylum seekers with basic legal information, and **Congress** should provide the necessary resources to do so.

4. Improve the Resettlement System to Better Protect the Rights of Refugees

Develop a Fast-Track Process for Refugees at Imminent Risk

Resettlement serves several important purposes. First, resettlement is a tool to provide international protection to highly vulnerable refugees with acute protection needs in countries of first asylum. Second, resettlement provides durable solutions to large groups of refugees, in tandem with the durable solutions of local integration and voluntary repatriation. And finally, resettlement is an act of responsibility sharing, allowing states to help to reduce the impact of refugees on countries of first asylum.¹⁰³ Yet resettlement is not a quick process—many refugees can wait for more than one year to be resettled to third countries. While often the long wait for resettlement is difficult for many refugees, the waiting period can be deadly or dangerous for refugees who face imminent risks of harm in their countries of first asylum. The United States currently lacks a formal system to expedite the resettlement of individual refugees who face imminent risks or serious threats.

While by definition all refugees are vulnerable and many are likely to have experienced direct violence, some refugees are at particular risk of serious harm or imminent danger in their countries of first asylum. These

risks of harm or danger may arise from the political, cultural, or social environment in the country of first asylum. The individuals may be high-profile journalists or human rights advocates, refugees with urgent medical problems, unaccompanied minors, victims of xenophobic violence, men and women subject to sexual and gender-based violence, refugees who face persecution on account of their sexual orientation or gender identity, and women and children who are at risk of being trafficked.

In order to identify refugees who face imminent risks of harm, UNHCR needs to enhance its screening and outreach measures to ensure that fast-track resettlement is accessible and available to at-risk refugee categories. In some contexts, it has been reported that vulnerable refugees are either hesitant to register with UNHCR outright, or, if they do register, will withhold personal information about particular circumstances that would reveal acute risks warranting expedited resettlement. For example, an increasing number of Iraqi refugee women are turning to survival sex as a means to provide for themselves and their families.¹⁰⁴ While many of these women are registered with UNHCR, they rarely disclose the fact that they engage in survival sex to UNHCR registration officers. This kind of activity, as well as sexual and gender-based violence more broadly, carries tremendous social stigma throughout the Middle East. Lesbian, gay, bisexual and transgendered (LGBT) refugees face similar issues in a number of different contexts, often opting to hide their sexual orientation from UNHCR, even when they are facing homophobic violence in their countries of first asylum.¹⁰⁵ Targeted outreach to vulnerable refugees and vulnerable groups, as well as sensitive and confidential questioning during registration and other key interactions—to identify potential risks in the country of first asylum—are needed to detect those at risk of imminent harm.

While the Department of State has indicated it does fast-track individual cases, a publicly available written policy or procedure describing this process has not yet been produced. The absence of a formal and transparent system to expedite resettlement processing for refugees at imminent risk, to enable them to escape danger, is a critical protection gap in the U.S. refugee program.

As it conducts its ongoing review of the refugee resettlement system, the National Security Council should take steps to address this gap. The White House, working with the Departments of State and Homeland

Security, should develop a set of written procedures to facilitate expedited processing of at-risk refugees who face imminent harm in countries of first asylum. The United States should make written guidance publically available and distribute it widely to relevant stakeholders, such as U.S. Embassies and Consulates, UNHCR, and non-governmental organizations that may learn of individuals who are in need of fast-track resettlement.

In addition to strengthening its own fast-track system, the United States should support UNHCR to increase its capacity to evacuate refugees facing imminent harm or danger in countries of first asylum to safe locations for resettlement processing. UNHCR currently maintains a number of Emergency Transit Centers in different locations around the world. Yet they have limited capacity to hold large number of refugees, and targeted assistance from the United States is required to ensure these centers cater to diverse groups of refugees with various protection needs.

RECOMMENDATIONS: Develop a Fast-Track Process for Refugees at Imminent Risk

- The *White House*, working with the *Departments of State and Homeland Security*, should develop a formal global system to fast-track refugee status determinations and resettlement processing for refugees facing imminent harm in countries of first asylum who are referred for resettlement to the U.S. Refugee Admissions Program (USRAP). Key elements of such a system are outlined above.
- The *Department of State* should support UNHCR to increase its capacity to protect refugees facing imminent harm, through both fast-track resettlement processing and, when needed, measures to ensure at-risk refugees are safely evacuated to third countries for resettlement processing.

Improve Fairness and Effectiveness of Resettlement Process

The U.S. government has acknowledged “the essential need for an orderly and fair system for the adjudication of asylum claims.”¹⁰⁶ The principles of orderliness and fairness should likewise guide the U.S. overseas refugee processing system. Recently DHS undertook efforts to better include safeguards within overseas processing, but significant gaps still remain. For example, when refugees are deemed ineligible for resettlement, the

information they receive is not sufficient for them to meaningfully appeal. The DHS Notice of Ineligibility is not translated into local languages. Should a refugee want to appeal a denial through the Request for Reconsideration (RFR) procedure, she can make written submissions only—in-person interviews are not available. Anecdotal evidence suggests that refugees are more successful in their RFRs when they have legal representation, yet refugees’ attorneys cannot speak on their clients’ behalf to U.S. government officials or receive information on their cases.

