



# How to Repair the U.S. Asylum System

Blueprint for the Next Administration

December 2008

FOR THE NEXT U.S. ADMINISTRATION

**BLUEPRINT**

## 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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# How to Repair the U.S. Asylum System

## Blueprint for the Next Administration

*“And to all those who have wondered if America's beacon still burns as bright: Tonight we proved once more that true strength of our nation comes not from the might of our arms or the scale of our wealth, but from the enduring power of our ideals: democracy, liberty, opportunity and unyielding hope.”*

**President-Elect Barack Obama,  
November 4, 2008**

*“Uprooted by war, civil strife, and persecution, millions of refugees from nations throughout the world depend on the lifeline of continuing good will extended by the international community.”*

**President-Elect Barack Obama,  
June 20, 2008**

## Introduction

The United States has long been recognized as a beacon of hope and safety for the persecuted around the world. This tradition of providing refuge to victims of religious, political, ethnic and other forms of persecution is central to our identity as a nation committed to freedom and respect for human dignity.

This historic commitment is codified in core legal obligations to which the United States has subscribed. As a signatory to the 1967 Protocol to the 1951 Convention relating to the Status of Refugees, the United States has pledged not to return people to places where their lives or freedom would be threatened because of their *race, religion, nationality, social group or political opinions*. This international legal obligation was implemented formally in the Refugee Act of 1980.

In 2007 there were approximately 11.4 million refugees world wide, the vast majority displaced from their home lands to neighboring countries. Only a small percentage of the total number of refugees sought asylum in industrialized countries. Last year, 50,700 people applied for asylum in the United States; 25,270 were granted protection.<sup>1</sup> Because of its identity as a nation of immigrants and its leadership role in crafting international rules for refugee protection, U.S. treatment of refugees sets the global standard. When U.S. leadership falters, that standard is eroded, and refugees face increased risks.

In the past decade it has become increasingly difficult for bona fide refugees to gain asylum protection in the United States. Beginning with passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the institution of asylum has been significantly eroded. Increased legal obstacles, restrictions on basic due process, expansion of immigration detention and overly-inclusive counter-terrorism measures have meant that fewer refugees are able to find the protection to which they are entitled. Under the Bush Administration, refugees have been caught up in a web of laws, regulations and policies advanced in the name of national security and immigration “enforcement” that have disfigured the immigration system and left refugees more vulnerable than ever.

# How to Repair the U.S. Asylum System

## Summary

President Obama should make clear at the outset that his administration will restore America's commitment to refugees and resume its place in the world as a leader in protecting the persecuted. Human Rights First offers the following concrete recommendations for how the Obama Administration should fulfill that commitment:

### REFORM DHS TO ENSURE PROTECTION OF REFUGEES

- Direct the Secretary of DHS to create a DHS Refugee Protection Office within the Secretary's Office.
- Maintain a Senior Refugee and Asylum Policy position in the DHS policy office.
- Create a new Undersecretary for Immigration and Refugees or strengthen the Deputy Secretary's capacity and chain-of-command authority.
- Strengthen White House coordination on refugee protection by increasing the capacity of the National Security Council to coordinate between governmental agencies.
- Direct the DHS General Counsel to make refugee protection a priority by creating a litigation unit and shifting ICE trial attorneys into that unit.

### SAFEGUARD ASYLUM SEEKERS FROM ARBITRARY AND INAPPROPRIATE DETENTION

- Direct DHS and DOJ to revise regulations to provide asylum seekers with access to custody redetermination hearings before an immigration judge.
- Direct DHS to rescind ICE's November 2007 directive on the parole of asylum seekers.
- Direct DHS to develop and implement effective alternatives to detention programs.
- Direct DHS to promulgate regulations that decrease its reliance on prisons and prison-like facilities and create legally enforceable detention standards.

### PROTECT BONA FIDE REFUGEES FROM THE ARBITRARY BARRIER TO ASYLUM IMPOSED BY THE ONE-YEAR FILING DEADLINE

- Support legislation to eliminate the procedural obstacle to protection imposed by the arbitrary one-year deadline for filing an asylum application.

