



**WRITTEN STATEMENT OF
THE ADVOCATES FOR HUMAN RIGHTS**

**SUBMITTED TO THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

**FOR THE MAY 19, 2010, HEARING ON
"RENEWING AMERICA'S COMMITMENT TO THE REFUGEE CONVENTION:
THE REFUGEE PROTECTION ACT OF 2010"**

The Advocates for Human Rights commends the Senate Committee on the Judiciary for conducting this hearing concerning America's commitment to the protection of refugees. The Advocates for Human Rights is a non-governmental, nonprofit organization dedicated to the promotion and protection of internationally recognized human rights. With the help of hundreds of volunteers each year, The Advocates investigates and exposes human rights violations; represents immigrants and refugees in our community who are victims of human rights abuses; trains and assists groups that protect human rights; and works through education and advocacy to engage the public, policy makers and children about human rights. The Advocates holds Special Consultative Status with the United Nations.

For over 25 years The Advocates for Human Rights has provided immigration legal assistance to asylum seekers in the Upper Midwest. Today The Advocates provides free legal services in approximately 500 cases each year, including asylum seekers who fear persecution if forced to return to their countries of origin and immigrant detainees who would otherwise be left without any access to counsel during removal proceedings.

Protection of refugees is among the United States' greatest accomplishments and highest responsibilities. Standing as a beacon of freedom and hope throughout the world, the United States puts our values into action each time we meet our obligations to protect victims of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Human rights defenders and democracy activists seek protection in the United States. So too do ordinary men, women, and children from around the world who find their lives and freedom endangered by repression and terror. At heart, refugee protection is about giving individual people the chance to rebuild their lives in safety and dignity.

The Advocates for Human Rights submits this Statement to highlight some of the failures of our current refugee and asylum law to protect the fundamental human rights of those seeking protection on our shores and to outline how the Refugee Protection Act addresses these problems.

I. Introduction

The Refugee Protection Act promises meaningful reform of the U.S. refugee and asylum system to ensure that the United States meets obligations under the 1951 Convention.

International law recognizes that while the United States has the right to control immigration that right is tempered by its obligations to respect the fundamental human rights of all persons. With few exceptions, the United States may not discriminate on the basis of national origin, race, or other status. The United States' refugee and asylum system, while among the world's most generous, contains systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice.

The United States asylum and refugee system fails to protect fundamental human rights to due process, fair deportation proceedings, freedom from arbitrary detention, humane detention conditions, freedom from *refoulement* to persecution or torture, and family unity. Problems with the asylum and refugee protection systems have resulted in denial of protection to bona fide refugees. The arbitrary one-year filing deadline for filing asylum claims, denial of protection against *refoulement* for those who have been convicted of minor crimes, and a sweeping definition of "material support" of "terrorist activities" have seriously undermined the United States' compliance with the obligations under the Refugee Convention.

The vast apparatus of the U.S. immigration system, including the oft-amended Immigration and Nationality Act and the bureaucracies which enforce, interpret, and administer the law, do not reflect the United States' commitment to human rights protection. As the United States implements existing laws and develops new statutes, regulations, and policies, it must turn to its international human rights obligations as the starting point for policy development. Without a commitment to human rights implementation at the core of immigration policy, the United States will continue to struggle to meet its obligation to ensure that the human dignity of every person within its borders is respected.

II. United States' Obligations Under the International Human Rights Framework

Pursuant to the International Covenant on Civil and Political Rights (ICCPR), non-citizens in the U.S. have a right to **due process and fair deportation procedures**,¹ including international standards on proportionality.² Non-citizens enjoy the right to private life guaranteed by ICCPR article 17.³ Non-citizens also enjoy the right to freedom from discrimination under article 2 of the ICCPR and the obligations imposed by the Convention on the Elimination of all forms of Racial Discrimination (ICERD).⁴

Both the Universal Declaration of Human Rights and the ICCPR guarantee the right to **liberty and security of person**.⁵ The ICCPR guarantees the right to life.⁶ Further, no one should be subjected to arbitrary arrest or detention.⁷ Non-citizens who are detained have a **right to humane conditions of detention**,⁸ and are entitled to **prompt review of their detention by an independent court**.⁹ **Detention of refugees and asylum seekers should be avoided** whenever possible; if refugees and asylum seekers must be detained, adequate safeguards should be in place to avoid arbitrary detention.¹⁰

