

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 United States is a State Party to the *1967 Protocol relating to the Status of Refugees (1967 Protocol)*, thereby binding itself to the *1951 Convention relating to the Status of Refugees (1951 Convention)* as well, and has a comprehensive set of laws and policies to implement its obligations.¹ Congress explicitly intended that the foundation of the 1980 Refugee Act was to bring the United States into conformity with its international obligations.² Traditionally, it is a strong supporter of the right to seek and enjoy asylum. Currently, the United States is the global leader in welcoming resettled refugees and the second largest asylum country among “industrialized” nations behind Germany. A recent report from the Transactional Records Clearinghouse³ found that the asylum grant rate has dropped 10 percent over the past decade reaching just over 50 percent in U.S. Fiscal Year (FY) 2014, which runs from 1 October 2013 – 30 September 2014.

Over the past several years there has been a significant influx of new arrivals and, until most recently, the vast majority had been unaccompanied children (UAC), seeking international protection from El Salvador, Guatemala, Honduras, and, to a lesser extent, Mexico. The U.S. has seen a similar increase in the number of families with young children, as well. The latest available statistics indicate that approximately 68,541 UAC and 68,445 family units presented themselves to border officials when reaching the United States in FY 2014 alone.⁴ In response, the United States has implemented changes to its previous policies and practices, particularly as relates to the treatment of asylum-seeker families.

¹ Refugee Act of 1980, 94 Stat. 102, now codified at 8 U.S.C. § 1101(a) (42) (A) (2006) (refugee definition) and 8 U.S.C. § 1158(a) (1) (1982) (asylum provisions).

² See, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (“If one thing is clear from the legislative history of the new definition of “refugee,” and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.”) (Citing Conference Committee Report, S. Rep. No. 96-590, p. 20 (1980); H. R. Rep., at 9.).

³ Transactional Records Access Clearinghouse Immigration (TRAC) at Syracuse University, Rise Seen in Asylum Denial Rates (August 4, 2104) available at <http://trac.syr.edu/immigration/reports/361/>.

⁴ U.S. Customs and Border Protection (CBP), Apprehensions of Unaccompanied Alien Children, available at <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children>

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

The United States 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*; yet the United States continues to be a strong supporter globally of the right to a nationality. At the same time, UNHCR remains concerned about United States law and policies toward stateless persons in the United States and the hardships this population faces.⁵

II. ACHIEVEMENTS AND BEST PRACTICES

Impact of Detention on the Right to Seek Asylum

The United States has made several positive reforms over the past several years.⁶ Since 2009, ICE has increased oversight over its detention facilities. In 2011, the United States issued Performance-Based National Detention Standards (PBNDS) to further raise standards for the conditions of detention as administered by ICE. In July 2012, Immigration and Customs Enforcement (ICE) developed and implemented a Risk Classification Assessment (RCA) tool to guide officers in making individualized custody decisions at the point of intake.⁷ Also in 2012, the United States issued guidance limiting the use of long distance transfers from one facility to another, which can jeopardize an asylum-seeker's access to counsel.⁸ In 2014, the United States issued two directives, one seeking to reduce the incidence of sexual assault in detention,⁹ another to increase oversight on the use of segregation of asylum-seekers and others.¹⁰ ICE has also developed strong stakeholder relationships with civil society.

In recent years, the United States collaborated with several non-governmental organizations to pilot community-based alternative to detention (ATD) release programs that offer case management services including the provision of basic information and referrals to appropriate agencies or NGOs concerning their rights and obligations in removal proceedings and their needs for legal assistance, health care and other services. Two NGOs have entered into formal agreements with ICE to pilot these models in select areas of the country. With the agreement of the NGOs and ICE, UNHCR will conduct an independent evaluation of the pilots in late 2014 and early 2015.

UNHCR acknowledges with appreciation these and other positive steps the United States has taken concerning detention of and alternatives to detention for asylum-seekers.

⁵ Citizens of Nowhere. Solutions for the statelessness in the U.S., UNHCR and Open Society Institute, 2012 at 30.

⁶ For a chronological listing of the positive reforms as identified by Immigration and Customs Enforcement (ICE), see, <http://www.ice.gov/detention-reform/detention-reform.htm>.

⁷ Id., Number 06-2012.

⁸ <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>

⁹ <http://www.ice.gov/doclib/detention-reform/pdf/saapi2.pdf>

¹⁰ http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf

Access to Territory and 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. These procedures include safeguards designed to ensure that asylum-seekers are not removed without an opportunity to seek asylum. In 2003, with the cooperation of the United States, UNHCR monitored this process and produced a study on the impact of expedited removal on asylum-seekers. A more comprehensive study on the same was undertaken in 2005 by the U.S. Commission on International and Religious Freedom (USCIRF), a U.S. governmental commission.¹¹ The United States has adopted a few of the recommendations made in both UNHCR and USCIRF studies. Because the use of expedited removal was expanded after these reviews, the United States is currently facilitating access for UNHCR to monitor the current use of the expedited removal procedures at a number of locations around the country.