### ENSURE THAT REFUGEES ARE NOT BARRED FROM PROTECTION DUE TO OVERLY-BROAD TERRORISM DEFINITIONS

- Support legislation to amend the overly-broad definitions of "terrorist activity" and "terrorist organization" in INA §212(a)(3)(B) so that they target actual terrorism.
- Review overly expansive interpretations of existing statutory language by the Executive Branch particularly as they pertain to what constitutes "material support" and to involuntary acts.
- Immediately direct DHS and DOS, in conjunction with DOJ, to implement a more efficient and sensible process for exercising its existing discretionary authority to exempt individuals and/or groups from certain terrorism-related bars to relief.

## **RECOGNIZE GENDER-BASED PERSECUTION AS A GROUND FOR ASYLUM**

- Direct DHS and DOJ to promulgate joint regulations that make clear that women persecuted on account of their gender are eligible for asylum.

## **REQUIRE REFORMS TO IMPROVE THE QUALITY OF ASYLUM ADJUDICATIONS**

- Ensure that asylum officers, immigration judges and members of the Board of Immigration Appeals (BIA) have adequate time to hear and evaluate each case.
- Support appropriations to provide adequate staffing, training, and resources for the Asylum Office, the immigration courts and the BIA.
- Restore meaningful appellate review by implementing reforms at the BIA.

# How to Repair the U.S. Asylum System

## Details

### REFORM DHS TO ENSURE PROTECTION OF REFUGEES

#### Background

Since the functions of the legacy Immigration and Naturalization Service (INS) were transferred to the Department of Homeland Security (DHS) in March 2003, Human Rights First has urged the senior leadership of DHS to create effective structures to ensure coordination, attention and commitment to the protection of refugees and asylum seekers, including those who interact with U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). Not only has DHS failed to create effective structures to address these issues, but the absence of these structures has contributed to DHS's failure adequately to address a range of critical asylum issues in a manner consistent with this country's commitment and legal obligations to those who seek protection in the United States.

When immigration and asylum functions were transferred to DHS in March 2003, DHS also inherited the responsibility of ensuring that the United States lives up to its obligations under the Refugee Convention, its Protocol and other human rights conventions. Yet DHS leadership has viewed policies relating to asylum seekers and refugees primarily as matters of "security" and immigration "enforcement." The separation of immigration "enforcement" and immigration "services" functions into separate bureaus has meant that ICE and CBP enforcement policies (and the actions of ICE trial attorneys, ICE detention and deportation officers, CBP inspectors and Border Patrol officers) are now divorced from chain-of-command oversight by senior officials who understand the importance of exercising this authority in a manner consistent with this country's legal

commitments relating to the treatment and protection of refugees. Moreover, given the extraordinary management, bureaucratic and security challenges facing the Department, DHS senior leaders have limited capacity and attention to devote to sorting out the differing positions of the various immigration agencies (ICE, CBP and USCIS) on matters that affect asylum seekers and refugees, particularly on those matters that may have a lower public profile.

The competing mandates of the different bureaus within DHS make it exceedingly difficult to resolve inter-bureau issues relating to asylum within DHS, and the result has been an erosion in protection for refugees. In 2005 the bi-partisan, congressionally mandated U.S. Commission for International Religious Freedom (USCIRF) conducted an extensive study of the U.S. asylum and detention system and reached the same conclusion.<sup>ii</sup> USCIRF's report documented serious failings in U.S. treatment of refugees who seek asylum in the United States and recommended a series of specific policy reforms. Among those, USCIRF recommended that DHS create an office, headed by a high-level official, to address and coordinate cross-cutting asylum issues. Instead, DHS appointed a senior refugee coordinator, housed him in the DHS policy office, and then gave him the additional responsibility for handling broader immigration policy matters.