Pursuant to the international legal obligations undertaken by the U.S. government, individuals also have a right **to seek and enjoy asylum from persecution and protection from *refoulement***.¹¹ Similarly, the Convention Against Torture prohibits a State from expelling, returning, or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹²

Regardless of immigration status, individuals in the U.S. have a **right to family unity**.¹³ In interpreting the obligations of the ICCPR, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.¹⁴

III. The Refugee Protection Act Addresses Key Failures of the U.S. Refugee and Asylum System to Respect Human Rights

Section 3 of the Refugee Protection Act would eliminate the arbitrary time limits on asylum applications.

United States law denies asylum to *bona fide* refugees who fail to file their asylum claims within one year of arriving in the United States.¹⁵ This arbitrary deadline violates U.S. obligations under the Refugee Convention and Protocol. Rather than preventing fraud, which was the stated purpose behind the filing deadline,¹⁶ in practice the deadline penalizes *bona fide* asylum seekers and disproportionately affects those most in need of protection,¹⁷ including survivors of torture. Rushed asylum applications can lead to denials based on credibility, particularly for torture survivors who struggle with memory loss, Post-Traumatic Stress Disorder, depression, and other barriers to quickly applying for asylum.

Exceptions¹⁸ to the one-year filing deadline are granted inconsistently.¹⁹ For some asylum seekers, this means years of delay while their case is heard before an immigration judge; for others, it means denial of asylum. Most federal courts of appeal have held that they do not have jurisdiction to review determinations relating to the one year filing deadline for asylum applications.²⁰

The Advocates for Human Rights represented a Guinean political activist who was detained for over two and one-half years and tortured by the Guinean government. Although he filed his application within one year of arrival and submitted some proof of the date he arrived in the United States, he could not prove his date of entry to the satisfaction of the immigration judge. He was denied asylum and ordered removed from the United States; he remains in the U.S. under an order of withholding of removal.

The Refugee Protection Act would eliminate the arbitrary one-year filing deadline for asylum applications and bring the United States into compliance with obligations under the Refugee Convention.

Section 4 of the Refugee Protection Act would protect victims of terrorism from themselves being defined as terrorists.

The USA PATRIOT Act of 2001²¹ and the REAL ID Act of 2005²² expanded the class of individuals who are inadmissible to the U.S. for having provided material support to a terrorist

organization, rendering *bona fide* refugees and asylum seekers ineligible for protection.²³ The political activities which form the very basis of many refugees' claims for protection have, under U.S. law, now been defined as "terrorist activities" barring them from refugee status, asylum, family reunification, or permanent resident status.²⁴ Human Rights First, which has extensively documented the crisis created by the "material support" bar, cites numerous examples of denial of protection for *bona fide* refugees because of testimony they gave when seeking refugee or asylum status.²⁵

Under U.S. immigration law, "terrorist activity" is extremely broadly defined.²⁶ That overbroad definition, combined with the creation of the so-called Tier III terrorist category,²⁷ and a definition of "material support" which the U.S. is applying to *de minimis* or coerced acts, has resulted in widespread denial or prolonged delay in protection of bona fide refugees.²⁸ While the law gives the Executive Branch of the U.S. broad discretion to waive application of the "terrorism"-related provisions of the immigration law to individual cases,²⁹ this approach turns eligibility for forms of protection mandatory under international law into a matter of executive grace for many applicants, and has failed to provide protection to several categories of individuals who should be protected under the Refugee Convention and Protocol. The practical implementation of the waiver authority has been extremely slow, and has yet to reach the large number of applicants who had voluntary associations with groups now considered to be "Tier III terrorist organizations."³⁰

The Refugee Protection Act would ensure that bona fide refugees can find safe haven in the United States while excluding those who fall outside the scope of the Refugee Convention. The Refugee Protection Act would make important changes to current law, including excluding coerced activity from the definition of "terrorist activity," replacing the ill-crafted definition of "terrorist activity" currently found in the Immigration and Nationality Act with a definition that describes actual terrorist activity; and eliminating the Tier III terrorist group definition.