UNHCR appreciates the ongoing cooperation and facilitation of its monitoring by the United States.

International Protection of Children

From 2010 until summer 2014, the majority of asylum-seeker families apprehended by immigration authorities were not subject to detention. During this time, Immigration and Customs Enforcement (ICE) operated only one facility for detention of families and its capacity was less than 100 beds. Unaccompanied children, on the other hand, were, and continue to be, transferred to the custody of the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services. ORR does not have any immigration enforcement authority.¹² As soon as possible, ORR places children in its custody in a range of state-licensed child care facilities from secure detention to shelters to foster care. In compliance with the best interests of the child principle, ORR seeks to place children in the least restrictive setting appropriate and to release children whenever possible to a parent, other family member or a community sponsor, for the duration of the child's immigration proceedings.

Among other provisions concerning UAC, the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) mandates that the asylum claims of unaccompanied children are to be heard in the first instance by the Asylum Division (AD), within the United States Citizenship and Immigration Services (USCIS), an agency with no immigration enforcement obligations, in a non-adversarial interview.¹³ The new provisions also mandate identification of unaccompanied children arriving from contiguous countries—Mexico and Canada—who may have been or may be at risk of being trafficked; may have a credible fear of persecution; and are unable to make an independent decision to withdraw a request to seek admission into the United States.¹⁴

¹¹ See <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

¹² While in ORR custody, unaccompanied children receive shelter, food, clothes, education, health care, counseling, legal “Know Your Rights” presentations, and individual legal screenings.

¹³ 2008 TVPRA, 110 P.L. 457, 122 Stat. 5044 (2008) § 235(d) (7) (B).

¹⁴ TVPRA § 235(a) (2). These screening procedures are designed to help ensure that such children receive protection, access to the full asylum adjudication process and other remedies, and critical services and were put into place specifically to address the concerns that children from Mexico were routinely returned there upon their arrival to the United States border without any screening for protection needs.

Most recently, ORR announced a \$4,261,268 budget increase to support the provision of legal services to unaccompanied children after their release from the custody of ORR and has allocated those funds to two NGOs for implementation. In addition, in June 2014 the Executive Office for Immigration Review announced a new partnership called “Justice Americorps”, a program funded by an initial \$2 million grant from the Department of Justice that will enroll approximately 100 lawyers and paralegals to provide legal services to the most vulnerable of unaccompanied children. This allocation and new grant program reflect an important advancement by the United States in fulfilling its 2011 Commemorative Pledge (2011 Pledge or Pledges) to “promote the availability of pro bono legal counsel for persons of concern to UNHCR—in particular unaccompanied children and those with diminished mental capacity.”¹⁵

UNHCR welcomes the steps the United States has taken in advancing the protection of children.

Application of the Refugee Definition

On 26 August 2014, the Board of Immigration Appeals (BIA) issued a precedent-setting decision ruling that “married women in Guatemala who are unable to leave their relationship” constituted a particular social group; the domestic violence perpetrated by her husband constituted past persecution; and the nexus between his motive for harming her and her membership in the social group were established.¹⁶ UNHCR welcomes this decision, which marks important progress on these issues.

III. KEY PROTECTION ISSUES AND RECOMMENDATIONS

Issue 1: Detention of Persons in Need of International Protection

While important steps have been taken improving conditions of immigration detention and release, UNHCR remains concerned that certain U.S. detention policies and practices detrimentally impact the right to seek asylum. The United States uses around 250 different facilities to detain over 400,000 non-citizens for removal proceedings each year, the majority of which are jails and jail-like facilities, several hours from any urban area. In 2010, the last year for which information is available, 15,769 of these were asylum-seekers.¹⁷ Asylum-seekers have not been held in separate facilities, and in 2010, the average length of detention for asylum-seekers ranged from 65-95 days.¹⁸ Detained asylum-seekers often lack access to legal representation, and face an adversarial court process where the government is represented by trial counsel,¹⁹ thereby increasing their vulnerability and making it even more difficult to effectively

¹⁵ The complete list of Commemorative Pledges made by the United States, along with its assessment of its progress in fulfilling them is available at: <http://www.state.gov/j/prm/releases/factsheets/2013/211074.htm>.

¹⁶ Matter of A-R-C-G-, et al. 26 I.& N. Dec. 388 (BIA 2014). In a supplemental brief to the Board, the U.S. government had conceded to these same findings. The Board remanded the case to the Immigration Judge for further consideration.