Not surprisingly, given its mandate and structure, DHS has failed effectively to address a range of refugee and asylum matters. These failures have resulted in the exposure of shameful incidents of prolonged and unnecessary detention of asylum seekers, shockingly inadequate access to medical care in immigration detention facilities, and erroneous denials of asylum protection due to flawed legal interpretations. Such public revelations have led to critical congressional inquiries and stories in major media outlets that have humiliated DHS leadership and consumed significant agency resources. Despite this exposure, the Department has failed to address these problems with systematic solutions, such as those recommended by USCIRF. Instead, ICE issued an even more restrictive policy on the parole of asylum seekers from detention. CBP has failed to implement reforms needed to prevent the mistaken deportation of refugees. DHS has been

slow to address the impact of the “terrorism” bars on innocent asylum seekers and refugees in a timely and effective manner. If DHS is to continue to be the agency tasked with protecting refugees who seek asylum in the United States, genuine structural reforms are urgently needed.

## Recommendations

To ensure improved protection of refugees by DHS, the Obama administration should implement the following structural changes:

- **Direct the Secretary of DHS to create a DHS Refugee Protection Office within the Secretary’s Office.** That office should be provided with the resources, staffing and authority to ensure the protection of asylum seekers and refugees throughout DHS. The office, which should have both operational and policy oversight of the various immigration agencies on asylum and refugees issues, should be headed by a political appointee, with extensive experience in refugee issues, who reports directly to the DHS Secretary. This senior official should have at least 8 staff members who are responsible for areas that include: inspections and expedited removal; border patrol, expedited removal and detention of asylum seekers; legal standards for detention and parole; detention conditions and legal access; Coast Guard, interdiction and asylum/migration issues; refugee resettlement issues; and the U.S. asylum system.
- **Maintain a Senior Refugee and Asylum Policy position in the DHS policy office,** and provide that position with at least two staff members. That position should report directly to the DHS Assistant Secretary for Policy.
- **Create a new Undersecretary for Immigration and Refugees or Strengthen the Deputy Secretary’s capacity and chain-of-command authority** to increase coordination across bureaus on refugee and asylum matters, and to ensure that the Refugee Protection Office’s directives and guidance are followed by the various immigration-related agencies.
- **Strengthen White House coordination on refugee protection by increasing the capacity of the National Security Council to coordinate refugee and asylum matters between governmental agencies,** including DHS, the Department of State and the Department of Justice.
- **Direct the DHS General Counsel to make refugee protection a priority by ensuring compliance, throughout DHS, with refugee and human rights treaty obligations.** The new DHS General Counsel should set up mechanisms to ensure that Coast Guard, ICE, CBP and USCIS policies and actions are in accordance with U.S. treaty obligations. To ensure that positions and actions of DHS “trial attorneys” are in accord with U.S. treaty obligations, these attorneys should be redeployed from ICE to a new litigation unit within the General Counsel’s office. The General Counsel should also create the position of Associate General Counsel for Refugee and Asylum Matters.



## **SAFEGUARD ASYLUM SEEKERS FROM ARBITRARY AND INAPPROPRIATE DETENTION**

### **Background**

Refugees who seek asylum in the United States are often detained for months and sometimes years as they go through the asylum adjudication process. Refugees who find themselves detained by the U.S. government include political dissidents from China, pro-democracy student activists from Cameroon, women from Mali forced to undergo female genital mutilation, those fleeing oppression from the military junta in Burma, torture survivors from Iraq, and victims of extortion by terrorist organizations in Colombia. People from all corners of the world view the United States as a beacon of hope and safety from persecution. Many flee here because they believe in the fundamental values of freedom and opportunity upon which this country was founded. Sadly, what many of them encounter upon arrival in the United States is a drastically different reality.

Those arriving at the border without proper documentation are subject to mandatory detention under the expedited removal process. In its February 2005 report, the USCIRF found that the overwhelming majority of asylum seekers subject to mandatory detention under expedited removal are inappropriately detained in jails or jail-like facilities. In many of these cases asylum-seekers are co-mingled with criminal inmates or immigrant detainees with criminal convictions. Asylum seekers held in these facilities are required to wear prison uniforms, even when they appear in front of a judge. They are handcuffed and sometimes strip searched when brought to these facilities and, in some locations, appear in immigration court in shackles and handcuffs. Furthermore, the remoteness of many facilities makes obtaining legal counsel extraordinarily difficult, leaving many asylum seekers without access to the necessary resources to prepare and present their asylum claims.

