

Statement of Human Rights First

United States Senate Committee on the Judiciary “Renewing America’s Commitment to the Refugee Convention: The Refugee Protection Act of 2010”

May 19, 2010

Human Rights First applauds the Senate Judiciary Committee for holding a hearing on the Refugee Protection Act of 2010 and for shining a light on the serious problems in the U.S. refugee and asylum systems. In particular, we commend Chairman Leahy for his leadership in championing this important piece of legislation and urge the Senate to take further steps toward passing the Refugee Protection Act and restoring our nation’s commitment to protect vulnerable refugees

Since 1978, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. We accomplish this objective by ensuring that refugees have access to asylum, by advocating for fair asylum procedures, by pressing for U.S. compliance with international refugee and human rights law, and by helping individual refugees to win asylum through our *pro bono* asylum legal representation program. Human Rights First and our volunteer lawyers have helped victims of political, religious, and other persecution from Burma, China, Colombia, Congo (DRC), Iraq, Zimbabwe, and many other countries gain asylum and protection from persecution in this country. Our asylum advocacy is informed by the experiences of our refugee clients and their *pro bono* lawyers.

Introduction

The United States has a long history of providing refuge to victims of religious, political, ethnic, and other forms of persecution. This tradition reflects a core component of this country’s identity as a nation committed to freedom and respect for human dignity. Thirty years ago, when Congress passed the Refugee Act of 1980, with strong bi-partisan support, 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. To this day, the Refugee Act remains a symbol of this country’s unified commitment and humanitarian leadership in addressing the plight of persecuted and displaced people around the world.

In the intervening years, the United States has granted asylum and provided resettlement to thousands of refugees who have fled political, religious, ethnic, racial, and other persecution. These refugees have come from Burma, China, Colombia, Liberia, Iran, Iraq, Rwanda, Russia, Sierra Leone, Sudan, and other places where people have been persecuted for who they are or what they believe. Many were arrested, jailed, beaten, tortured, or otherwise persecuted due to their political or religious beliefs, or their race, ethnicity, or other fundamental aspect of their identity. Over the years, these refugees and their families have been able to rebuild their lives in safety in the United States.

Over the past fifteen years, however, the United States has faltered in its commitment to those who seek protection. A barrage of new statutory provisions, policies, and legal interpretations have undermined the institution of asylum in the United States and led the United States to deny asylum or other protection to victims of persecution. These obstacles include:

- A filing deadline and other barriers that have limited access to asylum for genuine refugees;
- The rapid escalation of immigration detention and the failure to provide crucial due process safeguards to prevent detention from being arbitrary or unnecessary;
- Expansive bars to admissibility and flawed legal interpretations that have mislabeled refugees as supporters of “terrorism”;
- Flawed interpretations of the “particular social group” and “nexus” requirements of the refugee definition; and
- Maritime interdiction procedures that lack effective safeguards to ensure that the United States is not returning refugees to persecution.

The Refugee Protection Act includes provisions to address these obstacles as well as other necessary fixes to the asylum and resettlement systems. The Refugee Protection Act would restore – and renew – not only our commitment to protect the persecuted but also our moral authority to lead the global community in addressing the plight of persecuted and displaced people around the world.

The Refugee Protection Act Eliminates the Asylum Filing Deadline

The asylum filing deadline bars a refugee from asylum if he or she cannot demonstrate by “clear and convincing evidence” that the asylum application was filed within one year of arrival in the United States, absent changed or extraordinary circumstances. In the 13 years since the deadline went into effect, more than 79,000 asylum applicants have had their cases rejected by U.S. asylum adjudicators under the deadline, as detailed by Human Rights First in a March 2010 briefing paper.¹ The Refugee Protection Act would eliminate the deadline so that bona fide refugees with well-founded fears of persecution are not denied asylum because of a technical requirement.

There are many reasons why a refugee might file a request for asylum protection more than a year after arriving in the United States. Many asylum seekers do not speak English, have suffered physical or emotional trauma, and struggle upon arrival simply to meet their basic needs. Some potential applicants might not understand asylum law procedures or even know they are eligible for asylum. Others may face delays in securing counsel given the lack of government-funded representation and the limited availability of *pro bono* representation.