Section 5 of the Refugee Protection Act would protect vulnerable groups of asylum seekers.

U.S. asylum law has fallen out of step with the intent and obligations of the Refugee Convention. Recent developments, including the Board of Immigration Appeals' adoption of the requirement that "particular social groups" must be "socially visible" in order for its members to invoke refugee protection have created a definition rejected by the U.N. High Commissioner for Refugees, the body charged with implementation of the Convention. Changes made by Congress in the REAL ID Act also have brought the U.S. out of compliance with our refugee protection obligations and to well-established U.S. case law regarding an asylum seeker's burden of proof and corroboration of their claim. Other changes are necessary, including the creation of an exception for those coerced into participating in persecution, including children forcibly conscripted into armed conflict, to respond to the Supreme Court's decision in *Negusie v. Holder*, 129 S. Ct. 1159 (2009).

The Refugee Protection Act would make important technical corrections to the Immigration and Nationality Act to ensure that U.S. asylum protection remains consistent with our obligations under the Refugee Convention.

Section 6 of the Refugee Protection Act would ensure fair deportation proceedings for asylum seekers.

While U.S. law provides that aliens in removal proceedings have “the privilege of being represented,” representation must be “at no expense to the Government.”³¹ The United States’ failure to ensure that all non-citizens have access to representation during their expulsion hearings violates ICCPR article 13. In 2008, approximately 57% of all removal cases completed were unrepresented.³² According to a recent report of the American Bar Association, there is “strong evidence that representation affects the *outcome* of immigration proceedings.”³³ Approximately 84% of detained cases were unrepresented.³⁴

By permitting the Attorney General to appoint counsel in complex cases or in cases where individuals are unable to represent themselves, the Refugee Protection Act would significantly increase U.S. compliance with article 13 of the ICCPR. The Advocates for Human Rights regularly represents clients with Post-Traumatic Stress Disorder and other mental health impairments resulting from the torture or trauma which compelled them to seek asylum. These clients struggle to meet deadlines, keep appointments, recount their experiences, and gather evidence to prepare for their cases, and without representation these most vulnerable asylum seekers are significantly less likely to be able to obtain protection. In addition, The Advocates for Human Rights has represented clients with severe mental health and cognitive disorders who are unable to speak for themselves in removal proceedings. Under current law, however, immigration judges must deal with these most difficult cases *pro se* if a charitable agency is unable to provide free counsel.

The Refugee Protection Act would provide the Attorney General with the capacity to appoint counsel in complex cases where fair and expeditious adjudication requires representation. This provision would bring the United States into compliance with our obligation to provide fair deportation proceedings to everyone facing expulsion from our country.

Section 8 of the Refugee Protection Act would address the arbitrary detention of arriving asylum seekers.

Asylum seekers in the United States are subject to arbitrary detention in violation of article 9 of the International Covenant on Civil and Political Rights. The Immigration and Nationality Act’s expedited removal system, which mandates detention of arriving asylum seekers and the practice of U.S. immigration authorities to continue the detention of many asylum seekers even after credible fear has been established, subjects thousands of people each year to arbitrary detention in the United States in violation of ICCPR article 9(1)³⁵. The lack of access to court review of detention for asylum seekers violates ICCPR article 9(4)³⁶.

Arriving asylum seekers in expedited removal proceedings are subject to mandatory detention and may not be released while awaiting their initial “credible fear” review to determine whether they may apply for asylum before an immigration judge.³⁷ Following determination of credible fear, asylum seekers may be released on parole pending their asylum hearings before an immigration judge or while on appeal, but if the detaining authority (ICE) denies parole, the asylum seeker is prevented under regulations from having an immigration court assess the need

for his continued custody.³⁸ ICE revised its parole guidelines effective January 2010, but ICE has not put these guidelines into regulations.³⁹

Under the changes proposed by the Refugee Protection Act, asylum seekers who have established their identify will be released within seven days of a finding of credible fear of removal, unless the Department of Homeland Security can show that release of the asylum seeker poses a risk to public safety or that the asylum seeker is a flight risk. Importantly, the Refugee Protection Act would require the promulgation of parole regulations to help promote fair, uniform detention decisions for asylum seekers around the United States, regardless of the port of apprehension.

