



How to Repair the U.S. Asylum and Refugee Resettlement Systems

BLUEPRINT FOR THE NEXT ADMINISTRATION

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BLUEPRINT
FOR THE NEXT U.S.
ADMINISTRATION

ABOUT US

On human rights, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

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“Our values and our interests dictate that the protection of the most vulnerable is a critical component of our foreign policy. We have a moral imperative to save lives. We also have interest in sustaining U.S. leadership, which enables us to drive the development of international humanitarian principles, programs, and policies like no other government in the world. Such efforts promote reconciliation, security, and well-being in circumstances where despair and misery threaten stability and critical U.S. national security interests.”

President Obama on World Refugee Day
June 20, 2011

Introduction

The Obama Administration, as it embarks on its second term, should reaffirm U.S. leadership on the protection of refugees by repairing flaws in the U.S. asylum and resettlement systems. Many of these flaws have persisted for years, undermining U.S. leadership and leaving refugees in difficult and vulnerable situations. The White House should lead this effort and launch stronger mechanisms to safeguard protection throughout U.S. agencies. The administration should also look for

opportunities to move some of these repairs forward in concert with broader immigration reform initiatives.

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. Over thirty years ago, when Congress—with strong bipartisan support—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 United States is the world leader in resettling refugees, working in partnership with faith groups, civil society, and communities across the country. The U.S. resettlement program is in many ways a success, but it also needs improvements in order to protect some of the most vulnerable refugees and to ensure that refugees can successfully rebuild their lives after arriving in the United States.

U.S. leadership in the protection of refugees is also about how this country treats refugees who seek asylum here in the United States—and whether this country’s policies and programs live up to the same standards we call on the rest of the world to respect. In the wake of World War II, the United States played a leading role in drafting the 1951 Convention Relating to the Status of Refugees and committed to comply with its core provisions by signing on to the Convention’s Protocol. Yet, the United States has faltered on its commitment to those who seek protection—imposing a flawed one-year filing deadline and other barriers that prevent refugees from receiving asylum; interdicting asylum seekers and migrants at sea without adequate protection safeguards; detaining asylum seekers in jails and jail-like facilities without prompt court review of detention; mislabeling victims of armed groups as supporters of “terrorism;” and leaving many refugees separated from their families for years and struggling to feed, house, and support themselves due to extensive delays in the underfunded and overstretched immigration court system.

The challenges facing both the asylum and resettlement systems have only been compounded by the failure to promptly resolve the steady stream of interagency asylum and refugees issues—now involving over seven

U.S. government agencies—and the lack of senior leadership focused on protection.

Over the last four years, the Obama Administration has taken some important steps towards addressing some of the significant challenges that are undermining the U.S. asylum and resettlement systems. But, as it embarks on its second term, these efforts should be accelerated because far too often the United States is—still—depriving refugees of access to its asylum system, detaining them in a costly system that relies on jails and jail-like facilities, leaving some of the most vulnerable refugees stranded even though they face imminent risks of harm and prolonging the separation of refugee families for years due to delays in the under-resourced immigration court system and the unworkable system for issuing “exemptions” from bars under the immigration law.

These deficiencies not only have domestic consequences, but they also lower the global standard. As the Council of Foreign Relations’ Independent Task Force on U.S. Immigration Policy—co-chaired by former White House chief of staff Thomas “Mack” McLarty and former Florida governor Jeb Bush—pointed out, the U.S. commitment to protect refugees from persecution “is enshrined in international treaties and domestic U.S. laws that set the standard for the rest of the world; when American standards erode, refugees face greater risks everywhere.”¹

Building on the long history of bipartisan support for U.S. leadership in protecting refugees, the Obama Administration—with leadership and engagement from the White House—should in its second term reevaluate and reform provisions of law, policies, and practices that are inconsistent with U.S. human rights commitments and values. Many of these policies and practices can be changed administratively. Some of these reforms—like the elimination of the one-year asylum filing deadline—can and should be included as components of comprehensive immigration reform initiatives.

How to Repair the U.S. Asylum and Refugee Resettlement Systems

SUMMARY

During his second term, President Obama should renew and restore U.S. leadership in protecting refugees, both at home and abroad. This blueprint provides a detailed roadmap of recommendations and summarizes these recommendations immediately below:

RESTORE ACCESS TO ASYLUM AND OTHER PROTECTION

- Prioritize work with Congress to eliminate the counterproductive asylum filing deadline.
- Safeguard refugees from expedited removal and effectively implement protection measures.
- Revise the U.S. approach to maritime interdiction and require interviews, interpreters, and other safeguards.
- Promulgate regulations clarifying “particular social group,” “nexus,” and lack of state action.

PROMOTE FAIR, TIMELY, AND EFFECTIVE ADJUDICATION FOR ASYLUM CASES

- Increase immigration judges, support staff and Board of Immigration Appeals (BIA) staffing.
- Support elimination of asylum filing deadline.
- Improve access to legal counsel and legal orientation presentations:
 - Expand Legal Orientation Programs (LOP).
 - Promote efficiency and justice through support of legal representation funding.
 - Facilitate recruitment of pro bono counsel.

- Give U.S. Citizenship and Immigration Services (USCIS) Asylum Office initial jurisdiction over all asylum and withholding claims.
- Revise asylum “clock” regulation so asylum seekers are not deprived of opportunity to support themselves for years.
- Limit use of video conferencing for hearings.

ELIMINATE UNNECESSARY AND INAPPROPRIATE IMMIGRATION DETENTION

- Implement cost-effective alternatives to detention, in place of unnecessary detention.
- Revise regulations, and support legal positions and legislation, to provide access to Immigration Court custody hearings.
- Stop using prisons, jails, and jail-like facilities.
- Adopt and implement standards appropriate to civil immigration detention.
- Increase access to legal representation, legal information, and fair procedures.

PROTECT REFUGEES FROM INAPPROPRIATE EXCLUSION

- Support legislative adjustments to immigration law definitions to actually target terrorism.
- Implement August 2012 exemption swiftly and ensure additional exemptions are signed soon.
- Adopt sensible legal interpretations.
- Issue regulations to prevent unjust exclusion under “persecutor” bar.

IMPROVE U.S. REFUGEE ADMISSIONS PROGRAM TO STRENGTHEN PROTECTION FOR VULNERABLE REFUGEES

- Meet U.S. resettlement goals and facilitate access for particularly vulnerable.
- Continue to improve security checks and reduce delays in U.S. resettlement processing.
- Provide appropriate support for refugee integration.

STRENGTHEN EXPEDITED RESETTLEMENT AND EXPEDITED PROTECTION

- Strengthen coordination of the multiple steps in the U.S. resettlement process, including:
 - Develop regional guidelines with target time frames.
 - Appoint expedite specialists at U.S. Resettlement Support Centers (RSCs).
 - Increase capacity to expedite security checks.
 - Designate RSC staff to conduct prescreening.
 - Provide prompt USCIS interviews.
- Report on number and timing of expedited cases.
- Address delays due to high rates of positive TB tests later shown to be TB-free upon further testing.
- Improve emergency protection through Emergency Transit Facilities and safe shelter.

STRENGTHEN PROTECTION AND INTERAGENCY COORDINATION

- Improve White House and interagency coordination:
 - Institute annual interagency protection meeting.
 - Prioritize and Increase staff to facilitate coordination on protection.
 - Create senior director for protection at the National Security Council (NSC).
- Institutionalize protection within the Department of Homeland Security (DHS):
 - Create undersecretary for immigration and protection.
 - Create and staff senior protection office.
 - Allocate more staff to DHS policy office.
 - Direct DHS general counsel to ensure protection compliance.