The lack of due process protections for arriving asylum seekers renders their detention arbitrary and thus inconsistent with this country's commitments under the Refugee Convention, its Protocol, and Article 9 of the

International Covenant on Civil and Political Rights.<sup>iii</sup> Refugees who seek asylum at U.S. airports and border entry points are considered "arriving aliens" and are not provided access to immigration court custody hearings – a safeguard that is afforded to most other immigrant detainees. Instead, the decision of whether to release an asylum seeker on parole or detain him/her for months or longer is left to the discretion of local ICE deportation officers. These ICE officers act in essence as both jailer and judge in determining whether an arriving asylum seeker can be released from detention.

Parole practices vary widely across the country, and asylum seekers in some parts of the country are rarely granted release. To remedy this situation, DHS should promulgate regulations codifying the parole criteria issued by INS in 1997. These criteria required that, in order to be eligible for parole, an asylum-seeker must prove his or her identity, that s/he had community ties (and was therefore not a flight risk), and that s/he was not a danger to the community. Rather than codifying this reasonable standard, ICE issued a new parole directive in 2007 that further restricted parole for asylum seekers by turning the previous parole criteria into a threshold requirement, allowing release of asylum seekers who met all those criteria only if they fit into specified categories (such as pregnant women, persons serving as witnesses, detainees with medical conditions, cases where release would be for the public benefit, etc), and asserting that parole should be available only in "limited circumstances."

DHS argues that detention is a necessary measure in protecting our borders and enforcing immigration law. In some instances, when identity cannot be established or there are concerns that the individual poses a danger to the community, the detention of an asylum seeker may be justified. However, once an asylum seeker establishes that s/he has a credible fear of persecution, provides evidence of his/her identity, and there is no reason to believe s/he poses a danger or risk of flight, the government interest in detaining the asylum seeker no longer outweighs the liberty restriction imposed upon the individual.



At an average cost of \$95 per person per day, the immigration detention system costs the American taxpayers over \$1.2 billion per year.<sup>iv</sup> Detaining an asylum seeker who poses no risk of flight or danger to the community is an unnecessary deprivation of liberty and a waste of scarce government resources. The devastating impact of detention can lead a bona fide refugee to abandon his/her claim for asylum and “voluntarily” return to a country where s/he fears persecution or torture.

Despite the documented success and cost savings of supervised release programs, costing an average between \$12 and \$28 per person per day, DHS has not yet implemented an effective nationwide alternative to detention for those who cannot be released on parole or bond. Additionally, despite evidence that community-based services help improve court appearance rates, DHS instead relies heavily upon highly invasive electronic monitoring programs rather than using alternative programs which connect individuals with community-based services, including legal assistance. And instead of using these programs to minimize unnecessary detention of asylum seekers, DHS has used its “alternatives to detention” programs to supervise the release of asylum seekers who would not have previously been detained at all or who would have been released without conditions.

The system of detaining asylum seekers is plagued by chronic problems that are pervasive throughout the immigration detention system. Detainees struggle to receive proper medical care, obtain legal counsel, use the telephone, and access religious services. USCIRF recommended DHS establish detention standards appropriate for asylum seekers. Nevertheless, the only standards in place in the U.S. immigration detention system are based upon standards for correctional institutions, and even those are not legally binding. Without appropriate and legally enforceable standards, these serious problems in the detention system will persist, and asylum seekers will continue to languish in harsh conditions that are inappropriate for those who are not serving a criminal sentence.<sup>v</sup>

## Recommendations

The United States must review and reform its detention framework for asylum seekers. The Obama administration should implement safeguards to minimize arbitrary detention, move away from the penal model used by the immigration detention system, and ensure that detention standards are legally enforceable and appropriate for asylum seekers. To accomplish this, the Obama administration should:

- **Direct DHS and DOJ to revise regulations to provide asylum seekers with access to custody redetermination hearings before the immigration court.** This regulatory reform would give arriving asylum seekers the same access as other detained immigrants to immigration court custody determination hearings and provide a check on local deportation officers who arbitrarily deny parole to eligible asylum seekers.
- **Direct DHS to rescind ICE’s November 2007 directive on the parole of asylum seekers.** The ICE Parole Directive issued in November 2007 should be immediately rescinded and regulations should be issued in its place that: require parole assessments for all detained asylum seekers; reinstate the parole criteria (identity, community ties and no security or other risk) set forth in the December 30, 1997 Parole Guidelines; and eliminate the additional hurdles imposed by the November 2007 directive. Codifying this revised policy in regulation will help to ensure that it is consistently followed by deportation officers.
- **Direct DHS to develop effective alternatives to detention programs.** Instead of supporting the appropriation of more money for the expansion of a jail-like detention system, the President’s Budget for FY 2010 should prioritize the development of less restrictive, more humane, and less costly methods of achieving the same government objective of monitoring immigrants in removal proceedings. These programs may include telephonic reporting and should be run by community-based, faith-based, or other non-governmental groups. Only in limited cases, when DHS can demonstrate a need for more restrictive measures, should alternatives to detention

include the use of electronic monitoring. Likewise, these programs should only be used for individuals who would otherwise be subject to detention, not for those who should not be detained or who are eligible for release without conditions.

- **Direct DHS to promulgate regulations that decrease its use of prisons and prison-like facilities and create legally enforceable detention standards.** As recommended by the U.S. Commission on International Religious Freedom, DHS should establish detention standards appropriate for asylum seekers. When asylum seekers are awaiting custody hearings, or when they are found to be ineligible for parole or release to an alternative program, they should not be detained in a penal setting. In the limited circumstances in which detention is utilized, that detention should be at a facility that allows asylum seekers to wear their own clothes, have real outdoor access, move about within the facility, and visit with family and friends face-to-face rather than through a glass partition. These regulations should decrease the use of shackles, guarantee prompt medical care that complies with accreditation requirements, ensure unobstructed access to legal counsel, and limit the use of solitary confinement.

## PROTECT BONA FIDE REFUGEES FROM THE ARBITRARY BARRIER TO ASYLUM IMPOSED BY THE ONE-YEAR FILING DEADLINE

### Background

One of the most harmful restrictions imposed upon asylum seekers by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is the one-year deadline for filing an asylum application. INA §208(a)(2)(B) bars a refugee from asylum if his or her application is not filed within one year of arrival in the United States, unless an asylum adjudicator decides that the asylum seeker is eligible for an exception based upon either “extraordinary” or “changed” circumstances. Due to the challenges faced by many asylum seekers, including the impact of experiencing mental and physical

trauma, the threat of death, fear for the safety of family members left in their home countries, and lack of information about the U.S. legal system, many of the most vulnerable asylum seekers fail to file within one year and are consequently barred from asylum because of this arbitrary procedural obstacle. The exceptions available have proved inadequate to ensure access to asylum for bona fide refugees, as they have been applied in such a narrow and rigid manner that adjudications officers are regularly denying asylum to worthy and qualified applicants.

The ostensible intent of the one-year filing deadline was to prevent non-refugees from claiming asylum to forestall deportation after they are discovered to be present in the country without documentation. However, there is no evidence that the deadline requirement has any relation to immigration fraud. The asylum system has strict requirements related to establishing credibility, complying with reasonable requests for corroborating evidence, and undergoing background and security checks that weed out fraudulent claims early in the proceedings. Additionally, the law imposes strict penalties upon individuals and attorneys who submit fraudulent applications. Instead of addressing fraud, the filing deadline has resulted in a wasteful and bureaucratic system that requires immigration court hearings for asylum cases that could and should have been granted at the asylum office level.

The one-year filing deadline is an arbitrary bar to asylum that has the damaging consequence of preventing bona fide refugees from obtaining asylum status in the United States. Because of the one-year filing deadline, some refugees have been deported back to countries where they face persecution or have been afforded only the limited protection of withholding of removal under INA §241(b)(3), a simple guarantee of *non-refoulement* that does not allow a refugee to bring his or her spouse and children to safety in the United States or to apply for permanent residence so that s/he can integrate fully into American society.

