



Submission by the United Nations High Commissioner for Refugees
for the Office of the High Commissioner for Human Rights Compilation Report
Universal Periodic Review:

UNITED STATES OF AMERICA

I. Background and Current Conditions

The protection of fundamental human rights was a cornerstone in the establishment of the United States, which is a key leader around the globe in the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States signed and ratified the Universal Declaration of Human Rights and three human rights treaties: the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the two optional protocols to the Convention on the Rights of the Child. It has also signed, but not ratified, three other human rights treaties: the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.

The United States is a signatory to the 1967 Protocol relating to the Status of Refugees and has a comprehensive set of laws and policies to implement its obligations. Traditionally, it is a strong supporter of the right to seek and enjoy asylum, providing refugee protection and assistance, both in the domestic and overseas context. Currently, the United States is the largest asylum country among “industrialized” nations. Approximately 50,000 individuals sought asylum in the United States in 2009 and asylum grant rates continued to be relatively high (approximately 36% for affirmative claims and 47% for defensive claims). However, there are concerns about several aspects of US asylum policies and procedures and the application of the refugee definition. Some of the primary issues are discussed below. Furthermore, the United States is the largest resettlement country in the world. More than 61,800 refugees were resettled, representing virtually every region of the world. Resettlement to the United States accounts for over two-thirds of UNHCR’s resettlement globally.

In addition, the United States provides a number of forms of complementary humanitarian protection: temporary protected status for individuals in the United States from designated countries because of natural disasters, generalized violence or other humanitarian reasons and visas for victims of trafficking and serious crimes; visas for non-citizen children who have suffered abuse; and abandonment or neglect.

The United States is also a strong supporter globally of the right to nationality. However, it is not a party to either the 1954 Convention Relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness, there are also concerns about United States policies toward stateless persons in the United States.

II. Achievements, Best Practices, and Challenges

Right to Seek Asylum

United States detention policies have seriously impacted persons' right to seek asylum. The United States detains over 380,000 non-citizens in the United States for removal proceedings, using over 300 different facilities, the majority of which are local criminal jails in remote locations, several hours from any urban area. Asylum-seekers have not been held in separate facilities from other immigrants and statistics do not fully reflect the length of time they spend in custody. It is estimated that over 8,000 of those individuals detained seek asylum or refugee protection. Detained asylum-seekers often lack access to legal representation and face an adversarial court process where the government is represented by trial counsel. Studies have shown that lack of legal counsel significantly lower asylum grant rates.

In 2009, the United States committed to a comprehensive reform of its immigration detention system, which includes a focus on the conditions in which asylum-seekers are placed. As part of the reform effort, the United States plans to create a risk assessment tool to guide officers' individualized detention decisions, develop a nationwide plan related to alternatives to detention (ATD) and improve facility conditions for all detainees, including detained asylum-seekers. Also in 2009, the United States initiated a new ATD program. In contrast to the old program, the new program does not require ankle bracelets unless a person has been ordered removed (placed under deportation orders). The United States has also committed to looking at implementing community-based ATD programs, which would be even better suited to the needs of asylum-seekers.

In January 2010, the United States issued new parole guidelines regarding the release of arriving asylum-seekers from detention that included a number of very positive elements: a presumption of release; automatic consideration for release for all eligible asylum-seekers; that decisions be made promptly upon apprehension; and that decisions be made in writing.

Recommendation: UNHCR commends the United States for its commitment to comprehensive detention reform, its improvements to its ATD programs and its revision to its parole policy. UNHCR urges the United States to resort to the detention of asylum-seekers only under exceptional circumstances and promote community-based ATDs for those asylum-seekers who must be detained.

Access to Territory and Protection (Expedited Removal Procedures)

The United States has in place expedited removal procedures for certain individuals arriving along its borders who do not have proper documents to enter the United States. The procedures include a number of safeguards to ensure that asylum-seekers are not removed without an opportunity to seek asylum. The United States adopted a number of recommendations included in the UNHCR's 2003 study of the expedited removal procedures. A further and more comprehensive study in 2005 by a governmental commission (the US Commission on International and Religious Freedom (USCIRF)) found significant gaps in implementation of the safeguards at some ports of entry. Many of the commission's recommendations to address the issue have not been fully implemented.

Recommendation: UNHCR urges the United States to re-examine the USCIRF recommendations and adopt further quality assurance mechanisms for those procedures affecting asylum-seekers who are apprehended at the border. UNHCR also recommends that the US fund another comprehensive border monitoring study and publish its findings.