How to Repair the U.S. Asylum and Refugee Resettlement Systems

RESTORE ACCESS TO ASYLUM AND OTHER PROTECTION

BACKGROUND

A range of barriers limit access to asylum or other protection for many refugees and other vulnerable persons. These barriers include: the one-year filing deadline on U.S. asylum applications, the expedited removal system, U.S. maritime interdiction policies that lack adequate protection safeguards, and the twelve-year delay in issuing regulations on the “particular social group” and “nexus” elements of the refugee definition.

Asylum Filing Deadline: Human Rights First’s 2010 report, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, found that the filing deadline has not only barred refugees who face religious, political, and other forms of persecution from receiving asylum in the United States, but has also delayed the resolution of asylum cases and led thousands of cases that could have been resolved at the asylum office level to be shifted in to the increasingly backlogged and delayed immigration court system. An independent academic analysis of DHS data concluded that, between 1998 and 2009, if not for the filing deadline, more than 15,000 asylum applications—representing more than 21,000 refugees—would have been granted asylum by DHS without the need for further litigation in the immigration courts.²

Expedited Removal: Under § 235 of the INA, U.S. immigration officers have the power to order the immediate, expedited deportation of people who arrive in the United States without proper travel documents. While measures were put in place to protect asylum seekers with “credible fears” of persecution from this summary deportation, a study by the bipartisan U.S. Commission on International Religious Freedom

(USCIRF) found serious flaws in the implementation of these measures.³ DHS has, however, *expanded* the use of this flawed process. In 2002, 34,624 individuals were deported through expedited removal, but this number more than tripled to 123,000 in fiscal year 2011. In recent months, Human Rights First has learned of a number of cases in which asylum seekers who evinced a fear of return were not referred for credible fear interviews.

Maritime Interdiction: The United States has a long history of interdicting Cuban, Haitian, Chinese, and other asylum seekers and migrants at sea—a history that has triggered international criticism and set a poor model for other states around the world.⁴ The United States moreover does not have effective, fair, transparent, and nondiscriminatory standards to govern its interdiction actions and ensure compliance with its commitments under the Refugee Protocol and other human rights conventions. The UNHCR Executive Committee (of which the United States is a member) has made clear 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.”⁵ U.S. interdiction policies are flawed for all who attempt to come by sea—but they are inconsistent and 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, though some of the language read to Cubans encourages return to Cuba to seek U.S. protection.

Sexual and Gender-based Persecution Claims: While the United States has played a leading role in advancing protection for victims of sexual and gender-based persecution, a number of significant gaps continue to undermine the ability of refugees who face these and other harms to access and receive U.S. asylum or resettlement. Despite the pressing need for legal guidance on the particular social group and nexus elements, and a December 2009 announcement in the

Federal Register that the Departments of Homeland Security and Justice intended to relaunch the rulemaking process, the Obama Administration has not yet promulgated regulations, leading to inconsistent and arbitrary decision making at all levels of the immigration adjudication system.⁶ As a result of the twelve-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.

RECOMMENDATIONS

■ **Prioritize work with Congress to eliminate the counterproductive asylum filing deadline.** The administration should make it a top priority to work with Congress to eliminate the wasteful and counterproductive asylum filing deadline (contained in INA §208(a)). It should fulfill the December 2011 pledge, made in connection with the 60th anniversary of 1951 Refugee Convention, to work with Congress to eliminate the deadline. This reform should be included in any legislative immigration reform initiatives. The legislation should also permit refugees who were granted withholding of removal, but not asylum, due to the filing deadline to adjust their status to lawful permanent resident and to petition to bring their spouses and children to safety.

The administration should work with Senator Orrin Hatch, one of the main proponents of the deadline, who 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.”⁷ In 2011, the U.S. Department of Homeland Security confirmed that it had concluded that the filing deadline should be eliminated because it leads genuine refugees to be denied asylum, expends resources without helping uncover or deter fraud and only makes the process more difficult.⁸ Ironically, while the deadline was initially proposed as a tool to prevent fraud, it actually leads the United States to deny asylum to *credible* refugees while also delaying asylum adjudications and diverting

governmental resources from adjudicating the actual merits of asylum requests.

- **Safeguard refugees from expedited removal and effectively implement protection measures.** The administration should work with Congress to revise INA §235 to limit the use of expedited removal to migration emergencies as the process lacks sufficient safeguards to ensure asylum seekers are not mistakenly deported.⁹ In the meantime:
 - DHS and its component agencies U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) should ensure that procedures designed to protect asylum seekers from return to persecution are followed, publicly report on credible fear referral rates, and implement USCIRF recommendations on expedited removal.¹⁰
 - DHS and USCIS should conduct credible fear interviews within two weeks, request and allocate funding so interviews are conducted in person rather than by telephone or videoconferencing, and assess reasons for any declines in rates of referrals to credible fear interviews or grant rates.
 - Support, and ensure cooperation with, congressional authorization for USCIRF to conduct a review of the expanded implementation of expedited removal.
- **Revise U.S. approach to maritime interdiction and require interviews, translators, and other safeguards.** The White House should revise its approach to interdiction, and allow interdicted persons with fears or concerns of return to seek asylum or other protection in the United States. While the practice of interdiction continues:

- **DHS should develop transparent, nondiscriminatory written standards governing interdiction and rescue operations.** These standards should require interpreters, individual screening interviews, and effective safeguards so that those with protection concerns are referred for protection screening interviews. Not only would individual screening interviews help identify anyone who may require a full protection interview, but they are also essential to identify urgent medical concerns, victims of trafficking, and whether children are unaccompanied or at risk of harm. The set of very basic protection questions and language included on form I-867A&B, for use by border officials in expedited removal, would provide a model for use during individual interdiction screening interviews and assist in identifying individuals who should be referred for protection screening interviews.
- **The U.S. Coast Guard should use interpreters in any interdiction operations.** Interpreters are essential to ensure individuals can actually communicate any fear, concern, or need for a protection interview. Without interpreters, interdicted Haitians who do not speak English are somehow expected to indicate their fear of return by shouting (the much-criticized “shout test”).
- **DHS, USCIS, the Bureau of Population, Refugees, and Migration (PRM), and other agencies should work together to promptly resettle those found to be refugees,** in the United States or in places where they have family or other significant ties. They should not be held for extended periods at the U.S. base on Guantanamo Bay.
- **The Coast Guard and other U.S. representatives engaged in interdiction efforts should be trained on implementation of U.S. protection commitments.** The administration should direct the Coast Guard and other U.S. authorities engaged in interdiction operations to hold regular and repeated protection trainings, and should fulfill

the pledge made, in connection with the 60th Anniversary of the Refugee Convention, to conduct updated training to U.S. Coast Guard personnel to focus on identifying manifestations of fear by interdicted migrants.