¹⁷ DHS Fiscal Year 2009 and 2010 Report to Congress on Detained Asylum Seekers (2012), available at: <http://www.ice.gov/doclib/foia/reports/detained-asylum-seekers2009-2010.pdf>

¹⁸ DHS Fiscal Year 2009 and 2010 Report to Congress on Detained Asylum Seekers (2012), available at: <http://www.ice.gov/doclib/foia/reports/detained-asylum-seekers2009-2010.pdf>

¹⁹ Studies have shown that lack of legal counsel significantly lower asylum grant rates.

present their claims. Detention can also lead to depression, and often exacerbates existing harms for survivors of trauma and torture.²⁰

The United States' recent position that detention is necessary to deter asylum-seeker families from El Salvador, Guatemala and Honduras from journeying to the United States is particularly concerning,²¹ as is the significant increase in family detention. The detention of young children and their mothers fails to take into account their particular vulnerabilities, limits access to asylum procedures and legal representation, and is often emotionally detrimental. Moreover, during the summer of 2014, the United States rapidly expanded the detention of accompanied children who are awaiting their opportunity to be screened for their access to the full asylum procedures. The United States now has in place over 1,000 new family detention beds to house children accompanied by a parent, and another family facility of 2,400 beds is expected by the end of 2014. These families are subject to the adult procedures of expedited removal, including mandatory detention during the credible fear screening process.

However, after asylum-seekers have passed their credible fear screening interview, which determines eligibility to seek asylum, ICE has discretionary authority to release them. Unfortunately, in response to the increase in family arrivals, ICE has curtailed its use of this discretion for families. Arguing that they pose a national security risk, ICE has often opposed petitions for release brought by these asylum-seeker families even after a positive credible fear finding.²² Some immigration courts have nonetheless granted families' bond requests, though these amount have frequently been as high as \$30,000 - \$40,000 per family. UNHCR is closely monitoring the impact of this increase in detention on access to asylum for these families.²³

In addition to increasing the risk of arbitrary detention in violation of international standards,²⁴ UNHCR is concerned that prolonged detention significantly impacts asylum-seekers' ability to successfully pursue their claims for international protection, because of the remote location of many detention facilities, the use of tele-video conferencing to conduct asylum-related immigration court proceedings, limited access to legal representation and the lack of adequate funding to support such representation. Referring to immigrants and asylum-seekers, the Human Rights Committee has urged the United States to "*review its policies of mandatory detention and*

²⁰ See <http://physiciansforhumanrights.org/library/reports/from-persecution-to-prison.html>

²¹ DHS Submission of Documentary Evidence; Declaration of Philip T. Miller, Assistant Director of ERO and ICE Field Operations on July 14, 2015.

²² This "national security" ground for refusing release from detention is directly related to the "detention as deterrent" policy equating the security risk with the view that release of these mothers and their children would serve as a 'magnet' for other Central Americans and does not take into account their genuine fears of harm in their countries of origin.

²³ In response to the arrival of an increased number of family units from Central America, and the assessment that detention would have a deterrent effect, the United States has recently opened two new large family detention facilities in Artesia, New Mexico and Karnes City, Texas, and recently announced plans to open another 2,400-bed facility in Dilley, Texas.

²⁴ The prohibition of arbitrary detention in Article 9 of ICCPR states that detention may be justified only after the government has articulated that detention is 1) necessary as a last resort, when it is prescribed by law, and 2) proportional to need to deprive any individual of their liberty.

deportation of certain categories of immigrants in order to allow for individualized decisions, to take measures ensuring that affected persons have access to legal representation.”²⁵

Again, UNHCR views the implementation of the 2011 Performance-Based National Detention Standards (PBNDS 2011) at many ICE detention facilities that house asylum-seekers as a positive development;²⁶ however, many other facilities are still only compliant with earlier, less-protective detention standards. Moreover, these standards are not monitored by an independent body, and they are not legally enforceable.

In addition to ICE facilities, UNHCR also remains concerned about the conditions in short-term detention facilities at the United States borders, administered by Customs and Border Protection. These CBP “holding stations” are not designed for long-term detention and concerns arise regarding the conditions of confinement, including lack of access to medical care, access to adequate food and water, very cold temperatures, and access to counsel and consulates, among others.²⁷ UNHCR is concerned that conditions under which the detention of asylum-seekers is carried out in these facilities do not comply with international human and refugee rights standards set forth in UNHCR’s Detention Guidelines.²⁸

Recommendations

UNHCR urges the United States to:

- Utilize detention as a means of last resort for asylum-seekers and, where necessary, for as short a period as possible and under the least restrictive conditions as possible;
- End the arbitrary detention of asylum seekers, especially children, and enhance and expand case management alternatives to detention in community settings;
- Expand the use of the Risk Classification Assessment tool to objectively inform all detention decisions at periodic points beyond the initial encounter, especially when there is a fundamental change in circumstance.
- Ensure that conditions of detention are humane and dignified; and

²⁵ Human Rights Committee, Concluding observations (2014) CCPR/C/USA/CO/4, 110th Session, 23 April 2014, paragraph 15, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nnMFNOUOQBx7X%2b155yhIwlkDk6CF0OAadiqu2L8SNxDB4%2bVRPkf5gZFbTQO3y9dLrUeUaTbS0RrN07VHzbyxGDJ%2f>.