Section 10 of the Refugee Protection Act would ensure that asylum seekers are not detained under inhumane conditions.

Asylum seekers, like all people detained in immigration custody, are held in prisons, jails, and other prison-like detention facilities. Arriving asylum seekers are subject to mandatory detention during the expedited removal process, while many other asylum seekers are detained at the discretion of Immigration and Customs Enforcement.

In FY 2009, the United States detained an estimated 378,582 individuals in ICE custody, including those under ICE supervision.⁴⁰ Immigrant detainees are held in over 350 facilities around the United States,⁴¹ operating variously by the U.S. Department of Homeland Security, state and local governments, and private prisons.⁴² Virtually all immigrant detainees, including asylum seekers, are held in prison- or jail-like settings⁴³ which fail to adhere to guarantees in ICCPR articles 10(1) and 10(2)(a).⁴⁴ Immigrant detainees wear prison uniforms, are regularly shackled during transport and in their hearings, and are held behind barbed wire.⁴⁵ Depending upon where they are detained, they may not be permitted contact visits with family,⁴⁶ may be subject to degrading conditions including strip searches,⁴⁷ and may face barriers to communicating with their family, counsel, or other support systems.⁴⁸ Asylum seekers in detention may be held for prolonged periods of time without access to the outdoors.⁴⁹ Appropriate psychological and medical services for torture survivors are universally unavailable.⁵⁰ Asylum seekers and other immigrant detainees routinely are commingled with convicted people.⁵¹ In August and October 2009, ICE announced plans to reform the immigrant detention system, but thus far there has been limited progress toward a shift to non-penal facilities in cases where detention is required.⁵²

Highly publicized cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity.⁵³ Between 2003 and April 2009, ICE reported over 90 deaths of non-citizens in their custody.⁵⁴ Shocking reports of the United States' failure to provide care to ill or injured persons in its custody abound.⁵⁵ Although the United States has adopted detention standards, the standards are not enforceable and have significant deficiencies in monitoring and oversight, little transparency, and no consequences for non-compliance with standards.⁵⁶ Reports indicate that the United States failed to report deaths in a transparent way.⁵⁷ Between 2007 and 2009, at least 26 reports on the failures of the U.S. immigrant detention system have been released.⁵⁸

A woman seeking asylum from Ethiopia, being treated for depression and Post-Traumatic Stress Disorder resulting from torture, was detained for over one year in Minnesota's Ramsey County Adult Detention Center following her asylum hearing in front of an immigration judge. While detained, she never saw the outdoors and was co-mingled with the general convicted population because the facility with which ICE contracts lacks the facilities.

The Refugee Protection Act would take steps to bring the U.S. into compliance with our international obligations by ensuring that all immigrant detainees would be held in conditions meeting minimum standards, including access to legal service providers, group legal orientation presentations, translation services, recreational programs, access to law libraries, working telephones, religious services, prompt case notification requirements, and other basics.

Section 14 of the Refugee Protection Act would eliminate the one-year waiting period for refugees and asylum seekers granted asylum to become Lawful Permanent Residents.

Under current law, refugees and people granted asylum must wait one year before filing applications for adjustment of status to lawful permanent resident. This arbitrary waiting period, a hold-over from the system in place prior to the enactment of the Refugee Act of 1980, stands in the way of expeditious integration and acquisition of citizenship by refugees, contrary to article 34 of the Refugee Convention.⁵⁹

The current law presents a tremendous burden to asylum seekers granted asylum. For example, The Advocates for Human Rights represents a woman and her teen-age son who were granted asylum following her torture because of suspected opposition political activity. She and her son are now in the process of filing applications for permanent resident status at a cost of \$1,010 each. This family, struggling to rebuild their lives, recently moved out of a homeless shelter after the woman found part-time work cleaning hotel rooms.