- **Promulgate regulations clarifying interpretation of “particular social group,” “nexus” and lack of state protection.** The White House should direct the Department of Justice (DOJ) and DHS to promulgate regulations providing that:
 - Either direct or circumstantial evidence is sufficient to fulfill the nexus requirement, including evidence that legal or social norms in the home country tolerate persecution of individuals like the applicant. This framework is consistent with the Supreme Court’s nexus analysis in *INS v. Elias-Zacarias*. If direct or circumstantial evidence establishes that race-religion, nationality, membership in a particular social group, or political opinion is one central reason for persecution, nexus is established, regardless of whether the persecutor also has other motives.
 - 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*,¹¹ 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 demand that a particular social group be “socially visible,” a requirement that is posing severe obstacles to a broad range of meritorious asylum claims, including claims based on gender violence.
 - Where an asylum applicant fears persecution at the hands of nongovernmental actors, the applicant may qualify for protection by showing that the home state is unable *or* unwilling to

protect the applicant, and this requirement is satisfied where the government fails to provide effective protection.

PROMOTE FAIR, TIMELY, AND EFFECTIVE ADJUDICATION FOR ASYLUM CASES

BACKGROUND

The immigration court system within the Executive Office for Immigration Review (EOIR) is in a state of crisis and is not adequately serving the interests of the U.S. government or the applicants appearing before it. While resources for immigration enforcement have increased steeply or remained high in recent years, the resources for the immigration court system have lagged far behind leaving the immigration courts under-staffed and under-resourced. The immigration court backlog, as of October 2012, was at 321,044 cases, with pending cases already waiting an average of 532 days.¹² As the Administrative Conference of the United States (ACUS) confirmed in June 2012, the immigration court backlog and “the limited resources to deal with the caseload” present significant challenges.¹³ The American Bar Association’s Commission on Immigration, in its comprehensive report on the immigration courts, concluded that “the EOIR is underfunded and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.”¹⁴

Through our partnership with law firms representing asylum seekers through our pro bono program, Human Rights First sees firsthand the hardship that court backlogs and extended processing times create for our refugee clients—many of whom are currently being given court dates two years away. While they wait for their claims to be heard, many remain separated from spouses and children who may be in grave danger in their home countries. Without access to work authorization while awaiting their immigration court hearings, many asylum seekers are unable to support themselves and their families. Some become homeless or destitute. Lengthy court delays also increase the difficulty of recruiting pro bono counsel.

The delays and burden on the immigration courts are compounded when cases that could or should be

granted at the asylum office level are put into the immigration court system. As noted above, thousands of asylum cases have been placed into the immigration court system unnecessarily due to the inefficient asylum filing. Many other asylum cases could also be more efficiently resolved at the asylum office level. Immigration court resources are also diverted in other ways, including by the asylum “clock” which has been reported to take at least 20% of court administrators’ time.¹⁵

The efficiency, effectiveness, and fairness of the immigration court system, as well as the administration of justice, are further undermined by the lack of legal counsel in asylum and immigration court proceedings. As the EOIR has explained: “Non-represented cases are more difficult to conduct. They require far more effort on the part of the judge.”¹⁶ The ABA study found that fewer than half of immigrants in immigration court had the benefit of representation, and for those in detention, about 84 percent were unrepresented.¹⁷ The academic statistical study *Refugee Roulette* found that represented asylum seekers win their cases at a rate that is about three times higher than the rate for the unrepresented.¹⁸ The fairness of the immigration court system is also undermined by the increasing conduct of asylum hearings via video conferencing (VTC), particularly for asylum and other merits hearings where the stakes are extraordinarily high and the outcomes can hinge on the immigration judge’s finding of credibility.

RECOMMENDATIONS

- **Increase the number of immigration judges, support staff, and Board of Immigration Appeals personnel.** The White House and the Department of Justice/Executive Office for Immigration Review should urge Congress to provide DOJ/EOIR with adequate resources to conduct timely and fair proceedings and specifically to (1) increase staffing at the immigration courts and the Board of Immigration Appeals and (2) provide mandatory initial training and ongoing professional development for all BIA members, immigration judges, and legal support staff.

- **Support elimination of asylum filing deadline** which, as detailed above, would reduce the number of asylum cases referred to the immigration courts.
- **Improve access to legal counsel and legal orientation presentations:**
 - **Significantly expand the Legal Orientation Program (LOP)** to improve immigration court efficiency and justice, as detailed below in the immigration detention section of this blueprint.
 - **Promote efficiency and justice through support of legal representation funding.** EOIR should, as ACUS recommended, make the case to Congress that funding legal representation for respondents in removal proceedings, including those in detention, as well as children and those with mental health issues, will promote justice and produce efficiencies and net cost savings. The Obama Administration should actively support these efforts, as well as the appointment of guardian ad litem for unaccompanied minors and individuals who lack competency.
 - **Grant requests for earlier hearing dates.** EOIR should welcome, and immigration judges should grant, requests to schedule immigration court hearing dates within several months, rather than in two years or longer. This would allow asylum seekers with family stranded at risk abroad, or with children on the verge of “aging out,” to have their cases resolved sooner. A reliable system for requesting earlier hearing dates might also help individuals secure counsel, including pro bono counsel, who might be hesitant to commit to take on cases with hearings two or three years away.
 - **Give USCIS Asylum Office initial jurisdiction over all asylum and withholding claims.** DHS and DOJ should adopt a single non-adversarial interview process before the USCIS Asylum Office for all asylum seekers, including “arriving” asylum seekers and “defensive” asylum seekers. Key steps are detailed in the 2012 ACUS report.¹⁹
- **Revise asylum “clock” and work authorization regulations and procedures so asylum seekers are not deprived of opportunity to support themselves for years.** DHS and DOJ should revise their regulations and procedures²⁰ to allow asylum and withholding applicants to qualify for work authorization provided that at least 150 days have passed since the filing of an asylum application. This adjustment would address multiple problems relating to the work authorization “clock” and would enable many asylum seekers to avoid becoming destitute and homeless while waiting for their hearing dates. It would also improve immigration court efficiency. USCIS should also allow applicants to view their asylum clock information online, as recommended by the USCIS ombudsman.²¹ In January 2012, USCIS committed to explore the feasibility of making an applicant’s asylum clock information available online in the Electronic Immigration System (ELIS).²²
- **Limit use of video conferencing for hearings.** The Obama Administration should work with Congress to secure adequate funding for EOIR so that judges can conduct merits hearings in person rather than via video-conference (VTC). The administration should also facilitate coordination between ICE and EOIR so that ICE uses detention facilities close to immigration courts, and EOIR provides immigration judges to work at these facilities. The administration should limit VTC to some “master calendar” hearings, and bar the use of VTC in asylum and other merits hearings. EOIR should take steps to address problems with VTC including those identified in the 2012 ACUS report. EOIR should also encourage immigration judges to afford favorable consideration to requests that hearings be conducted in person and EOIR should require coding of asylum and other hearings conducted via video to allow for data collection and analysis. EOIR and ICE should make VTC available to allow counsel to communicate with detainees.

ELIMINATE UNECESSARY AND INAPPROPRIATE IMMIGRATION DETENTION

BACKGROUND

DHS and ICE detain up to 33,400 immigrants and asylum seekers each day—an all-time high of over 429,247 in fiscal year 2012 alone. At an average cost \$164 per person, per day, the U.S. immigration detention system costs taxpayers over \$2 billion annually, despite the availability of less costly, less restrictive and highly successful alternative to detention programs.²³ Alternatives to detention—which can include a range of monitoring mechanisms, case-management, and in some cases electronic monitoring—can save more than \$150 per day per immigration detainee—millions annually.²⁴ As the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy noted, alternatives to detention can “ensure that the vast majority of those facing deportation comply with the law, and at much lower costs.”²⁵ A January 2012 Heritage Foundation report also recognized the cost-effectiveness of alternatives to detention.²⁶

While ICE has expanded its use of alternatives to detention, it has not used these cost-effective alternatives to reduce unnecessary detention and detention costs—citing to language in DHS appropriations legislation that ICE has viewed as mandating that it maintain a specific number of detention beds (33,400 for fiscal year 2012).