²⁶ See, ICE Performance-Based National Detention Standards 2011, available at: <https://www.ice.gov/detention-standards/2011/>

²⁷ See, e.g., Federal Court Complaint challenging treatment of children in custody at the border, available at: <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>.

²⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>.

- Provide greater access to representation of asylum-seekers, in particular those most vulnerable among them: children, women who have suffered gender-based violence, LGBTI individuals, and individuals who have faced or are currently suffering from trauma; and support the ability of NGOs and others to provide pro bono counsel through funding and other mechanisms.

Issue 2: Asylum Adjudication Procedures

Studies by academics, non-governmental organizations and U.S. government oversight agencies as well as reviews by federal circuit courts present certain concerns about the quality of decision-making by the Asylum Division²⁹, Immigration Courts and the BIA.³⁰ These studies reflect, for example, a high variance of grant rates across adjudicators.³¹ Experts point out that the Immigration Courts and the BIA are overburdened and under resourced - recent reports list the immigration court case backlog at 400,000 cases.³² Experts also call for more specialized legal training to adjudicate protection claims and increased internal review.

Owing in large measure to this backlog in adjudication of claims, the average waiting period for non-detained individuals from the time an asylum claim is filed until the merits of the claim are heard by an immigration judge has increased dramatically in recent years. In FY 2005, the average waiting period was 381 days while in FY 2013 it reached 562 days, and as of July 2014, had reached 567 days.³³ These lengthy delays result in an inability of asylum-seekers to effectively present their protection claims; make follow-up court appearance more difficult to keep track of and attend; inability of many asylum-seekers to have authorization to work; and maintain a state of “limbo” causing additional stress and confusion.

United States law foresees a filing deadline for asylum applications. Applications must be submitted within a year since the individual entered U.S. territory. One 2011 Pledge made by the United States was to “[w]ork with Congress to eliminate the one-year filing deadline for submission of asylum applications.”³⁴ Legislation that would repeal the one-year filing deadline has been introduced; but has yet to be enacted into law. As a result, there are still a number of individuals prevented from applying for asylum and subject to removal despite having a valid claim.³⁵

²⁹ See, e.g. Andrew I. Schoenholtz, Philip G. Schrag & Jaya Ramji-Nogales, Lives in the Balance: Asylum Adjudication by the Department of Homeland Security (2014).

³⁰ See, e.g., Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (Refugee Roulette) (2009).

³¹ See id.

³² TRAC, Backlog of Pending Cases in Immigration Courts as of July 2014 available at: http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php

³³ TRAC, Average Time Pending Cases Have Been Waiting in Immigration Courts as of July 2014, available at: http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

³⁴ See note 15, supra.

³⁵ There are limited exceptions to the filing deadline: changes in circumstances that materially affect asylum eligibility or extraordinary circumstances such as serious illness, mental or physical disabilities, including “any effects of persecution or violent harm.” 8 C.F.R. §208.4(a) 4-5. Those barred from asylum eligibility based on the one-year filing deadline or other grounds may apply for “withholding of removal”, which provides that an individual may not be returned to their country of origin until the situation there has changed, this form of protection has a higher burden of proof and does not confer many of the key benefits associated with asylum such as family reunification and the ability to obtain lawful permanent residence status. 8 U.S.C. §1231(b)(3); or for protection

Recommendations

UNHCR urges the United States to:

- Repeal the one-year asylum filing deadline, especially for all children with claims; and
- Ensure the adjudication of refugees claims within reasonable timeframes and reduce the current backlogs by reinforcing the capacities of the Department of Justice Executive Office for Immigration Review.

Issue 3: Access of Children to International Protection

The United States increased considerably the use of detention for undocumented children accompanied by a parent in 2014. United States authorities have responded to the progressively growing influx from Central America by detaining new family arrivals with the stated goal of expediting their removal and deterring others from coming to the United States. This detention policy has the consequential impact of curtailing the right to seek asylum of many children leaving situations of well-documented violence. The United States has rapidly opened new facilities to detain children accompanied by their mothers, with conditions inappropriate for children and without an infrastructure and procedures in place to ensure access to asylum and legal representation. As a result, NGOs have reported and are documenting medical and mental health concerns for the children detained in such facilities and of many who have been removed who were not able to meet with their legal representative and fully pursue their claims for asylum. In November 2014, the United States plans to open an additional facility for family detention that will hold as many as 2,400 individuals, increasing the government's original capacity from under 100 beds to thousands in a matter of months, with an intention of reaching 6,300 beds and detaining a more significant proportion of arriving families.