Treatment of Unaccompanied and Separated Children

Over the last six years, the United States has improved its care and custody of unaccompanied and separated children placed in United States Immigration Court removal proceedings. In March 2003, the Government transferred the authority for the custody and care of these children, some of whom include asylum-seekers, from the enforcement divisions of the former Immigration and Naturalization Service (INS) to the Office of Refugee Resettlement (ORR), a services agency with significant experience working with separated children, including the United States' "Unaccompanied Refugee Minors" program for resettled refugees. ORR prioritizes release of children to parents, guardians or other family or community sponsors. While some children with criminal histories or behavioral issues are held in secure juvenile facilities, the majority of children are held in state-licensed child care facilities specifically contracted by ORR.

In December 2008, the United States further improved its treatment of unaccompanied and separated children with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA.) Its provisions set standards for how unaccompanied and separated children will be treated in custody, improve mental health and other services and address the conditions under which children who are not eligible to stay in the United States can be repatriated. The bill mandates that unaccompanied children's asylum claims be first decided by the Asylum Division in a non-adversarial interview, as opposed to by an Immigration Judge, and enhances support for children's access to pro bono legal representation and guardians. The provisions also mandate identification of children arriving along the borders, who have been or are at risk of being trafficked as well as those who are eligible for asylum and other forms of immigration relief. This requirement is designed to help ensure that such children receive protection and critical services. United States border officials have assumed this responsibility.

Unfortunately, unaccompanied and separated children applying for asylum or placed in immigration court removal proceedings are not provided legal representation by the United States government. In addition, children are not provided with best interest determinations before

being removed from the United States. In UNHCR's view, these deficiencies impact on children's ability to receive asylum or other humanitarian forms of protection generously offered by the United States or to be protected from removal to situations that are not in their best interest.

Recommendations: UNHCR commends the United States for its progress on the treatment of unaccompanied and separated children. It urges the United States to provide legal representation to all such children who are seeking asylum or in immigration court removal proceedings. Given that the screening of children along the borders is a new and significant responsibility for border officials, UNHCR urges the United States to work with child welfare experts in the development of its screening tool it uses to identify unaccompanied and separated children in need of protection and to include such experts in its training of border officials. UNHCR also encourages the United States to provide funding for comprehensive independent monitoring by child protection experts of the implementation of the screening procedures to ensure their effectiveness. UNHCR also urges the United States to adopt best interest determinations before removing a child from its territory and to improve its repatriation procedures to ensure that the return of children takes place in conditions of safety and dignity.

Asylum Adjudication Procedures

The United States asylum adjudication system includes two systems for applying for asylum at the first instance: commonly referred to as "affirmative" and "defensive" procedures. Which system an applicant is able to access depends on a number of factors. Those apprehended who have not yet applied and are not in lawful status generally must apply defensively.

The affirmative process allows applicants to have an interview with an asylum officer within the Government's Asylum Division. It is non-adversarial in nature, and the adjudicators undergo six weeks of extensive model asylum training. The United States often invites immigration officers from other countries to participate in the training, and the Asylum Division has worked with UNHCR to help other countries develop their asylum systems.

In the defensive process, individuals present their claims in an adversarial court setting to an Immigration Judge, and the government is represented by counsel. The United States does not provide full legal representation to asylum seekers; although, it does provide some detained asylum-seekers legal orientations and plans to pilot in 2010 government-funded legal representation for some particularly vulnerable groups. The defensive asylum process provides for several levels of appeal to a higher court. Immigration Judges adjudicate all types of immigration cases not just asylum claims.

Studies by academics, non-governmental organizations and U.S. government oversight agencies as well as reviews by federal circuit courts raise concerns about gaps in the quality of decision-making by the Immigration Courts and the administrative review body, the Board of Immigration Appeals (BIA). Experts point out that the courts and the BIA are overburdened and under resourced. They also indicate that Immigration Judges lack sufficient legal training and are not subject to adequate internal review. Reports reflect that some judges virtually never grant asylum while others grant it a very high percentage of the time.

The BIA has adopted a “streamlining” decision making process which shifted review of appeals from having each case decided by a three member panel to only one member. The one member is able to issue an affirmance of the Immigration Judge’s decision without providing a written opinion and legal analysis of the case. While the BIA adopted this policy to better manage its heavy caseload, there are concerns that the lack of written decisions in these cases impedes meaningful review of asylum claims.

The United States has made some structural changes to the courts and the BIA is considering further reforms. It has also agreed to increase the number of Immigration Judges, although, the proposed increase will not meet projected needs. The Senate has introduced legislation that would shift jurisdiction over initial asylum claims of arriving asylum-seekers from the Immigration Courts to the Asylum Division.