Immigration detainees are held in over 250 jails and jail-like facilities nationwide. In these facilities, they wear prison uniforms and are typically locked in one large room for up to 23 hours a day, they have limited or essentially no outdoor access, and visit with family through a Plexiglas barrier. The bipartisan U.S. Commission on International Religious Freedom concluded that these kinds of facilities “are structured and operated much like standardized correctional facilities” and are inappropriate for asylum seekers.²⁷ A 2009 DHS-ICE report confirmed that “all but a few of the facilities that ICE uses to detain aliens were built as jails and prisons.”²⁸

In 2009, DHS and ICE committed to shift the immigration detention system away from its longtime reliance on jails and jail-like facilities to facilities with conditions more appropriate for civil immigration law detainees.²⁹ In a statement of objectives for new facilities, ICE described “less penal” conditions that would include increased outdoor access, contact visitation with families, and “non-institutional” clothing for some detainees. The UNHCR, in its 2012 guidelines on detention, as well as other international human rights authorities, have confirmed that asylum seekers and other immigration detainees should not be detained in facilities that are essentially penal facilities, nor should they be made to wear prison uniforms but should instead be permitted to wear their own civilian clothing.³⁰

As documented in Human Rights First's 2011 report *Jails and Jumpsuits: Transforming the U.S. Detention System—A Two-Year Review*, and discussed during Human Rights First's Detention Dialogue Symposia, many criminal correctional facilities actually offer less restrictive conditions than those typically found in immigration detention facilities, and corrections experts have confirmed that a normalized environment helps to ensure the safety and security of any detention facility.³¹

DHS and ICE have opened two facilities with less-penal conditions and made progress on some other aspects of detention reform. ICE continues however to hold the overwhelming majority of its daily detention population in jails and jail-like facilities, with a full 50% held in actual jails. These facilities are often in remote locations, far from already limited pro bono legal resources, the immigration courts, or U.S. asylum offices. At many of these remote facilities, immigration officials are also—increasingly—turning to the use of video-conferencing to conduct immigration court hearings and even credible fear screening interviews, compounding the challenges that detained asylum seekers face in accessing protection.

RECOMMENDATIONS

The Obama Administration should prioritize immigration detention reform as detailed in Human Rights First's blueprint, *How to Fix the Immigration Detention System*. Some key steps include:

- **Prioritize immigration detention reform with strong White House leadership.** The Obama Administration should make transformation of U.S. immigration detention policies and practices a priority in its immigration reform agenda and should announce a major initiative to advance immigration detention reforms, many of which can be implemented without congressional action. The administration also should designate immigration detention transformation as a top priority for DHS and ICE.
- **Implement cost-effective alternatives to detention, in place of unnecessary detention.** ICE should implement an effective nationwide system of Alternatives to Detention (ATD) utilizing appropriate levels and types of supervision, community support, and individualized case management so that individuals who do not present risks can be effectively supervised without resort to much more costly detention.³² Alternatives programs should be used *in place of* detention that is unnecessary rather than primarily as a supplement to existing levels of detention. The administration should reject the notion that it is mandated to detain daily the number of individuals corresponding to the number of beds Congress funds. The administration should also realize cost savings by urging Congress, in connection with DHS appropriations legislation, to (1) not include language referencing a specific number of detention beds, and (2) recognize ICE flexibility in its allocation of the enforcement and removal budget to shift funds from detention to more cost-effective alternatives to detention—flexibility that it included in the 2013 budget request for DHS.³³
- **Revise regulations to provide access to immigration court custody (bond) hearings.** The Departments of Justice and Homeland Security should revise regulatory language in provisions located mainly at 8 C.F.R. §1003.19(h)(2)(i) and §212.5, as well as §208.30 and §235.3, to provide arriving asylum seekers and other immigration detainees with the chance to have their custody reviewed in a “bond” hearing before an immigration court. The administration should also support inclusion of this reform in legislation to ensure lasting reform. The UNHCR’s 2012 guidelines on detention, as well as recent reports of the U.N. special rapporteur on human rights of migrants and the Inter-American Commission on Human Rights, confirm the need for prompt court review of immigration detention.
- **Stop using prisons, jails, and jail-like facilities.** ICE should phase out the use of prisons, jails, and jail-like facilities to hold asylum seekers and other immigration detainees. After an individualized assessment of the need to detain, ICE should only use facilities with conditions appropriate for civil immigration detention: detainees should be permitted to wear their own clothing, move freely in a “normalized environment” among various areas within a secure facility, access true outdoor recreation throughout the day, access programming and email, have some privacy in toilets and showers, and have contact visits with family and friends. There are a few existing ICE facilities that have conditions, which as detailed in Human Rights First’s blueprint *How to Fix the Immigration Detention System*, could be replicated, with improvements in other facilities.
- **Develop and implement standards appropriate to civil immigration detention.** A 2009 report, prepared for DHS and ICE by the expert appointed by Secretary Napolitano to review the immigration detention system, concluded that the detention standards used by ICE—which are based on criminal incarceration standards “impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.” DHS and ICE should develop and implement new standards—not modeled on corrections standards—to specify conditions appropriate for civil immigration detention. These new standards should be guided by the American Bar Association’s Civil Detention Standards, adopted

by the ABA House of Delegates in August 2012, which confirm some key conditions that should be included in civil immigration detention standards including that immigration detainees be permitted contact visits, be allowed to wear their own clothing (rather than uniforms), and be provided with free access to outdoor recreation throughout the day. USCIRF also recommended that DHS establish more appropriate detention standards.

- **Increase access to legal representation, legal information, and fair procedures.**
 - DOJ, DHS, ICE, and the White House—should work with Congress to ensure that Legal Orientation Programs (LOP) are funded and in place at *all* facilities detaining asylum seekers and other immigration detainees. LOP has received widespread praise for promoting the efficiency and effectiveness of the removal process from immigration judges, who have praised LOP for better preparing immigrants to identify forms of relief. During fiscal year 2012, LOP was operating in 25 detention facilities on a budget of \$4.6 million, and it was expected to reach 65,000 of the more than 400,000 individuals held in immigration detention. The president’s fiscal year 2013 DOJ budget request included \$6 million for adult LOP, a \$2 million increase.
 - The administration should also support funding for legal counsel in immigration proceedings and in particular for vulnerable groups such as children, those with mental health issues, and those held in immigration detention.
 - DHS should end the use of detention facilities in remote locations which limit access to legal representation, medical care, and family. The administration should work with Congress to ensure in-person immigration judges and asylum officers for hearings and interviews.

PROTECT REFUGEES FROM INAPPROPRIATE EXCLUSION

BACKGROUND

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 would otherwise qualify for refugee protection. Bars to refugee protection also exclude 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. However, as detailed in two reports issued by Human Rights First, for a number of years now, overbroad definitions and interpretations of the terms “terrorist organization” and “terrorist activity” in U.S. immigration law have ensnared people with no real connection to terrorism. Consequently, thousands of refugees seeking safety—including those with family already in the United States—have been barred from entering or receiving protection in the United States, and many refugees and asylees already granted protection and living in this country have been barred from obtaining green cards and reuniting with family members.