Children's access to asylum procedures and the nature of such proceedings differ based on whether they are accompanied or unaccompanied. As mentioned above, the TVPRA requires that all unaccompanied children seeking asylum are referred to the Asylum Division for a non-adversarial presentation of their claims. Arriving children accompanied by a parent, on the other hand, are placed in adult proceedings. Those children who are detained with their mothers are placed in adult accelerated procedures in which they do not have the right to a hearing before immigration judge before removal unless he or she or the parent accompanying them expresses a fear of return. Children who have their own fear of return apart from their parent or parents must present their independent protection claim in adversarial proceeding without the benefit of appointed counsel, where the United States is always represented by counsel, thus making it even more difficult for a child to navigate the system and to have a meaningful opportunity to present their protection claim. Moreover, if the child's request for asylum is granted, the parent cannot derive protection from that granted to the child.³⁶

Unaccompanied children from Mexico or Canada face procedures distinctly different from those from non-contiguous countries. Unlike UAC from non-contiguous countries who are

against torture. 8 C.F.R. §208.16(c), which likewise has a higher burden of proof and does not confer any of the benefits of asylum.

³⁶ An unmarried child under the age of 21 may derive asylum from a parent. 8 U.S.C. §§1158(b)(3), 1101(b)(1).

automatically referred to the custody of ORR and placed into full immigration proceedings, those from Mexico and Canada can be directly returned to either the Mexican or Canadian authorities at the border without an immigration hearing. Before a Mexican or Canadian UAC³⁷ is returned, the TVPRA mandates that DHS first screens each child to ensure that he or she has not been trafficked and is not at risk of being trafficked; does not have a fear of return to the country of origin based on a credible fear of persecution; and is able to make an independent decision to withdraw a request to seek admission into the United States.³⁸ If all three of those conditions are not met, the child is to be referred to the custody of ORR in the same process that applies to UAC from non-contiguous countries and placed directly into immigration proceedings. These protective requirements are, in many cases, not adequately followed. Various public reports have documented and asserted that Mexican UAC are turned back without any screening and in many other instances, those who are screened are not screened effectively and therefore are found ineligible to seek asylum or other forms of protection in the United States.

DHS has delegated its screening responsibility to U.S. Customs and Border Protection (CBP), the law enforcement agency whose primary function is to secure the United States' borders. The screening is conducted in jail-like conditions by a uniformed official, sometimes only a few hours after the child has been apprehended. Often the screening interview is conducted in open spaces where officials are constantly passing through, with the child sitting near or even next to unrelated adults, including those who may have put the child in danger, such as a trafficker. CBP officials have not been sufficiently trained in child-sensitive interview techniques or in the appropriate understanding and application of the TVPRA requirements.³⁹ These conditions may increase a child's fear and anxiety and put tremendous pressure on them, making it extremely difficult to share sensitive personal information. The Committee on the Rights of the Child has urged the United States "*inter alia through future reauthorization of the 2008 TVPA and the 2011 Refugee Protection Act that foreign immigrant children victims of the offences covered by the Optional Protocol are not returned or deported.*"⁴⁰

Despite a 2011 Pledge to "[u]pdate existing guidance on both procedure and substance for the adjudication of asylum claims brought by children,"⁴¹ the United States has not yet fulfilled this commitment, resulting in situations where a child's perspective and needs may not be adequately taken into account in the assessment of a child's eligibility for asylum.

³⁷ Although the TVPRA includes both Mexico and Canada, rarely if at all do UAC arrive to the United States at its northern border.

³⁸ TVPRA § 235(a) (2). This standard puts the burden on the officer conducting the screening to determine a lack of risk of harm rather than the extent to which there may be a risk of harm if returned to the country of origin.

³⁹ See, UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 11(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html> for a discussion of child-sensitive interviewing and assessment of protection claims.

⁴⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2 July 2013), available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrHPiif0%2f1kumQo%2bD50%2f9nYuN1Cg%2ftkLKTb9cFHOqpFKoJJGhf3jvUWHX65YO7tpP5Yu2RyPwMxVYxVAQcSu%2b3iRRk eQLvdULILPJoYY%2fpwk0hCI3zyLnwyS23JsfN2yw%3d%3d>

⁴¹ See note 15, *supra*.

No child, neither accompanied nor unaccompanied, is appointed legal representation at the expense of the United States government, though the budget increases noted above to support the provision of legal services to unaccompanied children after their release from the custody of ORR could begin to mitigate this concern, at least for unaccompanied children.⁴² Moreover, no best interests determination is conducted before removing a child from the United States. The Committee on the Rights of the Child has recommended “*incorporation of a “best interests determination” for unaccompanied children in all decisions throughout immigration-related procedures and ensure that every unaccompanied child is appointed an independent Child Advocate to protect the child’s best interests in all immigration-related procedures.*”⁴³ The absence of these important safeguards can hinder children’s ability to seek and receive asylum or other humanitarian forms of protection offered by the United States or to be protected from removal to situations that are not in their best interests.