Necessary Elements of a Fast-Track Resettlement Process for Refugees Who Face Imminent Harm in Countries of First Asylum

- A list of criteria, reviewed and updated regularly, to determine what types of cases should be fast-tracked;
- A strengthened role for qualified NGOs and U.S. embassies in referring acute protection cases directly to the U.S. Refugee Admissions Program; and
- Identification of the steps that must be expedited, depending on processing location and referral source—including UNHCR registration and refugee determination, Overseas Processing Entity procedures, DHS interview(s), sponsorship assurance, pre-departure preparations, and security clearances.

Instituting due process safeguards in the overseas process, including those detailed on the previous page, will help ensure that refugees in greatest need have a fair opportunity to be resettled in the United States.

RECOMMENDATION: Improve Fairness and Effectiveness of Resettlement Process

The *Department of Homeland Security* should improve the fairness of the overseas refugee resettlement process by increasing transparency and accountability, enhancing quality assurance mechanisms, requiring written Notices of Ineligibility for Resettlement describing the basis for denial, and allowing resettlement applicants to have legal representation.

Improve Staffing, Coordination, and Timeliness of Security Clearances

In the wake of the thwarted attack by the so-called Christmas bomber in a plane over Detroit in December 2009, the U.S. system of security clearance procedures has received increased media and congressional scrutiny. This scrutiny is much welcome. Inefficiencies and insufficient resources devoted to security clearance procedures not only make the United States more vulnerable, but also can delay the arrival in the United States of genuine refugees and their family members, potentially stranding them in danger or destitution in their countries of first asylum. For individuals who have already suffered serious violence, imprisonment, or other persecution, the delays caused by an under-resourced security clearance process can exacerbate the trauma of displacement.

The security clearance process is an essential step in the screening of refugees and other immigrants coming to the United States. It is a complex multi-agency process that requires participation by the Departments of Homeland Security, State, and Justice, as well as the Central Intelligence Agency. For refugee applicants, the process begins as soon as the U.S. government receives the case file, and involves running applicant names and fingerprints through multiple agency databases, further inquiry in the case of a “hit” (potential match), and sometimes an additional level of review called a Security Advisory Opinion. Since September 11, SAOs have been required for a wider range of individuals than before, sometimes based on nationality.¹⁰⁷

However, due to inadequate resources and coordination, security clearance procedures can delay resettlement for ten months or more without any affirmative communication from the government about the cause of the delay—particularly for refugee applicants with common names, whose applications may be held up while the U.S. government verifies their true identities, or for refugee applicants to whom the U.S. government has inappropriately applied exclusion provisions based on “terrorism bars.”¹⁰⁸

In its 2009 report “Promises to the Persecuted: The Refugee Crisis in Iraq Act,” Human Rights First found that significant delays in security clearance processes were holding up the resettlement of many Iraqi refugees, including those who had been targeted due to their work for the U.S. government or military.¹⁰⁹ Many Human

Rights First asylum clients and their families have also faced lengthy delays in their security clearance before they receive a final grant of asylum or can reunite with their families in the United States. For example, an Iraqi journalist who fled to Jordan with his family and was referred as a refugee to the United States waited almost 15 months – following DHS approval on his application and completed security clearances on his wife and children – before he received notice of his own completed security check. While they waited, he and his family were virtually housebound in Amman, depleting their savings and unable to work legally or plan for their futures.¹¹⁰

RECOMMENDATION: Improve Staffing, Coordination, and Timeliness of Security Clearances

The *White House*, working with the *Departments of State, Justice and Homeland Security*, and the *Central Intelligence Agency*, should complete the ongoing inter-agency review on security clearance procedures, and implement improvements promptly. Each agency involved in the security clearance process should be provided the staffing it requires to complete checks accurately and expeditiously, within a set number of days; and a point person should be charged with the authority to ensure that each case moves through the system in a timely manner.¹¹¹

Provide Appropriate Support for Refugee Integration

Refugee admissions to the United States have become far more diverse since the Refugee Act was passed in 1980, both in terms of the cultural, historic, linguistic, and religious backgrounds of the newly resettled populations and the individual post-arrival needs of refugees within these diverse groups. Despite the increased diversity of resettled refugee populations, as well as the changing and in some cases increasingly difficult socioeconomic realities of life in the United States, the U.S. Refugee Admissions Program (USRAP) has continued to apply the same one-size-fits-all system to post-arrival assistance that was established in 1980. Refugee resettlement organizations and refugees themselves have long recognized the inadequacies of the system. Two recent reports from the International Rescue Committee and from Georgetown University Law Center document the challenges faced particularly by newly resettled Iraqi refugees, which only echo those

faced by other refugee populations in the United States.¹¹²

Steps to Improve the Fairness of the Refugee Resettlement Adjudication Process

- DHS Notice of Ineligibility for Resettlement should describe the basis for the finding of ineligibility in a format similar to the Notice of Intent to Deny that is issued to affirmative asylum applicants who are in valid immigration status at the time USCIS adjudicates their cases. Without such an explanation of the facts on which DHS based its decision and of its legal conclusions, it is difficult for the refugee applicant (or any English speaker assisting the refugee applicant) to satisfy the requirements of a Request for Review (RFR) (i.e. to show why the original decision was wrong or to provide new evidence that would alter it).
- DHS Notice of Ineligibility for Resettlement should describe the right to request review, and the procedure for doing so, in a language the applicant understands.
- RFR should be adjudicated by senior USCIS officials rather than by Refugee Corps officers. A refugee applicant should receive an RFR decision within 90 days, and within a shorter time frame if the applicant's case is fast-tracked due to vulnerability in the country of first asylum.
- RFR adjudicators should be encouraged to conduct in-person applicant interviews in cases where the facts and submissions indicate that an interview would help ensure an accurate determination, rather than attempting to make all decisions based on written submissions, which are often prepared without the assistance of an attorney.
- DHS should create effective quality assurance procedures for decisions on both initial refugee applications and RFRs.
- A refugee applicant should have the right to legal representation, and such representative should be permitted to accompany applicant to interviews, to submit evidence on his behalf, and to request and receive information regarding his case.