United States immigration law requires individuals to apply for asylum within one year of arrival into the United States subject to certain exceptions. An individual who does not meet that deadline may apply for “withholding of removal” but this has a higher standard of proof and does not have many of the benefits associated with asylum protection, such as a path to legal permanent residence. Thus, some individuals prevented from applying for asylum by the one-year deadline could be removed despite a valid asylum claim. Legislation to repeal the one-year deadline has been introduced in the US Senate.

Recommendations: UNHCR urges the United States to undertake a comprehensive review of its asylum adjudication system. As part of that review, UNHCR urges the US to explore working with UNHCR on a quality assurance initiative whereby UNHCR would provide hands-on review and assistance to individual adjudicators. UNHCR further urges the United States to adopt non-adversarial procedures for all first instance adjudications of asylum claims and to cease the practice of single Board member affirmances, particularly in asylum cases.

Application of the Refugee Definition

The refugee definition in the 1951 Convention relating to the Status of Refugees and the principle of *non-refoulement* have been incorporated into US domestic law. However, over the last several years US adjudicators have adopted increasingly narrow interpretations of the definition, such as decisions that severely limit the applicability of the particular social group ground impacting a number of asylum claims, including gender-based claims. For instance, recent jurisprudence includes overly restrictive new requirements for establishing a particular social group such as “social visibility” and “particularity.” There was positive progress in 2009, when the government reaffirmed its position that in some cases women fleeing domestic violence may constitute a particular social group and be eligible for asylum. The United States also committed to promulgating regulations clarifying for adjudicators how to interpret the particular social group category.

In addition, US immigration and asylum laws have been amended in a variety of ways that are inconsistent with international standards. For example, it includes a number of automatic overly broad criminal and “terrorism”-related bars to refugee protection and duress is not considered a legal defense. While the United States has broad authority to exempt individuals from the terrorism-related bars, at the start of 2010 there continue to be thousands of cases of refugee

applications for permanent residence and family reunification on hold due to the lack of a process to utilize the exemption authority. The United States has indicated its commitment to finalizing an exemption procedure to address these cases in early 2010. The current procedure for asylum-seekers in immigration court removal proceedings is to only consider exemptions after all administrative appeals and all other issues in a case have been decided, which can cause significant delay and inefficiency in UNHCR's view.

The United States has committed to issuing new asylum regulations in 2010 that would reform a number of aspects of the asylum system.

Recommendations: UNHCR is pleased that the United States plans to adopt asylum regulations and urges that the regulations clarify that neither "social visibility" nor "particularity" are required to establish a particular social group under the refugee definition. UNHCR also urges the US to amend its overly-broad "terrorism activity" definition, and in the interim, adopt exemption procedures that are effective and efficient for all cases.

Right to Nationality

The United States has generous citizenship laws and does not produce situations where individuals' right to nationality is compromised. United States citizenship can be obtained either by birth, derived through parents or acquired through naturalization. All children born within the United States and certain US territories are automatically US citizens. In certain circumstances, children born outside the United States where one or both parents are US citizens are considered citizens as well. Citizenship can also be acquired through the US naturalization process, generally after five years in lawful permanent resident status or three years if married to a US citizen.

However, there are stateless persons in the United States without any legal status and who face numerous challenges. Stateless persons are not granted any special status under United States law. Those who go through removal proceedings and do not qualify for protection on another basis, often suffer detention while the United States attempts to remove them even though they have no nationality anywhere. Under US law, such individuals should be released from detention within six months of their removal order and are eligible to apply for work authorization. However, a number of their basic human rights cannot be exercised. They have no legal status in the United States, will not be readmitted to the United States if they travel outside its borders and cannot sponsor family members who are abroad for reunification. Other stateless persons remain in hiding and do not enter the immigration system, often because they lack legal status. These individuals often have no documentation and are therefore unable to exercise their basic human rights as they often cannot work, travel or have access to basic services such as health care.

The United States has indicated a willingness to examine the issues facing stateless persons in the United States and the US Congress has included a provision in recent legislation that includes an avenue for some stateless individuals to apply for permanent lawful resident status.

Recommendations: UNHCR appreciates the leadership role that the United States has taken globally on the issue of statelessness and for its support of UNHCR's work on this issue around the world. UNHCR also commends the United States for the positive steps that it has taken on

this issue domestically. UNHCR urges the United States to provide a pathway to permanent legal status for stateless persons within the country. In the interim and for those who may not qualify for legal status, it is also recommended that the United States adopt suggested administrative reforms to ease restrictions placed on stateless persons within the United States.

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Division of International Protection
UNHCR
April 2010**