Recommendations

UNHCR urges the United States to:

- Refrain from using detention of children for deterrence purposes;
- Invest in building capacity for more humane and less costly community-based alternatives to detention rather than build more facilities to house families with the stated purpose of deterrence;
- Make available social and legal services to all unaccompanied children post-release to ensure their well-being and access to asylum and other immigration proceedings;
- Provide that all children, not just those unaccompanied, have their asylum claims heard first by an Asylum Officer in a non-adversarial interview and in a child-friendly environment;
- Adopt greater safeguards to ensure that accompanied children are not removed based on the denial of a parent’s claim to remain in the United States without the opportunity to assert an independent asylum claim and to create a mechanism through which the accompanying parent can lawfully remain in the United States with the child;
- Transfer the screening responsibility under TVPRA to a non-law enforcement agency with existing child welfare and international protection expertise, and in the interim develop and provide a more substantive training for border officials regarding child-sensitive interviewing and understanding and appropriate application of the TVPRA screening standards; and
- Carry out a best interests determination before removing a child from its territory and, for those for whom it is decided their best interests would be served by return to their

⁴²See, Section II. Achievements and Best Practices, International Protection of Children, *supra*. The allocation and impact of this very welcome financial support has yet to be seen; but it is anticipated it will have positive results.

⁴³Committee on the Rights of the Child, CRC/C/OPSC/USA/CO/2, sixty-second session, 2 July 2013, para. 47, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrHPiif0%2f1kumQo%2bD50%2f9nYuN1Cg%2ftkLKTb9cFHOqpFKoJJGhf3jvUWHX65YO7tpP5Yu2RyPwMxVYxVAQcSu%2b3iRRkeQLvdULILPJoYY%2fpwk0hCI3zyLnwyS23JsfN2yw%3d%3d>. It is noteworthy that the US Government recognizes the importance of best interest determination (BID) as demonstrated by the fulfilment of its pledges to offer BID experts abroad.

countries of origin, improve the repatriation procedures to ensure any such return takes place in conditions of safety and dignity.

Issue 4: Application of the Refugee Definition

Over the last several years, US adjudicators have adopted increasingly narrow interpretations of the refugee definition. For instance, some decisions unduly limit the standard for establishing a claim based on “membership of a particular social group” protection ground. These decisions impose restrictive requirements of demonstrating “social distinction” and “particularity” to establish membership of a particular social group.⁴⁴ This interpretation is inconsistent with international standards and has resulted in the denial of a number of asylum claims asserting this ground. In a manner more stringent than that provided by international refugee law, U.S. law also requires a nexus between the motive for the persecution and one of the protected grounds.⁴⁵

The application of these restrictive interpretations affect the asylum claims of both children and adults, particularly those from El Salvador, Guatemala, Honduras, and to a lesser extent Mexico. This is because asylum-seekers from these countries often raise membership of a particular social group as the protected ground⁴⁶ within the context of extensive unbridled crime, cartel and gang-related violence and the inability or unwillingness of the States to provide protection from these harms.⁴⁷ The majority of these cases are denied based on a finding by the adjudicator that the applicant failed to meet the social group requirements or to establish the nexus between the harm suffered and the persecutor’s reason for the harm, or both.

United States law has a number of overly restrictive “terrorism-related” bars to refugee and asylum protection both by statute and interpretation.⁴⁸ While the United States has broad authority to exempt individuals from these bars, there continue to be thousands of cases of refugee and asylee applications for permanent residence and family reunification, as well as asylum claims, on hold due to the lack of adequate procedures to assess eligibility for exemption to a bar as well as reluctance to fully utilize the exemption authority. In partial fulfillment of the 2011 Pledge, which aimed to “[s]ignificantly reduce, through the issues and application of exemptions to exclusion based on national security grounds, cases that are on hold for a review of eligibility for exemption to exclusion by the end of fiscal year 2012” and “[u]ndertake a

⁴⁴ See, Matter of M-E-V-G, 26 I. & N. Dec. 227 (BIA 2014); Matter of W-G-R, 26 I. & N. Dec. 208 (BIA 2014). From 1985 until 2006, to establish membership of a particular social group required only a showing that the group shared a common characteristic that is either immutable or so fundamental to one’s identity or conscience that they shouldn’t be required to change it. In re Acosta, 19 I&N Dec. 211, 233 (BIA 1985). This standard has been widely accepted in many other jurisdictions. See, e.g., T. Alexander Aleinikoff, “Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group,’” reprinted in Erika Feller, Volker Turk & Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations in International Protection* (2003) (internal citations omitted).

⁴⁵ See, e.g., In re M-E-V-G, 26 I. & N. Dec. 227 (BIA 2014); In re W-G-R, 26 I. & N. Dec. 208 (BIA 2014).

⁴⁶ These claims may also be based on political opinion or religious grounds in addition to or apart from the social group ground. Many of these claims have likewise been denied most commonly based on a finding that the application failed to demonstrate the nexus between the protected ground and the motivation of the persecutor.