The personal experiences of individual refugees contribute substantially to their needs upon arrival, even among refugees from similar regions and backgrounds. Some refugees come to the United States after languishing in remote refugee camps for decades; others have been struggling in large cities as urban refugees to survive in their countries of first asylum. Some come to join large close-knit families already in the United States, while others have lost their loved ones in war or conflict and arrive in the United States alone. Some may have never learned to read or received any formal education; others have completed years of higher education and worked as doctors, lawyers, scientists, or teachers in their countries of origin before they were forced to flee. Many have suffered serious violence or torture and require ongoing medical treatment or culturally appropriate mental health care.

Upon admission to the United States, refugees are eligible for up to eight months of benefits and services. These benefits are administered through two distinct agencies of the federal government: the Department of State and the Department of Health and Human Services' Office of Refugee Resettlement (ORR). The refugee benefits program is designed to be a "public-private partnership" among public entities—at federal, state, and municipal levels—and private non-profit organizations at national and local levels. At the federal level, the State Department's Reception and Placement program provides travel loans (repayments begin six months after arrival in the United States), assistance with travel arrangements, and assignment to a local resettlement agency in the United States. After arrival in the United States, refugees may access ORR's programs, which include cash and medical assistance, case management, employment services, and other benefits. Beyond the eight months, refugees are eligible for other "means-tested" federal public benefits, welfare programs that most lawful permanent residents are barred from accessing until they have been in the United States for five years.¹¹³

These benefits packages are designed to provide basic initial integration assistance to newly arrived refugees and put them on a path toward self-sufficiency, but they have been so watered down over the years that they are failing to provide the services and support systems needed by today's refugee populations. The current economic climate has exacerbated the challenges faced by refugees as they establish new lives in the United States. Many are finding it increasingly difficult to obtain

employment, with resettlement benefits proving to be inadequate in mitigating joblessness, poverty, and, in some instances, homelessness. The private support for resettlement services, as well as the support from state and municipal governments that have traditionally supplemented federal government funds, has significantly declined. The welfare system has been scaled back across the board, leaving almost no social safety net for newly arrived refugees who are unable to find work. Many refugees arrive in the United States with significant medical and mental health care needs, while the U.S. health care system has grown more and more expensive, making treatment unaffordable for most. The combination of all these factors has put many refugees in dire straits. Some are barely able to survive after coming to the United States, seeking the chance at a new beginning.¹¹⁴

In the past year, the Obama administration has initiated an inter-agency review process to identify potential reforms of the U.S. refugee resettlement system, and in January 2010 State Department doubled the per capita amount of the Reception and Placement grant.¹¹⁵ These are welcome first steps. The Administration must follow through on the reform process to identify and implement crucial reforms to an inadequate post-arrival system.

RECOMMENDATION: Provide Appropriate Support for Refugee Integration

- The **Departments of State and Health and Human Services** should reform the refugee benefits programs to provide more appropriate support based upon an individual needs-assessment of refugees being resettled to the United States. **Congress** should ensure that the program is properly funded to allow for meaningful post-arrival support and integration assistance.¹¹⁶

5. Create Mechanisms Within the U.S. Government to Ensure Protection and Inter-agency Coordination

On March 1, 2003, the Immigration and Naturalization Service (INS) was abolished and its functions transferred to the new Department of Homeland Security (DHS).¹¹⁷ As a result of this transfer of immigration functions, asylum seekers now interact with three separate component agencies within DHS—Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS)¹¹⁸—as well as with the Coast Guard during the course of migrant interdiction operations. The Immigration Courts and Board of Immigration Appeals are part of the Executive Office for Immigration Review, within the Department of Justice. Multiple government agencies are also involved in U.S. refugee resettlement, including the Department of State, the Department of Homeland Security, and the Office of Refugee Resettlement within the Department of Health and Human Services.

Strengthen NSC Coordination

With all of these federal agencies and component agencies involved in activities relating to U.S. refugee policy and Refugee Convention compliance, strong White House leadership is crucial both to ensure the protection of refugees and to coordinate and oversee the policies, positions, and actions of the four Departments and their component agencies. A clear signal from the White House that these issues are a priority will also help encourage greater attention to addressing these issues by the leadership of the various departments and agencies.