This fix would have an enormous impact on asylum seekers and refugees in Minnesota. It would shave years of unnecessary waiting time off our clients' ability to become U.S. citizens. It would also avoid processing of thousands of superfluous immigration applications every year by the overburdened U.S. Citizenship and Immigration Services and allow scarce free immigration legal services resources to be dedicated to other cases.

Section 17 of the Refugee Protection Act would help protect refugee families from unnecessary separation.

Current law violates U.S. obligations to respect and promote the unity of the family in violation of articles 17 and 23 of the ICCPR. Because of the prolonged time people may spend in refugee camps or seeking asylum, their children may have children of their own. Under the immigration law, these "derivatives" of "derivatives" are not allowed to accompany their parents to the US.

Particularly devastating to Minnesota's refugee population, on October 22, 2008, the United States stopped accepting all applications for the Priority 3 (P-3) refugee resettlement program, which gives certain refugees access to resettlement in the U.S. based on a family relationship with an individual permanently residing in the United States.⁶⁰ The suspension of P-3 refugee family unification followed mandatory DNA testing of applicants for resettlement which, according to the U.S., resulted in high rates of fraudulently-claimed family relationships.⁶¹ In

many refugee populations, children were taken into families in the midst of the violent civil crisis. When the families were able to resettle to the US, however, they were not able to bring these informally adopted children here because they do not meet statutory definition of a “child.” These informally adopted children, taken into families because of humanitarian necessity, account for some of the failure rates in the DNA testing program.

One statement, given to The Advocates during the Liberian Truth and Reconciliation Commission’s work in Minnesota, shows the chaos refugee families face: “All my family started to flee to different places. One brother fled to neighboring Guinea...My brother who stayed in Bomi County saw people in my brother’s house and told them to leave and they just shot him. I had nine siblings. One brother was a diplomat in Sierra Leone. Another brother lived in New York. Another brother fled to Guinea – I think he is still there. My oldest brother has not been heard from up to today. He just disappeared from the face of the earth. We believe he is most likely dead. One brother fled to Ghana. He is still there today. My sister came here too...I have two siblings still in Liberia.”

The Refugee Protection Act would address major problems identified in our extensive work with the Liberian community in particular and with other long-term refugee communities prevalent in Minnesota, including Hmong, Ethiopian, and Somali refugees.

IV. Conclusion

The Advocates for Human Rights thanks the Committee for the opportunity to provide this statement to the record. The United States, through the refugee and asylum system, provides an important safe haven to those fleeing persecution and torture from around the world. The Refugee Protection Act will strengthen that commitment.

¹ International Covenant on Civil and Political Rights (ICCPR), art. 13, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). *See also* UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 12, U.N. Doc. A/HRC/7/12/Add.2, (Mar. 5, 2008) (*prepared by* Jorge Bustamante, Mission to the United States of America) (noting that the Human Rights Committee has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. The Committee has clarified: “. . . if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.” and further: “An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one”).

² *Report of the Special Rapporteur on the Human Rights of Migrants*, *supra* note 1, ¶ 10.

³ *Id.*

⁴ ICERD, art. 1, ¶ 2 (providing for the possibility of differentiating between citizens and non-citizens); *but see* CERD, Gen. Rec. 11 (noting regarding the rights of non-citizens, art. 1, ¶ 2, must not detract from the rights and freedoms recognized and enunciated in other human rights instruments and “must be construed so as to avoid undermining the basic prohibition of discrimination”); Gen. Rec. 30, at ¶ 2 (noting that “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”).

⁵ Universal Declaration of Human Rights (UDHR), art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); ICCPR, *supra* note 3, art. 9.

⁶ ICCPR, *supra* note 1, art. 6.

⁷ UDHR, *supra* note 5, art. 9; ICCPR, *supra* note 1, art. 9(1) (stating no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law); *id.* art. 9(2) (guaranteeing that anyone who is arrested shall be informed, at the time of

arrest, of the reasons for his arrest and shall be promptly informed of any charges against him); *id.* art. 9(4) (requiring that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful). *See also* UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (reminding states that the legality of detention must be open for challenge before a court and 2); UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (reminding states of the right of the detained to a prompt review).

⁸ ICCPR, *supra* note 1, art. 7 (stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); ICCPR art. 10(1) (requiring that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2) (requiring that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

⁹ ICCPR, *supra* note 3, at art. 9(4).