⁴⁷ See generally UNHCR Regional Office for the United States and the Caribbean, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* (March 2014), available at www.unhcrwashington.org/children.

⁴⁸ 8 U.S.C. § 1182(a) (2).

review, to be completed by the end of calendar year 2012, to examine current interpretations of the terms under the national security exclusion grounds, for example, the meaning of material support, to better ensure that those in need of protection retain eligibility for it,”⁴⁹ the United States has implemented some important exceptions to the terrorism-related bars such as the defense of duress under certain circumstances. Nevertheless, the interpretation and application of these bars remain restrictive and broad. Moreover, the current procedure for asylum-seekers in asylum proceedings requires that eligibility for an exemption will be considered only by a single administrative mechanism, and only after all other issues have been decided and all administrative appeals have been exhausted. This process produces inefficiencies and continues to result in significant delays.

Recommendations

UNHCR urges the United States to:

- Issue, with the technical support of UNHCR, regulations that clarify the interpretation of “membership of a particular social group” and other aspects of the refugee definition so that they are in greater compliance with international standards;
- Bring its interpretation of asylum claims brought by individuals from El Salvador, Guatemala, Honduras and Mexico into greater compliance with international standards;
- Amend its overly-broad interpretation and application of national security bars to asylum and continue to adopt exemptions that will allow individuals in need of international protection to receive it; and
- Amend the current procedure for the adjudication of eligibility for an exemption to the terrorism-related bars to make it more efficient, easier to navigate, and to allow for prompt resolution.

Issue 5: Access to Territory and Expedited Removal

In the years since UNHCR’s 2003 Report on Expedited Removal and the 2005 USCIRF Report, both of which examined the implementation of the accelerated procedures under Expedited Removal, a number of developments have occurred that resulted in a departure from international standards. Of principal concern among them is the expansion of the geographic application of expedited removal, resulting in a significant increase in the numbers of asylum-seekers required to go through the credible fear process before being admitted into full asylum procedures. While safeguards are in place to protect against refoulement, concerns have been raised regarding identification and referral for substantive protection screening.

Additionally, the United States recently revised its training for asylum officers conducting credible fear screenings, requiring a much more in-depth interview that, rather than serve as an initial eligibility screening for access to asylum procedures, is more akin to a full assessment of the international protection claim. The standard for passing the credible fear process before this

⁴⁹ See note 15, supra.

recent change was already more stringent than international standards for asylum screenings in accelerated procedures.⁵⁰

Recommendations

UNHCR urges the United States to:

- Return the application of the credible fear interview to a standard more suitable to a preliminary screening process;
- Implement all the recommendations made in the 2005 USCIRF expedited removal study; and
- Limit the use of expedited removal only during times of mass influxes that justify the use of accelerated procedures.

Issue 6: Right to a Nationality and Protection of Stateless Persons

Although United States law provides a number of paths to establishing or receiving citizenship, there are nevertheless some aspects of its laws that are not satisfactory. For example, in order for a child born outside the United States to a U.S. citizen parent to be eligible for U.S. citizenship, that parent must meet certain requirements including having been physically present in United States territory before the birth of the child for “not less than five years, at least two of which were after attaining the age of fourteen years⁵¹”; there are more stringent requirements for a US father to pass citizenship to a child born to a non-US mother out of wedlock and outside the United States.⁵²

Stateless individuals who have no lawful basis to remain in the United States, which includes many such individuals, face numerous challenges. These individuals often have no documentation that would allow them to demonstrate their lack of nationality or to travel to another country. 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 United States law, such individuals should be released from detention within six months of their removal order and are eligible to apply for work authorization. Other stateless persons remain in hiding and do not enter the immigration system largely due to a fear of coming forward because they lack lawful status.⁵³

There is neither a statelessness determination procedure nor any mechanism under United States law or policy by which these individuals can seek lawful permanent status by virtue of their statelessness alone. Because of this core lack of protection, these individuals are often unable to

⁵⁰ Under international standards for accelerated procedures, claims for protection should be allowed to proceed unless they are determined during a screening to be “clearly abusive or manifestly unfounded.” Such screenings during accelerated procedures must also include adequate procedural safeguards to ensure against *refoulement*. See *UNHCR's Position on Manifestly Unfounded Applications for Asylum*, 1 December 1992, 3 European Series 2, p. 397, available at: <http://www.refworld.org/docid/3ae6b31d83.html>. It is important to note, as stated supra under Section II. Achievements and Best Practices Access to Territory and Expedited Removal Procedures, that the United States has consistently facilitated monitoring of Expedited Removal and related procedures.

⁵¹ U.S.C. §1401(g). There are also a few exceptions under this section such as service in the U.S. Armed Forces.

⁵² U.S.C. §1149.