RECOMMENDATION: Strengthen NSC Coordination

- The **White House** should strengthen its coordination on refugee protection by increasing the capacity of the National Security Council to coordinate refugee and asylum matters among governmental agencies, including the Departments of Homeland Security, Justice, State, and Health and Human Services.¹¹⁹

Bureaucratic Nightmares

Due to the lack of coordination, staffing, and prioritization devoted to addressing and resolving these issues, critical reforms that require inter-agency cooperation and collaboration have been stalled or delayed for years or are simply never adequately addressed. For example:

- After years of inter-agency dialogue and piecemeal actions, the Departments of Homeland Security, Justice, and State still have not resolved many of the most pressing problems relating to the unintended consequences the “terrorism” bars have had upon refugees and asylum seekers. This delay nearly shut down the U.S. refugee resettlement system and continues to undermine U.S. compliance with its *non-refoulement* obligations under the Refugee Protocol.¹²⁰
- The Bush administration had to appoint senior coordinators at both the Departments of State and Homeland Security in 2007 to ensure that adequate time and attention was devoted to improving the embarrassingly slow pace of resettlement for Iraq refugees, hundreds of thousands of whom had already fled Iraq by that time.¹²¹
- For over ten years, the Departments of Homeland Security and Justice have failed to issue joint regulations to clarify the “particular social group” category and “nexus” requirement in the refugee definition.¹²²
- For years, ICE has detained asylum seekers in remote facilities far from USCIS Asylum Officers and EOIR Immigration Courts, as well as potential *pro bono* representation. These decisions reflect a lack of communication among these agencies as well as a failure to address the protection needs of asylum seekers.¹²³
- In its 2005 report, USCIRF concluded that it was “exceedingly difficult to address inter-bureau issues” relating to the detention of asylum seekers and the conduct of the expedited removal process.¹²⁴ It took DHS nearly four years to issue a substantive response to the findings and recommendations of USCIRF’s 2005 report as that response required the input of various DHS component agencies.

Accentuate Refugee Protection Within DHS

The separation of functions between component agencies within the Department of Homeland Security, coupled with the Department’s mission,¹²⁵ has long raised concerns that cross-cutting issues relating to the protection of asylum seekers and refugees would “fall between the cracks” or be difficult to resolve. In 2003, Human Rights First recommended that the Department create a high-level office to coordinate and ensure protection for refugees and asylum seekers.¹²⁶ After USCIRF made a similar recommendation, former DHS Secretary Michael Chertoff created a new position of Special Advisor for Refugee and Asylum Affairs in 2006, but the office was quickly given broader responsibility over immigration policy, limiting its capacity to address and resolve a range of cross-cutting refugee issues. That position has now been converted to a less senior level position, and still lacks sufficient staffing, authority, and capacity to adequately resolve inter-agency issues within DHS.

RECOMMENDATIONS: Accentuate Refugee Protection Within the Department of Homeland Security

- The ***Department of Homeland Security*** should create a Refugee Protection Office, headed by political appointee with extensive experience in refugee matters, who reports directly to the DHS Secretary or Deputy Secretary. This Office should have both policy and operational oversight and have the authority to increase coordination across DHS components on refugee and asylum matters. It should also ensure that directives and guidance that affect refugees and asylum seekers are followed. This office should establish mechanisms to ensure that Coast Guard, ICE, CBP, and USCIS policies and actions are in accordance with U.S. treaty obligations, working closely with DHS and U.S. agency legal offices charged with overseeing treaty compliance, such as the newly revived Inter-agency Working Group on Human Rights.
- ***The Department of Homeland Security***’s Office of Policy should maintain a position dedicated to refugee and asylum matters. That position should be elevated in seniority and given additional support staff.

Conclusion

The recommendations outlined in this paper can be adopted over the next year, as the United States marks the 30th anniversary of the Refugee Act and renews its commitment to protecting the persecuted. By implementing these reforms, the United States will reaffirm its leadership in addressing the humanitarian needs of refugees and its commitment to protecting refugees' rights.