## Recommendation

- **Support legislation to eliminate the procedural obstacle imposed by the one-year deadline in INA §208(a)(2)(B) for filing an asylum application.**

The imposition of an arbitrary filing deadline creates unnecessary inefficiencies and is inconsistent with international principles of refugee protection. Likewise, the deadline itself has not achieved the goal for which it was intended. Instead, it has increased bureaucracy and prevented many qualified and deserving individuals from obtaining asylum protection.

## ENSURE THAT REFUGEES ARE NOT BARRED FROM PROTECTION DUE TO OVERLY-BROAD DEFINITIONS OF TERRORISM

### Background

Due to the overly-broad definitions of terrorism in INA §212(a)(3)(B) and their expansive interpretation by the Bush Administration's Departments of Homeland Security (DHS) and Justice (DOJ), thousands of bona fide refugees who pose no danger to the United States have been denied protection or been put in indefinite limbo. In the past few years, refugees who have had their asylum applications denied or put on hold include women who were raped and enslaved by armed militias in Liberia, victims of extortion forced to pay armed terrorists in Nepal in order to save the lives of their children, and Afghans who supported groups that took up arms against the Soviet Union in the 1980's.

Laws excluding certain individuals from refugee protection are necessary to prevent those who may cause harm to the United States or are guilty of serious wrongdoing from gaining refugee status here. However, the current definitions and interpretations of "terrorism" and "terrorist activity" in the INA have sometimes turned commonsense definitions on their head, labeling *victims* of terrorism as "terrorists," characterizing medical care as "material support" to terrorism, and holding that allies of the United States, some of whom have fought alongside the U.S. military, as having engaged in

"terrorist activity." Recognizing the absurd results of these interpretations, the Bush administration has committed substantial government resources to mitigating this harm through exercises of its statutory authority under section 212(d)(3)(B) of the INA to waive application of terrorism-related grounds of inadmissibility in individual cases; however, such efforts have been narrow, overly bureaucratic, and have proved unworkable as long-term solutions.<sup>vi</sup>

### Recommendations

The exclusive use of unreviewable discretionary waivers is not a manageable long-term solution to the underlying problem of the overly-broad statutory definitions of terrorism. This problem requires a legislative solution. In the short term and in parallel to legislative reform, however, the Obama administration can make meaningful progress toward resolving certain aspects of this problem by reviewing some of the extreme interpretations. The Obama administration should:

- **Support legislation to amend the definitions of "terrorist activity" and "terrorist organization" in INA §212(a)(3)(B) so that they target actual terrorism.**
- **Review the overly restrictive interpretations by the Executive Branch of existing statutory language, particularly as they pertain to what constitutes "material support" and to involuntary acts.** The Obama administration should reconsider current agency interpretations that *de minimis* contributions (e.g., a chicken, a bag of rice) and medical care, for example, fall within the scope of the "material support" bar, and that apply the terrorism bars to acts committed under duress and to the acts of children.

■ **Immediately direct DHS and DOS, in conjunction with DOJ, to implement a more efficient and sensible process for exercising its existing discretionary authority to exempt individuals and/or groups from being barred by certain terrorism-related grounds.** These immediate administrative fixes include:

- To ensure that applicants who do not pose a threat to the United States are not inappropriately denied protection, immediately establish a workable process for adjudicating cases where the applicant had voluntary associations or activities in connection with groups that are being characterized as undesignated (Tier III) “terrorist organizations.” Applicants currently on hold in this category range from members of the democratic opposition in the Sudan to people who fought for the independence of Eritrea and Bangladesh decades ago. The current approach to waiver implementation has focused on granting exemptions related to specific Tier III groups, which is unworkable due to the large and growing number of groups involved, and because it focuses on the history of the group as a whole rather than on the actions of individual applicants. DHS and DOS should instead consider broader-based waivers that focus on what the applicant actually did and in what circumstances.
- To the extent DHS and DOS continue to use discretionary waiver authority as a way of resolving duress cases, those involving coercion by Tier I and Tier II groups (those organizations designated as Foreign Terrorist Organizations or placed on the Terrorist Exclusion List) should be treated in the same way as those involving coercion by undesignated Tier III groups. Duress is duress, regardless of the status of the group that inflicts it, and it adds nothing to this process to require preliminary review of individual Tier I and Tier II groups—many of which were listed or designated precisely because they had a well-known record of extortion and other abuses against civilians—

before allowing exemptions to be granted to their victims.