Recognizing these realities, when Congress instituted the deadline in 1996, leaders emphasized that it should not disqualify bona fide refugees.² Sen. Orrin Hatch, one of the main proponents of the deadline,

1 HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30th ANNIVERSARY OF THE REFUGEE ACT (2010) [hereinafter Human Rights First 30th Anniversary Recommendations], available at <http://www.humanrightsfirst.org/asylum/refugee-act-symposium/30th-AnnRep-3-12-10.pdf>.

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

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.”³

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

In other cases, refugees who have well-founded fears of persecution but cannot meet the higher standard under U.S. law for withholding of removal are ordered deported back to their countries of persecution under the one-year bar. While the differing standards have a long history under U.S. law, this anomaly can lead the United States to deport back to persecution refugees with well-founded fears of persecution – including in cases implicating the asylum filing deadline. Moreover, the exceptions to the deadline - for changed or extraordinary circumstances – have not prevented legitimate refugees with well-founded fears of persecution from being denied asylum in the United States.

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

- A young woman from Eritrea who had been tortured for her Christian beliefs was denied asylum, even though she faced a probability of persecution meriting withholding of her removal, after an Immigration Court ruled that she had not shown that she had filed within a year of her arrival.
- A Burmese student who fled to the United States after being jailed for several years for his pro-democracy activities was denied asylum, even after he was found to face a clear probability of persecution meriting withholding of his removal.

A filing deadline that prevents asylum cases from being adjudicated on their merits is inconsistent with U.S. commitments under the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Refugee Protocol, to which the United States became a party in 1968. The UNHCR Executive Committee, of which the United States is a member, has confirmed that failure to comply with technical requirements such as filing deadline “should not lead to an asylum request being excluded from consideration.”

The Refugee Protection Act Provides Safeguards Against Unnecessary and Inappropriate Detention

In an April 2009 report,⁴ Human Rights First found that over 48,000 asylum seekers were held in detention between 2003 and April 2009 at a cost of over \$300 million. Asylum seekers arriving at a U.S. airport or border point in search of this country’s protection – are detained in jails or jail-like facilities with inadequate procedural safeguards. If an Immigration and Customs Enforcement (ICE) officer denies

3 142 CONG. REC. S11492 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

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

parole, the decision cannot be appealed to a judge – even an Immigration Judge. In fact, these asylum seekers are not given access to Immigration Court custody hearings, a basic due process safeguard that would help protect asylum seekers from being unnecessarily detained for months or years. The lack of prompt court review is not only inconsistent with U.S. traditions of fairness, but it is also inconsistent with U.S. commitments under the Refugee Protocol and prohibitions against arbitrary detention under the International Covenant on Civil and Political Rights (ICCPR), as detailed in Human Rights First’s report. The Refugee Protection Act would remove barriers that prevent this group of asylum seekers from receiving prompt review by the Immigration Courts of detention decisions so that they are not subject to prolonged and unnecessary detention.

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

- A Baptist Chin woman from Burma was detained in an El Paso, Texas, immigration jail for over two years.
- A Tibetan man, who was detained for more than a year and tortured by Chinese authorities after putting up posters in support of Tibetan independence, was detained again for 11 months in a New Jersey immigration detention facility.

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

The Refugee Protection Act Protects Refugees from Inappropriate Exclusion

U.S. immigration laws have for many years barred from the United States people who pose a danger to our communities, threaten our national security, or who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law, even if they have a well-founded fear of persecution and otherwise qualify as refugees under U.S. immigration 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.

Over the past eight years, however, the provisions of the immigration law relating to “terrorism” – as that term is defined in the Immigration & Nationality Act (INA) – have undergone rapid legislative expansion. While these provisions were intended to target people who threaten U.S. national security and those who have engaged in or supported acts of wrongful violence, the statutory language for several of these provisions has been written so broadly, and the Departments of Homeland Security and Justice have interpreted and applied them so expansively, that in recent years thousands of refugees – who do not pose a danger to the United States and have not committed any acts that should bar them from protection under the Refugee Convention – have had their applications for asylum, permanent residence, and family reunification denied or delayed.

As detailed by Human Rights First in two reports – one issued in 2006 and the second issued just six months ago⁵ – thousands of refugees who were victimized by armed groups, including by groups the United States has officially designated as “terrorist organizations,” have been treated as “supporters of terrorism.” In addition, any refugee who ever fought against the military forces of an established government is being deemed a “terrorist” even if that government was a repressive regime that was brutally persecuting its people.