Endnotes

- ¹ Customs and Border Protection, Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and the U.S. Coast Guard within the Department of Homeland Security; the Bureau of Population, Refugees and Migration within the Department of State; The Office of Refugee Resettlement within the Department of Health and Human Services; and various offices within the Department of Justice.
- ² “The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfill their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.” UN Office of the High Commissioner for Human Rights, Universal Periodic Review, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.
- ³ See Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality and International Law*, 14 Am. U. Int. L. Rev. 61, 78 (1998).
- ⁴ See, e.g., UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva 14 August to 25 August 1950*, U.N. Doc. E/AC.32/8;E/1850 (Aug. 25, 1950).
- ⁵ 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.
- ⁶ Deborah Anker & Michael Posner, *A Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 10-11 (1981-1982).
- ⁷ See J. Kenneth Fasick, Director, International Division, General Accounting Office, Statement before the Subcommittee on Immigration, Refugees, and International Law, Judiciary Committee of the House of Representatives (May 16, 1979).
- ⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).
- ⁹ Anker & Posner, *supra* note 6, at 12.
- ¹⁰ *Id.* at 43, 60.
- ¹¹ Anker & Posner, *supra* note 6, at 34-39.
- ¹² Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102 (1980).
- ¹³ Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev. 141, 151 (1981).
- ¹⁴ Refugee Act of 1980, Pub. L. No. 96-212, § 412, 94 Stat. 102 (1980).
- ¹⁵ Anker & Posner, *supra* note 6, at 63-64. The House of Representatives had previously passed the House version of the Refugee Act with a vote of 328-47. Kennedy, *supra* note 13, at 148.
- ¹⁶ AUDREY SINGER & JILL H. WILSON, MIGRATION POLICY INSTITUTE, REFUGEE RESETTLEMENT IN METROPOLITAN AMERICA tbl 1 (2007), *available at* <http://www.migrationinformation.org/Usfocus/display.cfm?ID=585>.
- ¹⁷ U.S. DEPT. OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS tbl 17 (2003), *available at* <http://www.dhs.gov/files/statistics/publications/YrBk02RA.shtm>.
- ¹⁸ This number is based on refugees resettled from 1990-2008, affirmative asylum grants from 1990-2008 and defensive asylum grants from 1997-2008. Neither the EOIR nor DHS website provides statistics on defensive grants for these countries prior to 1997. See U.S. DEPT. OF HOMELAND SECURITY, 2008 YEARBOOK OF IMMIGRATION STATISTICS 40, 44-5, 47-8 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf (compiling refugee resettlements and affirmative and defensive asylum grants by nationality from 1999-2008); U.S. DEPT. OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE tbl 24 (2002), *available at* <http://www.dhs.gov/files/statistics/publications/YrBk00RA.shtm> (compiling refugee resettlements by nationality from 1990-2000); U.S. DEPT. OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE tbl 26 (2002), *available at* <http://www.dhs.gov/files/statistics/publications/YrBk00RA.shtm> (compiling U.S. affirmative asylum grants by nationality from 1990-2000); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ASYLUM STATISTICS, FISCAL YEAR 1998, *available at* <http://www.justice.gov/eoir/efoia/FY98AsyStats.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ASYLUM STATISTICS, FISCAL YEAR 1997, *available at* <http://www.justice.gov/eoir/efoia/FY97AsyStats.pdf> (compiling U.S. defensive asylum grants by nationality from 1997-1998).
- ¹⁹ U.S. DEPT. OF HOMELAND SECURITY, 2008 YEARBOOK OF IMMIGRATION STATISTICS 40 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf.
- ²⁰ UNHCR, 2010 Country Operations Profile—Sudan, Statistical Snapshot, <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e483b76>.
- ²¹ DANIEL C. MARTIN & MICHAEL HOEFER, U.S. DEPT. OF HOMELAND SECURITY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2008 3 (June 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf; KELLY J. JEFFERYS & DANIEL C. MARTIN, U.S. DEPT. OF HOMELAND SECURITY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2007 3 (June 2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf.
- ²² The Refugee Crisis in Iraq Act was passed as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).
- ²³ U.S. DEPT. OF STATE, REFUGEE ADMISSIONS REPORT AS OF JANUARY 31, 2010 (2010), *available at* <http://www.wrapsnet.org/Reports/AdmissionsArrivals/tabid/211/language/en-US/Default.aspx>.
- ²⁴ U.S. DEPT. OF HOMELAND SECURITY, 2008 YEARBOOK OF IMMIGRATION STATISTICS 39, 43 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf (compiling statistics on refugee admissions from 1980-2008 and affirmative

and defensive asylum grants from 1990-2008); The Secretary-General, *Concise Report on the Monitoring of World Population Trends and Policies, With Special Emphasis on Refugees*, ¶ 27, delivered to the Security Council, U.N. Doc. E/CN.9/1994/2 (Feb. 1, 1994) (noting the number of U.S. asylum grants from 1980-1990).

²⁵ Final Regulations were published on July 27, 1990, and came into effect October 1, 1990, establishing the Asylum Corps: “There shall be attached to the Office of Refugees, Asylum, and Parole such number of employees as the Commissioner, upon recommendation from the Assistant Commissioner, shall direct. These shall include a corps of professional Asylum Officers who are to receive special training in international human rights law, conditions in countries of origin, and other relevant national and international refugee law.” Asylum and Withholding of Deportation Proceedings, 55 Fed. Reg. 30,674 (Oct. 1, 1990) (codified at 8 C.F.R. § 208). The Department of Homeland Security did not implement an analogous Refugee Corps to process refugees for resettlement in the United States until 2006. See DAVID MARTIN, MIGRATION POLICY INSTITUTE, THE U.S. REFUGEE PROGRAM IN TRANSITION (2005), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=305>.

²⁶ Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J. L. REFORM 243, 253 (1983).

²⁷ See GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT 190-93 (1986).

²⁸ 509 U.S. 155 (1993).

²⁹ See Jesse Ellison, *The Refugees Who Saved Lewiston: A Dying Maine Mill Town Gets a Fresh Burst of Energy*, NEWSWEEK, Jan. 17, 2009.

³⁰ See Bo Thao, The Federal Reserve Bank of Minneapolis, *Twin Cities Refugee Groups Tackle Community Development*, COMMUNITY DIVIDEND (Sept. 2005), available at http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2321.

³¹ See Bill Johnson, *Opening the Door to a New World of English Words*, DENVER POST (Feb. 15, 2010); Sheba R. Wheeler, *Season to Share: Denver Conflict Center Helps Refugee Students Communicate Their Needs*, DENVER POST (Nov. 8, 2009).

³² Warren St. John, *Georgia School as a Laboratory for Getting Along*, N.Y. TIMES (Dec. 25, 2007).

³³ The Haitian Center for Human Rights et al. v. United States, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L./II.95, doc. 7 rev. at 550 (1997).

³⁴ The Illegal Immigration Reform and Immigrant Responsibility Act was passed as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1997).

³⁵ LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE 40TH ANNIVERSARY OF THE 1951 REFUGEE CONVENTION 122 (1991).