More than four years ago, Congress, in a bipartisan effort lead by Senators Patrick Leahy (D-VT) and Jon Kyl (R-AZ), amended the law to authorize the administration to exempt persons with no actual connection to terrorism from the effects of these statutory definitions. However, to date, the relevant government agencies have failed to establish workable procedures to implement that authority effectively, and have continued the abuses that legislation was supposed to end.

In addition, for many years, DHS and its predecessor agency, the Immigration & Naturalization Service, as well as the BIA, had applied 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 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 in the case of *Negusie v Holder*, 555 U.S. 511 (2009) that its earlier precedent did not dictate the interpretation of the INA's persecutor bar, and remanded the issue to the BIA for reconsideration. More than three years later, DHS and DOJ have yet to issue regulations revising their interpretations of the persecutor bar.

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 in U.S. immigration law. 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 legal interpretations. Key steps forward include:

- **Support legislative adjustments to immigration law definitions to target actual terrorism.** The 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. Currently, these definitions are being applied to anyone who at any time used armed force as a non-state actor or gave support to those who did. These have included Iraqis who supported the overthrow of Saddam Hussein, Sudanese who fought against the armed forces of President Omar Al-Bashir, and Eritreans who fought for independence from Ethiopia. These definitions are also being applied to persons who supported armed groups under duress, and to individuals who were kidnapped or conscripted as child soldiers.
- **Implement August 2012 exemption swiftly, and ensure additional exemptions are signed soon.** The DHS secretary should allow USCIS officers to reexamine and provide relief to individuals—on an individual, case-by-case basis—who had voluntary associations with so-called "Tier III" groups. These groups are not designated as terrorist groups anywhere and in many cases are long defunct or are groups the U.S. government sympathizes with and even supports. An exemption issued in August 2012 to allow the case-by-case adjudication of many cases in this category where the applicants (or their spouses) were previously granted protection in this country, was a step in the right direction. But this exemption needs to be implemented swiftly. In addition, the DHS secretary should sign additional exemptions to allow the prompt adjudication of cases of persons who do not bear responsibility for serious human rights abuses or crimes and pose no threat to the security of the United States. Progress in this area is particularly urgent with respect to refugees who are applying for asylum or resettlement now.
- **Adopt sensible legal interpretations.** The White House—in partnership with the Departments of Homeland Security, Justice, and State—should review and revise legal interpretations of the immigration statute inherited from the Bush Administration—including: (1) revise the approach to what constitutes "material support" to specify that the term applies only to support that is quantitatively significant and qualitatively of a nature to further terrorist activity (rather than, for example, to the distribution of prodemocracy pamphlets or the donation of a chicken); (2) clarify that "routine commercial transactions"—like the sale of flowers at a flower shop—do not constitute "material support;" and (3) the material support bar and other terrorism-related (immigration law) bars should not be applied

Specifically, the very expansive subsection of the "terrorist activity" definition at INA § 212(a)(3)(B)(V)(b) should be limited to the use of armed force against civilians and noncombatants, and the definition of a "Tier III" organization at INA § 212(a)(3)(B)(vi)(III) should be eliminated.

to persons acting under coercion, to children, or in other circumstances where criminal law would recognize a defense. Statutory interpretations should be brought into line with the purpose of the law, which was to exclude and deny relief to persons responsible for or supportive of terrorist acts or groups, and who are perceived to pose a terrorist threat to the United States.

- **Issue regulations to prevent unjust exclusion under “persecutor” bar.** DHS and DOJ should move forward to issue regulations revising their interpretations of the persecutor bar in the wake of the Supreme Court’s 2009 decision in *Negusie v. Holder*. These regulations should include language that ensures that those who are not legally responsible for the persecution of others are not unfairly targeted by these provisions which are aimed at those who knowingly and voluntarily persecuted their fellow human beings.

IMPROVE U.S. REFUGEE ADMISSIONS PROGRAM TO STRENGTHEN PROTECTION FOR VULNERABLE REFUGEES

BACKGROUND

The United States leads the world in resettling refugees, working in partnership with faith groups, civil society, and communities across the country. Not only does resettlement help save lives, but it can be a strategic tool for supporting and encouraging nations in war-torn regions across the world to admit and protect large numbers of refugees who are fleeing from violence, war, and serious human rights abuses. For example, the Obama Administration has reported that U.S. willingness to resettle refugees who had fled from the fighting in Libya to Tunisia and Egypt “helped keep borders open for refugees and helped relieve pressure on these two countries during their own periods of political change.”³⁴

In fiscal year 2010, the United States resettled over 73,000 refugees. But the level of U.S. resettlement has fallen steeply over the last few years—to about 56,000 refugees in fiscal year 2011 and 58,238 refugees for fiscal year 2012. The president had, however, authorized the resettlement of many more refugees—80,000 for fiscal year 2011 and 76,000 for fiscal year 2012. Many refugees around the world who were slated for potential resettlement to the United States were left stranded in difficult and sometime dangerous situations. Over the last year, the Obama Administration has worked to address many of the processing and security check delays that contributed to this problem, including delays relating to the addition of enhanced security checks. In its September 2012 report to Congress, the Obama Administration reported that “admissions levels remained low until interagency coordination and processing procedures were improved” and that “[t]hese improvements resulted in increased refugee admissions levels beginning in May 2012 and admissions levels are expected to continue at these higher levels in FY 2013.”³⁵

Although the United States has the world’s leading resettlement program, its processing times can be quite prolonged, leaving some refugees stranded in dangerous locations or in difficult circumstances. Moreover, some refugees are found ineligible for resettlement but are not provided with the information that would allow them to submit a meaningful request for review of that denial. Those who are resettled to the United States can face other challenges as they try to rebuild their lives and support themselves in their new home country.

RECOMMENDATIONS

■ **Enhance U.S. global leadership by meeting resettlement goals and providing access to resettlement for particularly vulnerable refugees.**

- The U.S. government agencies involved in the resettlement process— the Department of State (PRM), DHS (including USCIS), and the security vetting agencies—should devote the necessary prioritization and staffing to the Refugee Admissions Program so that the United States meets its goal of resettling 70,000 refugees in fiscal year 2013, maintains or increases that goal for the next fiscal year (taking into account global needs), and continues to reduce the average processing time for resettlement applications.
- PRM should increase access to U.S. resettlement for particularly vulnerable individuals, and in particular support increased UNHCR capacity to make referrals of particularly vulnerable cases for U.S. resettlement, encourage increased outreach to and identification of vulnerable individuals and support employment or deployment of more resettlement processing staff.
- The administration should strengthen measures to facilitate resettlement of LGBTI partners together. PRM and USCIS should facilitate access to resettlement, including through “Priority 3” processing, for partners of LGBTI refugees resettled to, or granted asylum in, the United States.

■ **Continue to improve security checks and reduce delays in resettlement processing.**

- The White House should continue to provide leadership and work with PRM, DHS, and the security vetting agencies to address sources of delay in security background checks, including: (1) staff all security vetting agencies sufficiently; (2) remove duplications in the security background check process; (3) reduce the number of cases unnecessarily delayed due to uncleared “holds” relating to potentially derogatory information; and (4) create a proactive auto-alert system so that any emerging derogatory information is flagged as it emerges rather than an additional security check having to be run pre-departure.
- The White House should continue to work with PRM, USCIS, and other partners to increase or maintain extended validity periods for key steps in the resettlement process, reduce the need for steps to be unnecessarily repeated by maintaining the interagency check validity period of 16 weeks, and allow fingerprints to be electronically resubmitted in all locations.