- Immediately implement streamlined procedures for the issuance of waivers in removal proceedings by considering exemptions as soon as there are uncontested findings of eligibility for the underlying relief a person is applying for (but for the terrorism bar), rather than requiring that a person have an administratively final order of removal before DHS can consider granting an exemption. The process recently announced by DHS would put some applicants, who have serious legal and/or factual arguments that the bar should not apply to them in the first place, in the very difficult position of choosing between pursuing an appeal on those issues and receiving more prompt consideration for an exemption. This is a particularly cruel choice for those detained and/or separated from their spouses and children, for whom time is of the essence. The announced process is also unduly cumbersome and gives rise to a risk of mistaken deportation or detention of applicants who could be left waiting for extended periods with final orders of removal in place.

## RECOGNIZE GENDER-BASED PERSECUTION AS A GROUND FOR ASYLUM

### Background

The Bush administration considered but ultimately failed to issue regulations recognizing that gender-based harms can meet the definition of “persecution” and that women who have suffered gender-based persecution should be protected under the “particular social group” ground of the refugee definition. This harm includes rape, forced marriage, honor killings, domestic violence, and female genital mutilation. Proposed regulations incorporating recognition of these claims were issued in 2000 but never finalized. In failing to issue such regulations, the Bush administration has assured that many gender-based asylum cases have been left on hold or been inappropriately denied, contrary to UNHCR guidance on the issue and our obligations under domestic and international law.<sup>vii</sup>

### Recommendation

To ensure adequate protection for victims of gender-based violence, the Obama administration should:

- **Direct DHS and DOJ to promulgate joint regulations that make clear that gender-based persecution is a basis for asylum eligibility.** The regulations should specifically recognize that “particular social group” which may form the basis for an asylum claim can be defined in whole or in part by gender. Likewise, the regulations should clarify that the existence of a “particular social group” is demonstrated by satisfying the criteria set forth by the BIA in *Matter of Acosta* without requiring social visibility. The regulations should incorporate the UNHCR’s International Protection Guidelines on social group and gender claims.

## REQUIRE REFORMS TO IMPROVE THE QUALITY OF ASYLUM ADJUDICATIONS

### Background

The quality of decision making by the immigration courts and the BIA has been widely criticized by federal court judges, the Government Accountability Office (GAO), members of Congress, legal scholars and other experts in recent years. Studies of the immigration court process have highlighted serious concerns related to the disparities that exist in asylum adjudications, both regionally between courts and amongst judges within the same court. This raises grave concerns about the quality of the decisions made by immigration judges, particularly since the appeals process provides few safeguards against wrongful denials.

Procedures installed at the BIA by the Bush administration have streamlined appeals to the point of triviality, often rendering BIA decisions little more than a rubber stamp on the decision made by the immigration judge below. These “streamlining” changes were made by the DOJ to speed up appeals by increasing the use of summary affirmances and single-member decisions. The effect has been a steep drop in the BIA’s approval of asylum appeals, leading members to deny asylum claims and issue precedent decisions based on misinterpretations of long-standing precedent and international standards. These flawed interpretations have inappropriately narrowed eligibility for asylum for many with bona fide claims and a genuine need for protection. Critical reforms announced by the DOJ in August 2006 failed to ameliorate the problem – and have still not been fully implemented.