¹⁰ UNHCR, Exec. Comm., *Detention of Refugees and Asylum Seekers, Conclusion No. 44* (XXXVII) UN Doc. A/41/12/Add.1 (Oct. 13, 1986) (stating that “in view of the hardship which it involves, detention should normally be avoided” and sets out the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. Those detained must have access to either an administrative or judicial review, an essential safeguard against arbitrary detention). *See also*, UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 26, 1999.

¹¹ UDHR, *supra* note 5, art. 14; 1951 Convention relating to the Status of Refugees, art. 33(1) July 28, 1951, 189 U.N.T.S. 137 [*hereinafter* Refugee Convention] (stating that no State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). *Id.* art. 31 (recognizing that refugees and asylum seekers may be forced by their circumstances to enter a country illegally in order to escape persecution, and providing that States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence).

¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [*hereinafter* Convention Against Torture or CAT] (stating that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights).

¹³ UDHR, *supra* note 5, art.16 (3); ICCPR, *supra* note 1, art. 23 (1), (3) (stating that the right of men and women to marry and found a family shall be recognized and that this right includes the right to live together); *id.* art. 17(1) (stating that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence . . .”).

¹⁴ UNHRC, 7th Session, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 17, A/HRC/7/12/Add.2 (Mar. 5, 2008) (*prepared by* Jorge Bustamante).

¹⁵ INA § 208(a)(2)(B).

¹⁶ “We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system.” 142 Cong. Rec. S4468 daily ed. (May 1, 1996) (statement of Sen. Simpson).

¹⁷ “[T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted [and] brutalized by their own governments. They have an inherent reluctance to come forward . . . before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to do it” 142 Cong. Rec. S3282 daily ed. (April 15, 1996) (statement of Sen. Kennedy).

¹⁸ INA § 208(a)(2)(D) (permitting grant of asylum filed more than one year after arrival only where the applicant can demonstrate (1) “changed circumstances which materially affect the applicant’s eligibility for asylum,” or (2) “extraordinary circumstances relating to the delay in filing the application”).

¹⁹ See TAHIRIH JUST. CTR., PRECARIOUS PROTECTION: HOW UNSETTLED POLICY AND CURRENT LAWS HARM WOMEN AND GIRLS FLEEING PERSECUTION 33 (Oct. 2009).

²⁰ INA § 208(a)(3). Note that INA § 242(a)(2)(D), added to the INA by the REAL ID Act of 2005, provides courts with jurisdiction over all constitutional claims or questions of law notwithstanding other restrictions on review in the INA. See *Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007) (reversing BIA's timeliness finding because BIA misinterpreted the regulation regarding when a document is deemed filed); *Diallo v. Gonzales*, 447 F.3d 1274 (10th Cir. 2006) (reversing BIA's interpretation of INA § 208(a)(2)(B) for purposes of determining whether petitioner filed within one year); *Mabasa v. Gonzales*, 455 F.3d 740 (7th Cir. 2006) (finding jurisdiction to review allegation that BIA failed to provide meaningful review because BIA wrongly analyzed claim as extraordinary circumstances when it should have been analyzed as changed circumstances); *Wijono v. Gonzales*, 439 F.3d 868 (8th Cir. 2006) (recognizing that court can review due process violation, but finding claim not exhausted).

²¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (adding a definition of “terrorist organization” consisting of three categories of armed groups, including Tier III organizations defined as any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” “terrorist activity” as defined by the INA and defining “material support” to a “terrorist organization” as “terrorist activity” in its own right). See HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 21 (2009) [*hereinafter* DENIAL AND DELAY].

²² Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005) (REAL ID Act) (expanding terrorism-related grounds of inadmissibility and deportation) According to Human Rights First, because of the interplay within the INA between the grounds of inadmissibility and deportation, “with the passage of the REAL ID Act, anyone described in *any* of the new long list of inadmissibility grounds at section 212(a)(3)(B) is now barred from all forms of refugee protection). See also DENIAL AND DELAY, *supra* note 21, at 22.