■ **Improve fairness by providing information necessary to request review of mistaken security-check denial.** In order to minimize mistaken denials based on security checks, USCIS should provide sufficient information to enable individuals to file a meaningful request for review of a resettlement denial related to a security check, including clear indications that a case is denied for security reasons as well as the nature of the information.

■ **Provide appropriate support for refugee integration.** The Office of Refugee Resettlement (ORR) and PRM should provide appropriate support for refugee integration including:

- ORR should maintain and increase the current level of support (through the per capita reception and placement grant of \$1,850) for refugees resettled to the United States so that they can rebuild their lives.

- PRM and ORR should commission a study by an independent academic expert, with input from civil society, nongovernmental organizations (NGOs), and other relevant stakeholders, on the quality of reception and integration for refugees and asylees, which includes a comprehensive survey of refugees and asylees.
- PRM should provide information to resettlement agencies— prior to and during the resettlement “allocations” process—concerning refugees with particular support needs, such as survivors of sexual and gender based violence (SGBV), survivors of torture and LGBTI refugees, so that these refugees can benefit from specific support services, including services funded by ORR, that have been established in resettlement locations in different parts of the country. ORR has funded specific support programs for groups, including torture survivors and LGBTI refugees, with specific needs, but at present PRM is not providing the relevant information to resettlement agencies so they are not able to identify these cases during the allocations process and cannot place them into these specific programs. As a result, individuals who could benefit from specific care services are instead placed elsewhere, including to locations that may have a negative impact on their welfare. For example, LGBTI refugees have been resettled to locations that are not able to provide the necessary support to, or are not welcoming to, LGBTI persons.

STRENGTHEN EXPEDITED RESETTLEMENT AND EXPEDITED PROTECTION

BACKGROUND

Many refugees continue to face extreme danger even though they have crossed borders in search of safety. In October 2011, PRM issued a fact sheet publicly outlining its criteria for expediting resettlement in some cases. The fact sheet identifies two categories of cases that can be considered by the United States for expedited resettlement—one that involves “life-threatening protection scenarios,” and a second in which refugees have suffered or face a range of serious harms or other urgent protection risks. The October 2011 PRM fact sheet indicated that the United States was not able to resettle cases involving life-threatening protection scenarios in less than eight to ten weeks, due to security clearance procedures, the requirement of face-to-face interviews, and protocols relating to the detection and treatment of tuberculosis.

However, in the time since that fact sheet was issued, U.S. government agencies have made significant progress in improving the pace of resettlement and security clearance processing. In its September 2012 report to Congress, the Obama Administration reported that “interagency coordination and processing procedures were improved.”³⁶ The NSS, PRM, and DHS have also worked together to develop measures to expedite security background checks in a limited number of cases—with security vetting agencies returning expedited interagency checks in five working days. Measures are also now in place to expedite Security Advisory Opinion (SAO) background checks (which are not required by all applicants) and PRM is currently taking steps that will further reduce the general SAO processing time. In addition, PRM has supported the hiring of “expedite specialist” staff at two U.S. Resettlement Support Centers to oversee the progress of expedited cases through the U.S. resettlement system. PRM and its resettlement partners have also improved resettlement processing time by extending the “validity period” of some steps in the resettlement process that previously expired too quickly (leading

refugees to have to repeat certain steps in the process needlessly).

This progress has created a new opportunity for improving the U.S. Refugee Admissions Program's capacity to expedite the resettlement of a small number of refugees who face life-threatening or other serious and urgent risks. In the September 2012 Refugee Admissions Report to Congress, the Obama Administration confirmed that the multi-step nature of U.S. resettlement processing "does not exclude the United States from participation in the resettlement of urgent cases." It also reported that "on a case-by-case basis, individual applicants in need of expedited handling are processed on an accelerated schedule."

Outlined below are steps that the Obama Administration should take during its second term to strengthen U.S. capacity to expedite resettlement and to provide protection to refugees who face urgent or life-threatening risks while they are awaiting completion of resettlement processing. These steps would also help respond to President Obama's December 2011 directive on the protection of LGBT persons which instructed agencies to take steps to ensure that the "Federal Government has the ability to identify and expedite resettlement of highly vulnerable persons with urgent protection needs."³⁷

While some other countries have procedures that allow refugees at risk to be resettled faster, their programs do not negate the acute need for an effective U.S. expedited resettlement program. For instance, other programs do not always respond to the most at-risk individuals; some have very specific criteria that preclude many of those in need of urgent resettlement. In some cases, at-risk refugees have strong family or other ties to the United States. For example, some Iraqi refugees worked with the U.S. military or other U.S. organizations. Refugees with strong U.S. ties should generally be resettled to the United States.

RECOMMENDATIONS

The State Department (PRM) and USCIS, coordinated by the White House, should continue to take steps to improve the U.S. capacity to protect and resettle refugees facing urgent risks within eight weeks or less from some key locations. They should also develop the ability to resettle a small number of refugees facing imminent risks on an emergency basis. Key steps include:

- **Strengthen coordination of the multiple steps in the U.S. resettlement process.** PRM, USCIS, and Resettlement Support Centers should continue to strengthen coordination of the multiple steps in the U.S. resettlement process in order to make expedited processing less resource-intensive, including:
 - **Develop regional guidelines with target time frames.** PRM, USCIS and the RSCs should develop regional guidelines for all resettlement partners in each region with target time frames for each step in the process. These guidelines would improve the efficiency and consistency of expedited processing and promote continuity when current staff departs. PRM developed a draft of global guidelines in 2011, but regional guidelines would be able to reflect local processing realities.
 - **Appoint expedite specialists at RSCs.** PRM should fund RSCs to employ expedite specialists in the different regions to improve case management of expedited cases.
 - **Increase capacity to expedite security checks.** USCIS and PRM should continue to work with the security vetting agencies to increase the number of security background checks that can be expedited in emergency or urgent cases.
 - **Designate RSC staff to conduct prescreening.** RSCs should designate specific staff as responsible for conducting pre-screening in expedited cases, including in emergency cases.