These provisions are being applied to many refugees who were associated with groups that the U.S. government does not consider to be “terrorist organizations” in any other context. As a result, refugees who pose no threat to the United States, and are not guilty of any conduct for which the United States would legitimately want to exclude them, are being denied the protection they need or are unable to obtain permanent residence or reunite with their spouses or children. Any non-citizens who *do* pose a threat to the United States or who *are* guilty of actual terrorist acts or other crimes are *already covered* by other provisions of the immigration law, so that the “Tier III” definition (essentially any group of two or more people who use a gun or other weapon for purposes other than financial gain) is being used overwhelmingly against people who were not its intended targets. In fact, many of the refugees affected by the “Tier III” definition’s over-breadth were involved only in peaceful political activity in connection with groups that are now deemed to be “terrorist organizations” for immigration-law purposes. Examples of organizations that have been labeled “Tier III” organizations include: groups that fought the ruling military junta in Burma and were not included in the 2007 legislation that removed the Chin National Front and other Burmese insurgent groups from the scope of the Tier III definition; the Democratic Unionist Party and the Ummah Party, two of the largest democratic opposition parties in Sudan, many of whose members were forced to flee the country in the years after the 1989 military coup that brought current President Omar Al-Bashir to power; and virtually all Ethiopian and Eritrean political parties and movements, past and present.

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

The Secretaries of State and Homeland Security have discretionary authority to decline to apply these “terrorism”-related provisions in individual cases, and for nearly five years, this has been the Administration’s primary approach to addressing these problems. Unfortunately, as detailed in Human Rights First’s reports and an April 2010 letter to DHS Secretary Janet Napolitano and Attorney General Eric Holder from Human Rights First and 23 other refugee advocacy organizations, this approach is not working. The Refugee Protection Act clarifies the definition of terrorist activity, creates an exception for material support provided as a result of coercion, and eliminates the immigration law’s “Tier III” category of terrorist organizations.

5 HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED, (2006), available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>; HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES (Nov. 2009), available at <http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>. See also Human Rights First 30th Anniversary Recommendations at note 1.

The Refugee Protection Act Clarifies “Social Group” Basis for Asylum

The Refugee Protection Act would also clarify the “particular social group” basis and “nexus” requirements for asylum so that the asylum requests of vulnerable individuals, including women fleeing honor killings, domestic violence, and other gender-based persecution, are adjudicated fairly and consistently. As a result of a ten-year delay in resolving these issues, asylum applicants have been denied protection and returned to the hands of their persecutors, or have remained in legal limbo, postponing their ability to reunite with their children and bring them out of harm’s way.

Under decisions issued by the BIA in 2007 and 2008, asylum applicants who base their claim on their membership in a particular social group, in addition to providing evidence that the members of the group share a common immutable characteristic, have also been required to show that the group is both “discrete” and visible to society at large such that they can be distinguished from others in the eyes of the persecutor.⁶ Reversion to the BIA’s long-established and well-regarded *Acosta* standard would eliminate the need for a particular social group be “socially visible” – a requirement that is posing severe obstacles to a broad range of meritorious asylum claims, and has been criticized by federal court judges such as Judge Posner of the Seventh Circuit Court of Appeals, who recently observed that “if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible.”⁷

The Refugee Protection Act Ensures Protection in Maritime Interdiction

The United States currently does not have effective, fair, transparent, and non-discriminatory interdiction standards to guide its actions and ensure compliance with its commitments under the Refugee Protocol and other human rights conventions. The Refugee Protection Act would require DHS to develop uniform policies to identify asylum seekers interdicted at sea and ensure protection in the course of interdiction and rescue operations.

U.S. interdiction policies are flawed for all who attempt to come to the United States by sea – Haitians, Cubans, Chinese, and others. But they are particularly flawed for Haitians. Haitians are not informed, either in writing or verbally, that they can express any fear or concern about repatriation. By contrast, Cubans are at least told that they can raise any concerns with a U.S. officer. The United States also does not require that Creole-speaking officers or translators are present during interactions with Haitians. As a result, if a Haitian migrant should want to advise a Coast Guard officer about a fear of return, the migrant may not be able to communicate verbally with the officer. This non-process is known as the “shout test” – because the only way for a Haitian migrant to communicate a fear of return (which might lead a U.S. officer to refer the migrant for a screening interview with an Asylum Officer) is to shout or wave his or her hands or somehow make a fear of return known by physical action. Without effective communication, there can be no assurance that a refugee would be able to communicate his or her fears of return to U.S. officials conducting interdiction or rescue operations.

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

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