²³ The Human Rights Committee in its Concluding Observations noted at ¶ 17 that the Committee is concerned the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided “material support” to a “terrorist organization”, whether voluntarily or under duress. The Committee noted regret at having received no response on this matter from the State party. The Committee observed that the State party should ensure that the “material support to terrorist organizations” bar is not applied to those who acted under duress. UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

²⁴ The following cases of The Advocates for Human Rights illustrate the “material support” problem: A Nepalese woman sought asylum in the US because Maoist insurgents had kidnapped her son. We had to advise her that she would be considered a “terrorist” under the material support guidelines because she paid the ransom for her son’s release. A Zimbabwean man was granted asylum in August 2008 on account of imputed political opinion, because the Zimbabwean government suspected him of supporting the Movement for Democratic Change. He petitioned for his wife and children to join him in the US in September 2008. In June 2009, The Advocates for Human Rights received notice that the cases are on “hold” under INA section 212(a)(3) – security related bars. An Oromo man was granted asylum by the immigration judge on account of the persecution and torture he suffered at the hands of the Ethiopian government. He applied for adjustment of status, but his application was placed on hold because of his affiliation with the Oromo Liberation Front. In the fall of 2009, The Advocates for Human Rights was contacted by a therapist practicing in St. Paul who was worried that her Hmong clients, who were receiving that their applications for permanent residence or family reunification were “on hold” for material support of terrorism, could commit suicide

²⁵ DENIAL AND DELAY, *supra* note 21.

²⁶ Terrorist activity includes “any activity which is unlawful under the laws of the place where it is committed” and which involves any of a range of acts including “the use of any ... explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” INA § 212(a)(3)(B)(iii)(V).

²⁷ Tier III terrorist organizations include any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” “terrorist activity” as defined by the INA.

²⁸ See generally DENIAL AND DELAY, *supra* note 21.

²⁹ See 72 Fed. Reg. 9958 (Mar. 6, 2007) Notice of Determination.

³⁰ *Id.*

³¹ INA § 292. See also, ABA, Reforming the Immigration System, *supra* note 30, at 40 (noting that while courts may apply a case-by-case approach to determining whether the assistance of counsel would be necessary to provide fundamental fairness, under the United States Constitution’s Fifth Amendment due process guarantee, appointment of counsel has been denied in every published case).

³² REFORMING THE IMMIGRATION SYSTEM, *supra* note 31, at 39.

³³ *Id.*

³⁴ *Id.*

³⁵ Article 9, paragraph 1 of the ICCPR guarantees that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” According to the Human Rights Committee, any period of detention must be open to periodic review. Even though an initial period of detention may not be arbitrary (e.g. if it was necessary to carry out identity, security or health checks), subsequent periods may breach article 9(1) of the ICCPR, that is, prolonged detention may be arbitrary. See, e.g., *Spakmo v Norway*, HRC Case No. 631/1995, para. 6.3; HRC Concluding Observations on Japan (1998) CCPR/C/79/Add.102, para. 19 and Switzerland (1996) CCPR/C/79/Add.70.

³⁶ Article 9, paragraph 4 of the ICCPR provides that “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Again, the HRC has held that an asylum seeker must have a right to challenge his or her detention in a court. Anything less than a court review is not satisfactory. See, e.g., *Torres v Finland*, HRC Case No. 291/1988; *Vuolanne v Finland*, HRC Case No. 265/1987.

³⁷ INA § 235(b)(1)(B)(iii)(IV).

³⁸ See HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT (Mar. 2010) at 10 (noting that while Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points under regulations located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3). See also U.S. Comm’n on Int’l Religious Freedom, ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States (Dec. 23, 2009) (noting low rates of release on parole and citing that New Orleans released only 0.5 percent of asylum seekers, New Jersey less than four percent, and New York eight percent following a finding of credible fear), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126.

³⁹ U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, News Release: ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives (Dec. 16, 2009), available at <http://www.ice.gov/pi/nr/0912/091216washington.htm>.

⁴⁰ DR. DORA SHIRO, U.S. DEPT. OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009) at 2.

⁴¹ See NAT’L IMMIGR. L. CTR., ACLU OF S. CAL., AND HOLLAND & KNIGHT, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 4 (2009) [*hereinafter* A BROKEN SYSTEM].