## Recommendations

To improve the quality of asylum adjudications, the Obama administration should instruct DOJ and DHS to implement a series of reforms including:

- **Ensure that asylum officers, immigration judges and members of the Board of Immigration Appeals (BIA) have adequate time to hear and evaluate each case** and are not pressured into denying asylum cases due to “case completion deadlines” at EOIR and “productivity standards” for Asylum Officers. These reforms will help ensure that the United States does not send refugees back to persecution, and will help maintain the integrity of the asylum system by affording adjudicators the opportunity to assess credibility, safeguard against fraud, and ensure that they are accurately deciding cases whose decisions may have life or death consequences.
- **Support appropriations to provide adequate staffing, training, and resources for the Asylum Office, the Immigration Courts and BIA.** The number of immigration judges, law clerks, Board members and staff attorneys should be increased relative to case loads. Training programs should aim to ensure compliance with U.S. treaty obligations at all levels of the system by providing special training in international and U.S. refugee law standards to asylum officers, immigration judges, BIA members, DHS trial attorneys, and attorneys in the Office of Immigration Litigation. This training should emphasize that adjudicators and attorneys at all levels also bear responsibility to ensure that the United States does not deport a refugee in violation of the 1951 Refugee Convention and its 1967 Protocol. This training should also stress to DHS trial attorneys and attorneys in the Office of Immigration Litigation the role of prosecutorial discretion and provide guidance in identifying cases that merit a decision not to prosecute an individual or appeal a decision unfavorable to the government’s position.
- **Restore meaningful appellate review by implementing reforms at the BIA, including:**
  - Restore decision-making by three member panels at the BIA, including for cases involving asylum, withholding of removal and relief under the Convention Against Torture.
  - Reinstatement of the requirement that precedent decisions be issued by the full Board and rescind the directive that such decisions can be issued by a panel.
- Require Board members to issue decisions that provide the legal basis for their decisions and address the arguments made by the parties.

# Conclusion

President-elect Barack Obama has affirmed that the ideals of democracy, liberty, opportunity, and hope are the true strength of our nation. In that spirit, at the outset of his term President Obama should announce his commitment to implementing policies that will restore those ideals. Integral to that commitment is the U.S. tradition of providing refuge to victims of religious, political, ethnic and other forms of persecution.

U.S. policies designed to ensure asylum protection have been waning in the past decade with increasingly draconian and bureaucratic measures installed in recent years by the Bush Administration. These policies have left refugees more vulnerable than ever. Asylum seekers arriving at our border in search of protection are finding themselves subject to arbitrary and inappropriate detention; the barrier imposed by the one-year filing deadline is preventing bona fide refugees from obtaining asylum status; and the overly broad definitions of “terrorist activity” and “terrorist organization” are leading innocent victims to be labeled as terrorists, barring them from protection.

These policies are unnecessary and fail to reflect the core values of our nation. In this blueprint, Human Rights First has provided a series of concrete steps the Obama administration can take to repair our system of granting refuge to the persecuted to ensure that our asylum policies better reflect the fundamental values of freedom and human dignity upon which our nation was founded.

## Endnotes

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- <sup>i</sup> <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.
- <sup>ii</sup> U.S. Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal, (Washington, D.C., February 8, 2005).
- <sup>iii</sup> <http://www.humanrightsfirst.info/pdf/061206-asy-bac-un-arb-det-asy-us.pdf>.
- <sup>iv</sup> “Detention and Removal of Illegal Aliens,” Office of Inspector General, Department of Homeland Security, April 2006; [www.ice.gov](http://www.ice.gov), August 7, 2006.
- <sup>v</sup> For more information on the detention of asylum seekers see [http://www.humanrightsfirst.org/asylum/asylum\\_03.htm](http://www.humanrightsfirst.org/asylum/asylum_03.htm).
- <sup>vi</sup> For more information on the history of the material support/terrorism related inadmissibility grounds see [http://www.humanrightsfirst.org/asylum/asylum\\_refugee.asp](http://www.humanrightsfirst.org/asylum/asylum_refugee.asp) and <http://www.rcusa.org/index.php?page=material-support-issue>.
- <sup>vii</sup> For more information on gender-based asylum see [http://www.humanrightsfirst.org/asylum/asylum\\_02.htm](http://www.humanrightsfirst.org/asylum/asylum_02.htm).





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