³⁶ See DAVID A. MARTIN, MIGRATION POLICY INSTITUTE, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT (2005).

³⁷ HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009) [hereinafter HUMAN RIGHTS FIRST REPORT ON DETENTION], available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

³⁸ In 2005 the bipartisan U.S. Commission on International Religious Freedom (USCIRF) concluded, after conducting a detailed study, that it was not appropriate for the United States to detain asylum seekers in prison-like conditions. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME 1: FINDINGS AND RECOMMENDATIONS 68-69 (2005) [hereinafter USCIRF REPORT ON EXPEDITED REMOVAL], available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_1.pdf.

³⁹ HUMAN RIGHTS FIRST DETENTION REPORT, *supra* note 37, at 1, 3.

⁴⁰ 8 C.F.R. § 235.3(b)(9).

⁴¹ For at least the last six years, U.S. immigration authorities have detained asylum seekers who arrive on valid passports and visas. USCIRF REPORT ON EXPEDITED REMOVAL, *supra* note 38, at 69.

⁴² 8 C.F.R. § 212.5.

⁴³ These provisions are located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3.

⁴⁴ International Covenant on Civil and Political Rights art. 9(4), Mar. 23, 1976, 999 U.N.T.S. 171.

⁴⁵ 1951 United Nations Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 150.

⁴⁶ UNCHR Exec. Comm., *Detention of Refugees and Asylum-Seekers, Conclusion No. 44 (XXXVII)*, ¶ e (Oct. 13, 1986), available at <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

⁴⁷ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guideline 5(iii) (Feb. 1999), available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>.

⁴⁸ UN Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America*, ¶ 123, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

⁴⁹ Press Release, Immigration and Customs Enforcement, “Revised Parole Policy for Arriving Aliens with Credible Fear Claims,” Dec. 16, 2009, available at <http://www.ice.gov/pi/news/factsheets/credible-fear.htm>. Under this ICE policy, ICE assesses asylum seekers who have passed through credible fear for potential release based on factors such as flight risk and risks to the community or national security.

⁵⁰ These and several other examples of refugees who have been detained by the United States can be found in HUMAN RIGHTS FIRST REPORT ON DETENTION, *supra* note 37.

⁵¹ See Press Release, Immigration and Customs Enforcement, ICE Announces Major Reforms to Immigrant Detention System (Aug. 6, 2009), available at <http://www.ice.gov/pi/nr/0908/090806washington.htm>; Press Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 10, 2009), available at <http://www.ice.gov/pi/nr/0910/091006washington.htm>.

⁵² Exceptions to the filing deadline include “changed circumstances” and “extraordinary circumstances” related to the delay. Non-exhaustive lists of examples for each exception are included in the Regulations. See 8 C.F.R. § 208.4(a)(4)-(5).

⁵³ Filing deadline data provided to NGOs, including Human Rights First, by the USCIS Asylum Office on December 16, 2009.

⁵⁴ Human Rights First interview with Lynette Tobin, Esq., May 14, 2009.

⁵⁵ *Soe v. Gonzales*, 227 Fed. Appx. 468 (6th Cir. 2007). Additional details provided by the petitioner’s BIA brief (on file with Human Rights First).

⁵⁶ While some proponents of the deadline in 1996 argued that it would help curb fraud, the deadline has actually prevented legitimate refugees from receiving asylum. Moreover, the asylum system has other checks and mechanisms to identify fraud. Asylum applications and testimony are provided under penalty of perjury; applicants who provide false information can be prosecuted and permanently barred from receiving any immigration benefits in the future; original documents submitted as evidence regularly undergo forensic testing to help identify document fraud; and the Department of Homeland Security subjects asylum applicants—as it does all potential immigrants to the United States—to extensive security procedures, including FBI biometric (fingerprint) testing and identity checks through multiple intelligence databases.

⁵⁷ 142 CONG. REC. S11492 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

⁵⁸ Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 32 WEEKLY COMP. PRES. DOC. 1938 (Sept. 30, 1996).

⁵⁹ 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 (2008) (providing many case examples of genuine refugees who were denied asylum because of the filing deadline).

⁶⁰ See *INS v. Stevic*, 467 U.S. 407, 416 (1984).

⁶¹ 1951 Convention Relating to the Status of Refugees arts. 33-34, July 28 1951, 189 U.N.T.S.150.

⁶² UNHCR Exec. Comm., *Refugees Without an Asylum Country, Conclusion No. 15 (XXX)*, ¶ 1 (Oct. 16, 1979), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c960>.

⁶³ U.S. DEPT. OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2008 4 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

⁶⁴ See HUMAN RIGHTS FIRST, *IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES* (2000).

⁶⁵ USCIRF REPORT ON EXPEDITED REMOVAL, *supra* note 38 at 54.

⁶⁶ *Id.* at 69-70.

⁶⁷ HUMAN RIGHTS FIRST REPORT ON DETENTION, *supra* note 37, at 15.

⁶⁸ *Id.* at 60.

⁶⁹ *The Haitian Center for Human Rights et al. v. United States*, Case 10.675, Inter-Am. C.H.R., Report No. 51/96, OEA/Ser.L./II.95, doc. 7 rev. at 550 (1997).