- **Provide prompt USCIS interviews.** USCIS should provide prompt interviews including in cases where no circuit ride is planned. RSCs should request emergency interviews when necessary. In very limited circumstances (given the challenges relating to video-conferencing), USCIS should use videoconferencing where it is not possible to conduct a rapid face-to-face interview of a refugee facing imminent or urgent protection risks.
- **Report on the number and timing of expedited resettlement cases.** PRM should work with its RSC partners to compile and share information regarding the number of urgent cases resettled to the United States each quarter, the average processing time of urgent cases, the quickest case processed, and the major challenges impacting on expedited resettlement.
- **Address delays due to high rates of positive tuberculosis (TB) tests later shown to TB-free upon further testing.** In countries where the Center for Disease Control's 2007 tuberculosis guidelines are implemented, CDC should work with PRM to address the high rates of suspected TB cases that are then shown to be TB-free upon further testing. Suspected TB cases require a further six to eight weeks for sputum cultures to be tested which creates a significant delay for cases needing to be expedited. Particularly problematic is that in some regions a low percentage of suspected TB cases are shown to have actual TB upon further testing. CDC and PRM should work together to implement an alternative and more rapid form of testing to prevent individuals without TB from being unnecessarily delayed by an overly-inclusive initial TB reading.
- **Strengthen use of Emergency Transit Facilities for protection cases.** The United States currently supports and makes regular use of Emergency Transit Facilities (ETFs) in Romania, Slovakia, and the Philippines—particularly in cases where USCIS officers cannot access the country of asylum or the specific location of applicants to conduct resettlement interviews. PRM should make more use of the ETFs for refugees facing urgent or life-threatening protection situations (in addition to using the facilities for “transit” cases). PRM should also allow more efficient use of the facilities by allowing the use of *all* available spaces at a facility once some members of larger groups have departed (rather than limiting new arrivals until the entire group has departed). PRM should also support the training of ETF staff so that they are equipped to address the protection needs that will arise at these facilities for survivors of sexual and gender-based violence (SGBV), LGBTI refugees and persons with disabilities.
- **Strengthen support for safe shelter.** To ensure the safety of refugees who face high risks of violence—including as they await U.S. resettlement processing—PRM and DRL should strengthen support to UNHCR and local NGOs to enable them to provide, or increase their capacity to provide, safe shelter for refugees facing high risks. In many cases, scattered site housing is the safest approach. U.S. support should increase the capacity of existing refugee shelter and scattered housing initiatives as well as support the inclusion of refugees in existing shelters for citizens, such as those for survivors of sexual and gender-based violence (SGBV).

STRENGTHEN PROTECTION AND INTERAGENCY COORDINATION WITHIN THE U.S. GOVERNMENT

BACKGROUND

Asylum seekers and refugees now interact with three separate agencies within DHS – CBP, ICE, and USCIS.³⁸ The U.S. Coast Guard, also within DHS, interacts with asylum seekers and refugees too, as well as other vulnerable migrants, in the course of maritime interdiction operations. U.S. immigration courts and the BIA are part of EOIR, which is within DOJ, as is the Office of Immigration Litigation (OIL). Multiple government agencies are also involved in U.S. refugee resettlement, including Department of State (PRM), USCIS within DHS, as well as ORR within the Department of Health and Human Services. On top of these bureaus, various “security vetting agencies,” with other important priorities, also play a role in background and security check processing.

This overly bureaucratic and fractured system has meant that the interagency issues relating to the protection of asylum seekers and refugees have often fallen through the cracks. The efforts to address and solve these problems are further aggravated by the fact that protection of asylum seekers and refugees has to compete with many other pressing issues that fall within DHS’s responsibility.

In 2003, Human Rights First recommended that the department create a high-level office to coordinate and ensure protection for refugees and asylum seekers.³⁹ A new position of Special Advisor for Refugee and Asylum Affairs was created in 2006, but the office was quickly given broader responsibility over immigration policy, which limited its capacity to address and resolve a range of cross-cutting refugee issues. The position was subsequently converted to a less senior level role, and it still lacked sufficient staffing, authority, and capacity to resolve interagency issues within DHS. Other experts have expressed concern that unresolved cross-cutting immigration issues have undermined DHS performance, due to the lack of mechanisms, at the departmental level, for resolving differing views of the various agencies with immigration-related responsibilities.

Nearly ten years after the creation of DHS and the proliferation of asylum and refugee-related responsibilities among such a multitude of agencies, strong leadership on protection and interagency cooperation have not yet been established, and reforms are either stalled, delayed for years, or simply never adequately addressed. Some examples include: the twelve year delay in issuing clarifying regulations relating to “social group” eligibility for asylum; the failure to effectively address the delays in security check processing until senior National Security officials intervened; the slow pace of exemptions and review of flawed legal interpretations in connection with the immigration law’s “terrorism” bars, as well as the inability to agree to more effective approaches to addressing this challenge; the failure to issue timely regulations following the Supreme Court’s decision in *Negusie v Holder*; the failure to implement effective and nondiscriminatory protection safeguards in U.S. maritime interdiction; and the location of immigration detention centers far from asylum offices that can conduct credible fear interviews or immigration courts to conduct removal hearings.

Because all of these federal agencies and component agencies are involved in activities relating to U.S. refugee policy and Refugee Convention compliance, strong White House leadership is crucial. A clear signal from the White House that asylum and refugee resettlement issues are a priority would help encourage greater attention to addressing these issues within the agencies and ensure that key reforms are incorporated into comprehensive immigration reform initiatives.

RECOMMENDATIONS

- **Improve White House and interagency coordination on asylum and resettlement.** As the Council of Foreign Relations Task Force on Immigration Policy recommended, the administration should “give greater priority for refugee issues ... within the White House.” Key steps include:
 - **Institute annual interagency meeting on protection** The White House should institute an annual interagency cabinet-level meeting to coordinate federal efforts on a range of protection matters, including asylum and refugee resettlement. The meetings would help move forward efforts to address cross-cutting challenges, as they would present a regular opportunity for cabinet-level officials to highlight accomplishments and priorities. This process should be modeled on the president’s Interagency Task Force to Monitor and Combat Trafficking in Persons (a cabinet-level entity created by the Trafficking Victims Protection Act of 2000 to coordinate federal efforts to combat trafficking in persons). This meeting should be chaired by the president to hold officials accountable for the problems outlined in this blueprint, and also for the president to communicate his commitment to U.S. leadership in protecting refugees directly to his heads of agencies.
 - **Prioritize and improve coordination across agencies** The White House should prioritize the coordination of refugee and similar protection issues across the multiple agencies. The White House should increase NSS, Domestic Policy Council staffing to support improved coordination (not only around the recent security check delays but going forward on an ongoing basis). As resolving these interagency issues in a timely manner, and ensuring that various agencies fulfill their protection responsibilities—consistent with U.S. global leadership interests and human rights commitments—will require direct engagement by the president and senior White House staff. The president and senior White House staff should monitor and regularly intervene with the heads of the relevant agencies on these matters.
- **Create a senior director for protection at the NSC.** To give the White House greater capacity to improve protection, the director should be supported by the NSS and the Domestic Policy Council, and coordinate a range of protection issues, including refugee resettlement, asylum, and unaccompanied minors.
- **Institutionalize protection within DHS.**
 - **Create undersecretary for immigration and protection.** The position of undersecretary for immigration and protection should be created at DHS. The undersecretary should have line authority over ICE, CBP and USCIS, and over the Coast Guard on matters relating to protection of refugees and vulnerable migrants. In addition to facilitating resolution and action on matters relating to immigration policy, this position would facilitate coordination and timely resolution of refugee, asylum and other protection related issues so that fewer issues would require the attention of the secretary.
 - **Create and staff a senior protection office.** DHS should create a Senior Protection Office, led by a direct report to the secretary of DHS or the new undersecretary. Both the USCIRF and the CFR Immigration Policy Task Force recommended greater coordination and prioritization of refugee issues at DHS and the creation of an office within DHS that is responsible for refugee protection.⁴⁰ This office should have both policy and operational oversight, and should establish mechanisms to ensure that Coast Guard, ICE, CBP and USCIS policies and actions are in accordance with U.S. treaty obligations.

