



Protecting the Persecuted and Abiding by U.S. Commitments under International Human Rights Law

Key Issues and Recommendations for Consideration during the Universal Periodic Review February 2010

The United States is a leading voice for the protection of refugees around the world. Not only is the United States a party to the 1967 Protocol Relating to the Status of Refugees (“Refugee Protocol”), but it is also party to the International Covenant on Civil and Political Rights (“ICCPR”) and other human rights conventions that protect the rights of all individuals, including refugees and asylum seekers. Despite its support for refugees abroad, this country has fallen short in terms of its protection of refugees who seek asylum in the United States.

Below are four examples of U.S. noncompliance with its human rights commitments that undermine the protection of refugees, as well as corresponding recommendations for reform.

1. Failure to Provide Prompt Court Review of Detention of Arriving Asylum Seekers

The failure to provide prompt, independent court review of decisions to detain arriving asylum seekers is inconsistent with U.S. commitments under the Refugee Protocol¹ and the ICCPR. On arrival, asylum seekers are subject to “mandatory detention” under expedited procedures. Subsequent parole assessments are conducted by U.S. Immigration and Customs Enforcement (ICE), the detaining authority. If ICE denies parole, the asylum seeker cannot appeal to a judge, even an immigration judge. While U.S. immigration judges review ICE custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens.”² In a 2009 report, Human Rights First documented the cases of many asylum seekers who were detained for months or longer without access to an immigration court custody hearing.³

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.”⁴ Article 31 of the Refugee Convention (to which the United States is bound through its accession to the Refugee Protocol) exempts refugees from being punished for illegal entry and provides that States shall not restrict the movements of refugees more than

¹ The United States acceded to the Refugee Protocol in 1968, and in doing so bound itself to comply with the substantive provisions of the 1951 UN Convention Relating to the Status of Refugees.

² Provisions located mainly at 8 C.F.R. 1003.19 and 212.5, as well as at 208.30 and 235.3.

³ See Human Rights First’s 2009 report “U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison.”

⁴ For more detailed analysis on the requirement of prompt court review of decisions to detain asylum seekers and migrants, see Human Rights First’s submissions to the Inter-American Commission on Human Rights, the UN Working Group on Arbitrary Detention, and the Special Rapporteur on the Human Rights of Migrants, as well as other materials at www.humanrightsfirst.org.

is “necessary.” The UN Special Rapporteur on the Human Rights of Migrants, after a 2007 mission to the United States, concluded that the U.S. immigration 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.”⁵ The UNHCR Executive Committee, of which the United States is a member, has recommended that detention of asylum seekers “should be subject to judicial or administrative review.”⁶ The UNHCR guidelines on the detention of asylum seekers call for procedural safeguards when an asylum seeker is detained, including “automatic review before a judicial or administrative body independent of the detaining authorities.”⁷

2. Asylum Filing Deadline Inconsistent with Refugee Protocol

Due to a one-year filing deadline, many asylum seekers, including refugees determined to face a probability of persecution, have had their requests for asylum rejected or denied by U.S. adjudicators. The filing deadline also leads to delays and governmental inefficiencies, diverting government resources that could be spent on substantive issues to instead deal with technical issues relating to deadline compliance. Article 33 of the Refugee Convention prohibits the return of refugees to persecution while Article 34 requires the United States to facilitate the assimilation and naturalization of refugees. The UNHCR Executive Committee has specified that technical requirements like filing deadlines “should not lead to an asylum request being excluded from consideration.”⁸

3. Overly Broad Approaches to Exclusion from Refugee Protection

The U.S. approach to excluding individuals from refugee protection is inconsistent with the Refugee Convention. As a result, many refugees have had their requests for asylum, resettlement, family unity, or permanent protection delayed or denied, as detailed in Human Rights First’s 2009 report “Denial and Delay: The Impact of the Immigration Law’s ‘Terrorism Bars’ on Asylum Seekers and Refugees in the United States.” For example, a young girl kidnapped at age 12 by a rebel group in the Democratic Republic of the Congo, used as a child soldier, and later threatened for advocating against the use of children in armed conflict, has been unable to receive a grant of asylum from the United States; her application has been on hold for over a year because she was forced to take part in armed conflict as a child.

The grounds of inadmissibility in U.S. immigration law based upon activities associated with “terrorism” - 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 the other statutory provisions that reference those definitions - are far more expansive than the exclusion grounds in the Refugee Convention. These provisions, and the other “terrorism”-related provisions of the Immigration & Nationality Act, also continue to be interpreted in ways that exacerbate the conflict with U.S. treaty obligations.

⁵ Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, 123, UN Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

⁶ UNHCR, Executive Committee, *Detention of Refugees and Asylum-Seekers*, Conclusion No. 44 (Oct. 13, 1986).

⁷ UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guideline 5(iii) (Feb. 1999).

⁸ UNHCR, Executive Committee, *Refugees Without an Asylum Country*, Conclusion No. 15, at (i) (Oct. 16, 1979).

4. U.S. Interdiction Procedures Inconsistent with Non-refoulement and Non-discrimination Obligations

Current U.S. interdiction policies do not ensure U.S. compliance with its commitments under the Refugee Protocol and other human rights conventions.⁹ For example, U.S. policies do not ensure that refugees and others with protection concerns are provided with effective access to protection interviews or even protection screening interviews. U.S. procedures to identify individuals who should receive interviews vary depending on the nationality of the interdicted individuals. These procedures, which are flawed for all nationalities, are particularly flawed for Haitians, raising serious concerns that the procedures for screening Haitians are not only deficient but also discriminatory. To identify Haitians for protection screening interviews, the United States uses the so-called “shout test” - only providing interviews to individuals who shout, wave, or otherwise indicate a potential fear of return, despite the lack of information provided, as well as a lack of individualized interviews or translators. 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.”¹⁰

Recommendations:

- 1. Provide Immigration Court Review of Detention:** The U.S. Departments of Justice and Homeland Security should revise regulatory language¹¹ and/or Congress should enact legislation to provide arriving asylum seekers and other immigrants with the chance to have their custody reviewed in a hearing before an immigration court.¹²
- 2. Eliminate Filing Deadline:** Congress should eliminate the asylum filing deadline.
- 3. Ensure Exclusion Complies with Refugee Protocol:** The administration and Congress should take steps to ensure the U.S. approach to exclusion is consistent with the Refugee Protocol. For example, Congress should eliminate the “Tier III” undesignated category of “terrorist” organizations.¹³
- 4. Revise Discriminatory Interdiction Policies:** The United States should review and revise policies relating to maritime interdiction to ensure compliance with the Refugee Protocol and other human rights obligations. Important reforms include abandoning the “shout” test, requiring translators, and implementing effective mechanisms to ensure that those with protection concerns are referred for protection interviews.

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⁹The United States has taken the position, upheld in the Supreme Court’s 1993 decision in *Sale v. Haitian Centers Council*, that the Protocol’s prohibition against the return of refugees to persecution does not apply to U.S. interdiction on the high seas – a position that triggered international criticism including from the Inter-American Commission on Human Rights.

¹⁰ UNHCR, Executive Committee, *Protection Safeguards in Interception Measures*, Conclusion No. 97 (Oct. 10, 2003).

¹¹ Supra note 2.

¹² For a detailed discussion of the flaws in the U.S. immigration detention system and a comprehensive set of recommendations, see Human Rights First’s 2009 report “U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison.”

¹³ For detailed recommendations, see Human Rights First’s 2009 report “Denial and Delay: The Impact of the Immigration Law’s ‘Terrorism Bars’ on Asylum Seekers and Refugees in the United States.”