⁷⁰ UNHCR Exec. Comm., *Protection Safeguards in Interception Measures, Conclusion No. 97 (LIV)*, ¶ a(iv) (Oct. 10, 2003), available at <http://www.unhcr.org/refworld/docid/3f93b2894.html>.

⁷¹ U.S. COAST GUARD, ALIEN MIGRANT INTERDICTION (2010), available at <http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/FY.asp>.

⁷² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 147-148, U.N. Doc. HCR/IP/4/Eng/REV/1 (1992).

⁷³ This definition describes as “terrorist activity” the use of any “weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

⁷⁴ These and other examples of refugees who have been affected by “terrorism”-related bars can be found in HUMAN RIGHTS FIRST REPORT ON “TERRORISM BARS,” *id.*

⁷⁵ HUMAN RIGHTS FIRST, *DENIED AND DELAYED: THE IMPACT OF THE “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 1* (Nov. 2009) [hereinafter HUMAN RIGHTS FIRST REPORT ON “TERRORISM BARS”], available at <http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

⁷⁶ See *id.* at 23-40.

⁷⁷ This approach consisted in issuing waivers specific to particular “Tier III” groups, allowing adjudicators to grant waivers to individuals associated with the particular “Tier III” group named in the waiver announcement. Since its implementation of waivers began in 2007, the Department of Homeland Security has issued waiver announcements with respect to only 13 “Tier III” groups. In view of the fact that DHS believed it had more than to 450 “Tier III” groups to deal with in December 2009, a group-based approach is clearly unlikely to offer any relief to refugees who are currently facing deportation without being considered for a waiver, or whose petitions for their spouses and children have been on indefinite hold for three years or more. “Tier III” data provided to NGOs, including Human Rights First, by USCIS on December 17, 2009.

⁷⁸ *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

⁷⁹ *Asylum and Withholding Definitions*, 74 Fed. Reg. 64,220 (Dec. 7, 2009).

⁸⁰ *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588 (Dec. 7, 2000).

⁸¹ *Matter of A-M-E- & J-G-U*, 24 I. & N. Dec. 69 (BIA 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008).

⁸² *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999; Att’y Gen 2001).

⁸³ 502 U.S. 478, 483 (1992).

⁸⁴ 19 I. & N. Dec. 211 (BIA 1985).

⁸⁵ *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir.2009) (Posner, J.).

⁸⁶ AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES: EXECUTIVE SUMMARY (Feb. 2010) [hereinafter ABA REPORT ON IMMIGRATION SYSTEM REFORM], available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

⁸⁷ JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

⁸⁸ *Id.* at 33-60.

⁸⁹ ABA REPORT ON IMMIGRATION SYSTEM REFORM, *supra* note 86, at ES-5.

⁹⁰ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2008 STATISTICAL YEARBOOK I1 (Mar. 2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>.

⁹¹ By contrast, in comparable federal administrative courts, Veterans Law judges decided approximately 729 veteran benefits cases per judge (approximately 178 of which involved hearings) in 2008, and Social Security Administration administrative law judges decided approximately 544 cases per judge in 2007. ABA REPORT ON IMMIGRATION SYSTEM REFORM, *supra* note 86, at ES-28.

⁹² *Id.*

⁹³ See RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 87, at 61-77.

⁹⁴ See Press Release, Dept. of Homeland Security, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2009), available at http://www.justice.gov/opa/pr/2006/August/06_ag_520.html.

⁹⁵ TRAC IMMIGRATION, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (June 2009), available at <http://trac.syr.edu/immigration/reports/210/>.

⁹⁶ ABA REPORT ON IMMIGRATION SYSTEM REFORM, *supra* note 86, at ES-5.

⁹⁷ U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges*, 30, GAO-08-940 (Sept. 2008), <http://www.gao.gov/new.items/d08940.pdf>.

⁹⁸ RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 87, at 45-46.

⁹⁹ USCIRF REPORT ON EXPEDITED REMOVAL, *supra* note 38, at 59.

¹⁰⁰ CHARLES H. KUCK, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES 8 (Dec. 2004), available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

¹⁰¹ ABA REPORT ON IMMIGRATION SYSTEM REFORM, *supra* note 86, at ES-7.

¹⁰² For more information about the Vera Legal orientation Program, see Legal Orientation Program, Vera Institute of Justice, <http://www.vera.org/project/legal-orientation-program>.

¹⁰³ UNHCR, *UNHCR Resettlement Handbook: Chapter 1—Resettlement: A Vital Instrument of International Protection and an Element of Comprehensive Solutions*, p. 1 (Nov. 2004), available at <http://www.unhcr.org/3d464b239.html>.

¹⁰⁴ See, e.g., UN Office for the Coordination of Humanitarian Affairs, *Regional Response Plan for Iraqi Refugees 2010* at 16 (2010), available at [http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/2010_Iraq_RRP/\\$FILE/2010_Iraq_RRP_SCREEN.pdf?OpenElement](http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/2010_Iraq_RRP/$FILE/2010_Iraq_RRP_SCREEN.pdf?OpenElement); INTERNATIONAL RESCUE COMMITTEE, A TOUGH ROAD HOME: UPROOTED IRAQIS IN JORDAN, SYRIA AND IRAQ 14 (Feb. 2010), available at http://www.theirc.org/sites/default/files/resource-file/IRC_Report_02_18_ToughRoad.pdf.