⁴² See e.g., DETENTION WATCH NETWORK, ABOUT THE U.S. DETENTION AND DEPORTATION SYSTEM, available at www.detentionwatchnetwork.org/aboutdetention.

⁴³ SHIRO, *supra* note 40, at 2.

⁴⁴ ICCPR, *supra* note 1, art. 10(1) (guaranteeing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2)(a) (providing that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

⁴⁵ See Human Rights Advocates, Submission to the Human Rights Council, 11th Session, Agenda Item 3: Rights of Migrants.

⁴⁶ County jails holding immigrant detainees in Minnesota have “video visits” with family members, where detainees see and speak with their family members via closed circuit television.

⁴⁷ See A BROKEN SYSTEM, *supra* note 41, at 14-15.

⁴⁸ See, e.g., KATHERINE FENNELLY AND KATHLEEN MOCCIO, U. OF MINN. HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, ATTORNEYS’ PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA (Nov. 2009).

⁴⁹ County jails, designed for short periods of detention, do not necessarily have outdoor recreation facilities. The Ramsey County Law Enforcement Center in St. Paul, Minnesota, has an average daily immigrant detainee population over 100. The facility has no outdoor recreation access. See also A BROKEN SYSTEM, *supra* note 41, at 21.

⁵⁰ See Dana Priest & Amy Goldstein, *Caught Without Care*, THE WASH. POST, May 13, 2008 (reporting that suicide is the most common cause of death among detained immigrants with 15 of 83 deaths since 2003 the result of suicide and stating, “No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent -- about 4,500 -- are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention”). See also PHYSICIANS FOR HUMAN RIGHTS, BELLEVUE/NYU CENTER FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), available at <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>.

⁵¹ A client of The Advocates for Human Rights seeking asylum from Ethiopia and being treated for depression and Post-Traumatic Stress Disorder, was detained for over one year in the Ramsey County Adult Detention Center in St. Paul, Minnesota, following her asylum hearing in front of an immigration judge. While detained, she never saw the outdoors and was co-mingled with the general convicted population because the facility with which ICE contracts lacks the facilities.

⁵² U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Press Release: ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), available at <http://www.ice.gov/pi/nr/0908/090806washington.htm>; U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Fact Sheet: ICE DETENTION REFORM: PRINCIPLES AND NEXT STEPS: Sec. Napolitano Announces New Immigration Detention Reform Initiatives (Oct. 6, 2009), available at http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.

⁵³ The New York Times alone contained at least 25 reports of problems with conditions in detention, including deaths in detention, between 2005 and March 2010.

⁵⁴ Immigration and Customs Enforcement, List of Detainee Deaths Since October 2003, available at http://graphics8.nytimes.com/packages/pdf/nyregion/ICE_FOIA2.pdf.

⁵⁵ Nina Bernstein, *Hong Kong Emigrant's Death Attracts Scrutiny of U.S. Detention System*, N.Y. TIMES, Aug. 13, 2008 (reporting that “[i]n April, [Hiu Lui] Ng began complaining of excruciating back pain. By mid-July, he could no longer walk or stand. And last Wednesday, two days after his 34th birthday, he died in the custody of Immigration and Customs Enforcement in a Rhode Island hospital, his spine fractured and his body riddled with cancer that had gone undiagnosed and untreated for months.”).

⁵⁶ See A BROKEN SYSTEM, *supra* note 41, at 4-5.

⁵⁷ Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, available at <http://www.nytimes.com/2010/01/10/us/10detain.html>.

⁵⁸ See NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT REPORTS ON IMMIGRATION DETENTION 2007-2009 (Feb. 2010), available at <http://www.immigrationforum.org/images/uploads/DetentionReportsSummaries2007-2009.pdf>

⁵⁹ Refugee Convention, art. 34, *supra* note 11.

⁶⁰ See U.S. DEPT. OF STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: FRAUD IN THE REFUGEE FAMILY REUNIFICATION (PRIORITY 3) PROGRAM, Feb. 3, 2009, available at <http://www.state.gov/prm/rls/115891.htm>.

⁶¹ *Id.*