- **Allocate More Staff to DHS Policy office.** DHS and Congress should work together to address the imbalance of policy staff between DHS component agencies with immigration mandates and the DHS policy office. The limited policy staff at DHS in contrast to the much larger policy staffing at ICE, CBP and USCIS, undermines the ability of DHS to resolve immigration policy matters that involve differing agencies and differing views. This imbalance should be addressed by reallocating immigration policy staff from the component agencies—particularly ICE and CBP—to the DHS policy office.
- **Direct DHS general counsel to monitor protection compliance.** The DHS general counsel's office should also be directed to monitor and oversee, as an integral part of its legal role, that U.S. refugee protection and human rights convention commitments are implemented throughout the agency, including within ICE and CBP. The office should, for instance, weigh in on positions taken by ICE on asylum cases to oversee compliance with the Refugee Protocol and on policies—like those relating to lack of court review of detention—that are inconsistent with U.S. commitments under human rights conventions.

Endnotes

¹ Council on Foreign Relations, Independent Task Force Report No. 63, U.S. Immigration Policy, p. 31 available at <http://www.cfr.org/immigration/us-immigration-policy/p20030>.

² The deadline bars an applicant from asylum if she cannot demonstrate by “clear and convincing evidence” that her application was filed within one year of her arrival in the United States, absent a finding of “changed” or “extraordinary” circumstances that would excuse her delayed filing. Examples of changed and extraordinary circumstances can be found at 8 C.F.R. § 208.4(a)(4) – (5). Human Rights First, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency*, (New York: September 2010) available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>. Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach, *Rejecting Refugees: Homeland Security’s Administration of the One-Year Bar to Asylum*, William and Mary Law Review, (December 2010), available at <http://wmlawreview.org/files/Schrag.pdf>.

³ USCRIF Report on Expedited Removal, p. 54, available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf.

⁴ Human Rights First, *Renewing U.S. Commitment to Refugee Protection Recommendations for Reform on the 30th Anniversary of the Refugee Act* (New York: Human Rights First, March 2010), p. 14, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/30th-AnnRep-3-12-10.pdf>.

⁵ UNHCR Executive Committee, *Protection Safeguards in Interception Measures, Conclusion No. 97 (LIV)*, ¶ a(iv) (Oct. 10, 2003), available at <http://www.unhcr.org/refworld/docid/3f93b2894.html>.

⁶ Asylum and Withholding Definitions, 74 Fed. Reg. 64,220 (Dec. 7, 2009).

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

⁸ UNHCR Washington Office, *Reaffirming Protection: Strengthening Asylum in the United States, Commemorating the 60th Anniversary of the 1951 Refugee Convention*, October 25, 2011, Summary Report, p. 18, available at <http://www.unhcrwashington.org/atf/cf/%7BC07EDA5E-AC71-4340-8570-194D98BDC139%7D/georgetown.pdf>.

⁹ See Human Rights First, *Is This America? The Denial of Due Process to Asylum Seekers in the United States* (New York: Human Rights First, 2000) available at <http://www.humanrightsfirst.org/our-work/refugee-protection/due-process-is-this-america/>.

¹⁰ USCIRF Report on Expedited Removal, *supra* note 3
19 I. & N. Dec. 211 (BIA 1985).

¹² TRAC, *Latest Immigration Court Numbers, as of October 15, 2012* available at http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog

¹³ Administrative Conference of the United States (ACUS), “Immigration Removal Adjudication, Committee on Adjudication, Proposed Recommendation, June 14-15, 2012,” p. 1, available at <http://www.acus.gov/wp-content/uploads/downloads/2012/05/Proposed-Immigration-Rem.-Adj.-Recommendation-for-Plenary-5-22-12.pdf>.

¹⁴ American Bar Association, *Reforming the Immigration Detention System* (2010), pp. 2-16 available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf

¹⁵ Benson and Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication Interim Draft*, p. 54, available at <http://www.acus.gov/wp-content/uploads/downloads/2012/04/Updated-ACUS-Immigration-Removal-Adjudication-Draft-Report-for-4-23.pdf>.

¹⁶ Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices* (Dec. 2004), available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/legalAssist.pdf.

¹⁷ American Bar Association, *Reforming the Immigration Detention System* (Washington, D.C.: ABA, 2010), *supra* note 14, 5-7.

¹⁸ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 1, pp. 45-46.

¹⁹ Heritage Web Memo 3455, “Administrative Reforms Insufficient to Address Flawed White House Immigration and Border Security Policies,” by Matt A. Mayer, Jan. 10, 2012, available at <http://www.heritage.org/research/reports/2012/01/administrative-reforms-in-immigration-and-border-security-policies>

²⁰ INA § 208(d)(2)(2009); 8 CFR § 208.7(a)(2011); 8 CFR § 1208.7(a)(2011); 8 CFR § 274a.12(c)(8)(2011). Additionally, The authority under INA § 208(d)(2) to promulgate a regulation allowing for employment authorization for asylum applicants rests with the Secretary under INA §103(a), 8 USC 1103(a), as amended by the Homeland Security Act of 2002, Pub. L. No. 107-296, tit. XI, § 1102, 116 Stat. 2273, and the Homeland Security Act of 2002 Amendments, Pub. L. 108-7, Div. L, § 105(a)(1), (2), 117 Stat.

531 (2003). See <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf>

²¹ Citizenship and Immigration Services Ombudsman, *Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication* (August 26, 2011) available at <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf>.

²² USCIS, Response to Recommendation 50 (January 4, 2012) available at <http://www.uscis.gov/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/USCIS%20Response%20to%20Formal%20Recommendation%2050.pdf>.

²³ National Immigration Forum, “Math of Immigration Detention” (August 2012) available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

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- ²⁴ Ibid.
- ²⁵ Council on Foreign Relations, *supra* note 1, p. 29.
- ²⁶ Heritage Foundation, *supra* note 19.
- ²⁷ USCIRF, Asylum Seekers in Expedited Removal Volume II, p. 189, available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf; USCIRF, Expedited Removal Study Report Card (2007), p. 5.
- ²⁸ Dr. Dora Schriro, Immigration Detention Overview and Recommendations (Washington, DC: Immigration and Customs Enforcement, 2009), p. 21, available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>. (hereinafter cited as 2009 DHS/ICE Report).
- ²⁹ Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two-Year Review* (New York: Human Rights First, 2011), pp. 4-6, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>, citing ICE, “Fact Sheet: 2009 Immigration Detention Reforms,” available at <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm>; ICE Strategic Plan FY 2010-2014 (Washington, DC: ICE, 2010), p. 6; ICE, “Fact Sheet: ICE Detention Reform Principles and Next Steps,” news release, October 6, 2009, available at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; DHS press conference, October 6, 2009, video recording, <http://www.c-spanvideo.org/program/289313-1>; and 2009 DHS/ICE Report, pp. 2-3.
- ³⁰ UNHCR, *Detention Guidelines: guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* (2012) available at <http://www.unhcr.org/505b10ee9.html>.
- ³¹ Human Rights First, *supra* note 29.
- ³² Council on Foreign Relations, *supra* note 1, pp. 106-109.
- ³³ 2011 Council of Foreign Relations Report, pp. 106-7; DHS Budget-in- Brief, Fiscal Year 2013, available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf>.
- ³⁴ Ibid, page 3.
- ³⁵ Ibid, page 15.
- ³⁶ Ibid, page 15.
- ³⁷ The White House, “Presidential Memorandum - International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons,” December 6, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-1> (accessed January 9, 2012).
- ³⁸ 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.
- ³⁹ 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.
- ⁴⁰ Council on Foreign Relations, *supra* note 1, p. 108.



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