¹⁰⁵ This problem has been documented among refugee populations in Turkey, Uganda, Syria and Jordan. See HELSINKI CITIZENS ASSEMBLY—TURKEY REFUGEE ADVOCACY AND SUPPORT PROGRAM & ORGANIZATION FOR REFUGEE, ASYLUM AND MIGRATION, UNSAFE HAVEN: THE SECURITY CHALLENGES FACING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ASYLUM SEEKERS AND REFUGEES IN TURKEY (June 2009), available at http://www.hyd.org.tr/staticfiles/files/unsafe_latest.pdf; REFUGEE LAW PROJECT, GENDER AGAINST MEN (2008), available at <http://www.forcedmigration.org/video/gender-against-men/>; HUMAN RIGHTS WATCH, THEY WANT US EXTERMINATED (Aug. 2009), available at <http://www.hrw.org/en/reports/2009/08/16/they-want-us-extermiated>.

¹⁰⁶ Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (July 27, 1990).

¹⁰⁷ See MARTIN, *supra* note 24, at 71-72.

¹⁰⁸ See HUMAN RIGHTS FIRST REPORT ON "TERRORISM" BARS, *supra* note 74.

¹⁰⁹ HUMAN RIGHTS FIRST, PROMISES TO THE PERSECUTED: THE REFUGEE CRISIS IN IRAQ ACT OF 2008 (Apr. 2009) [hereinafter HUMAN RIGHTS FIRST REPORT ON IRAQI REFUGEE CRISIS], available at <http://www.humanrightsfirst.org/pdf/090428-RP-iraqi-progress.pdf>.

¹¹⁰ Email communication with Human Rights First, 2008-2009.

¹¹¹ Human Rights First has made this recommendation directly to the National Security Council, as well as in its 2009 report "Promises to the Persecuted: The Refugee Crisis in Iraq Act of 2008." See HUMAN RIGHTS FIRST REPORT ON IRAQI REFUGEE CRISIS, *supra* note 109.

¹¹² INTERNATIONAL RESCUE COMMITTEE, IRAQI REFUGEES IN THE UNITED STATES: IN DIRE STRAITS (2009), available at http://www.theirc.org/sites/default/files/resource-file/irc_report_iraqcommission.pdf; Georgetown University Law Center Refugee Crisis in America: Iraqis and Their Resettlement Experience (2009), available at <https://www.law.georgetown.edu/cle/RefugeeCrisisInAmerica.pdf>.

¹¹³ See HUMAN RIGHTS FIRST REPORT ON IRAQI REFUGEE CRISIS, *supra* note 109, at 16.

¹¹⁴ See Refugee Council USA, THE U.S. REFUGEE ADMISSIONS AND ASSISTANCE PROGRAM AT A CROSSROADS: RECOMMENDATIONS BY REFUGEE COUNCIL USA, available at <http://www.rcusa.org/uploads/pdfs/Final%20RCUSA%20USRP%20Reform.pdf>.

¹¹⁵ Press Release, U.S. Dept. of State, Increase to the Refugee Reception and Placement Per Capita Grant (Jan. 25, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/01/135800.htm>.

¹¹⁶ Human Rights First endorses Refugee Council USA's full set of recommendations on reforms to the refugee resettlement and assistance programs. *See id.*

¹¹⁷ Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).

¹¹⁸ When asylum seekers arrive at an airport or a border entry post, they are initially inspected and interviewed by officers from CBP. If encountered in the border areas, asylum seekers are interviewed by officers with the Border Patrol, also part of CBP. When asylum seekers are detained, ICE is the component agency responsible for their detention. ICE "trial attorneys" will also represent the agency in Immigration Court removal proceedings, typically opposing asylum seekers' requests for protection. Before arriving asylum seekers are allowed to request asylum, they will first have to be interviewed by an Asylum Officer with USCIS. USCIS also conducts asylum interviews for asylum seekers who apply for protection after they have entered the country and who are not generally detained.

¹¹⁹ More broadly, better inter-agency structures and mechanisms are necessary to ensure the United States is complying with all international human rights treaties to which it's a party. For more detailed recommendations and background on this issue, *see* Testimony of Elisa Massimino, President and CEO of Human Rights First, Hearing on The Law of the Land: U.S. Implementation of Human Rights Treaties Before the United States Senate, Committee on the Judiciary, Subcommittee on Human Rights and the Law (Dec. 16, 2009), *available at* <http://www.humanrightsfirst.info/pdf/HRF-Elisa-Testimony-121609.pdf>.

¹²⁰ *See* HUMAN RIGHTS FIRST REPORT ON "TERRORISM BARS," *supra* note 74.

¹²¹ *See U.S. Taps Officials to Clear Iraqi Logjam*, REUTERS, Sept. 19, 2007.

¹²² *See supra* section 2.

¹²³ *See supra* section 1.

¹²⁴ USCIRF REPORT ON EXPEDITED REMOVAL, *supra* note 38, at 63.

¹²⁵ The mission of DHS is to prevent terrorist attacks in the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage from terrorist attacks. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).

¹²⁶ In November 2003, Human Rights First began urging DHS Secretary Thomas Ridge to create a high level of refugee protection in his office to ensure the proper resolution of refugee issues that cut across DHS component agencies. Human Rights First Letter to Thomas J. Ridge (Nov. 5, 2003), *available at* http://www.humanrightsfirst.org/asylum/ridge_letter110503.pdf.



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