⁵³ For a fuller discussion of stateless individuals in the United States see, *Citizens of Nowhere*, note 3 supra.

exercise basic human rights such as the ability to work, to be reunited with family, or to have access to basic services such as health care. Stateless individuals will not be readmitted to the United States if they travel outside its borders and in many cases are unable to travel within the United States without special permission. Many stateless individuals are required to report on a regular basis to immigration authorities and are frequently required to continue to seek permission to enter other countries including those in which they have no connection. As noted above in Section II. Achievements and Best Practices, Right to a Nationality and protection of stateless persons, in partial fulfillment of one of its 2011 Pledges, the United States has implemented a few administrative policies for some stateless individuals such as allowing them to seek and receive work authorization, reducing the requirements to report to an immigration official, and reducing the period of their detention. These welcome changes, nevertheless, do not fully address the needs of stateless individuals in the United States. Also noted above, proposed legislation to provide a vehicle for stateless individuals to obtain lawful status and eventually US citizenship has been introduced⁵⁴, however, that legislation has yet to be enacted into law.

Recommendations

UNHCR urges the United States to:

- Accede to the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness.
- Provide a mechanism for stateless individuals to seek and obtain lawful permanent resident status and eventually US citizenship through the enactment of the proposed 2013 Refugee Protection Act or by other means; and
- Adopt, in the interim, and for those who may not qualify for legal status, further administrative reforms to ease restrictions and more consistently provide access to basic human rights such as the right to work and to receive adequate health care for stateless persons within the United States.

**Human Rights Liaison Unit
Division of International Protection
UNHCR
October 2014**

⁵⁴ See note 17, *supra*.

Excerpts of Concluding Observations and Recommendations from UN Treaty Bodies and Special Procedures' Reports

- Universal Periodic Review:

UNITED STATES OF AMERICA

We would like to bring your attention to the following excerpts from UN Treaty Monitoring Bodies' Concluding Observations and Recommendations and from UN Special Procedures mandate holders' reports relating to issues of interest and persons of concern to UNHCR with regards to the United States of America.

I. Treaty Bodies

Human Rights Committee

[Concluding observations \(2014\) CCPR/C/USA/CO/4, 110th Session](#)

23 April 2014

Non-refoulement

13. While noting the measures taken to ensure compliance with the principle of non-refoulement in cases of extradition, expulsion, return and transfer of individuals to other countries, the Committee is concerned about the State party's reliance on diplomatic assurances that do not provide sufficient safeguards. It is also concerned at the State party's position that the principle of non-refoulement is not covered by the Covenant despite the Committee's established jurisprudence and subsequent state practice (arts. 6 and 7).

The State party should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant, continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries and take appropriate remedial action when assurances are not fulfilled.

Domestic Violence and trafficking

14. While acknowledging the measures taken by the State party to address the issue of trafficking in persons and forced labour, the Committee remains concerned about cases of trafficking for purposes of labour and sexual exploitation, including of children, and criminalization of victims on prostitution-related charges. It is concerned about the insufficient identification and investigation of cases of trafficking for labour purposes and notes with concern that certain categories of workers, such as farm workers and domestic workers, are explicitly excluded from the protection of labour laws, thus rendering these categories of workers more vulnerable to

trafficking. The Committee is also concerned that workers entering the U.S. under the H-2B work visa programme are also at a high risk of becoming victims of trafficking/forced labour (arts. 2, 8, 9, 14, 24, and 26).

The State party should continue its efforts to combat trafficking in persons, inter alia by strengthening its preventive measures, increasing victim identification and systematically and vigorously investigating allegations of trafficking in persons, prosecuting and punishing those responsible and providing effective remedies to victims, including protection, rehabilitation and compensation. It should take all appropriate measures to prevent the criminalization of victims of sex trafficking, including child victims, to the extent that they have been compelled to engage in unlawful activities. The State party should review its laws and regulations to ensure full protection against forced labour for all categories of workers and ensure effective oversight of labour conditions in any temporary visa program. It should also reinforce its training activities and provide training to law enforcement and border and immigration officials, as well as to other relevant agencies such as labour law enforcement agencies and child welfare agencies.

16. The Committee is concerned that domestic violence continues to be prevalent in the State party, and those ethnic minorities, immigrants and American Indian and Alaska Native women are at a particular risk. The Committee is also concerned that victims face obstacles to obtaining remedies, and that law enforcement authorities are not legally required to act with due diligence to protect victims of domestic violence, and often inadequately respond to such cases (arts. 3, 7, 9, and 26).

The State party should, through the full and effective implementation of the Violence against Women Act and the Family Violence Prevention and Services Act, strengthen measures to prevent and combat domestic violence, as well as to ensure that law enforcement personnel appropriately respond to acts of domestic violence. The State party should ensure that cases of domestic violence are effectively investigated and that perpetrators are prosecuted and sanctioned. The State party should ensure remedies for all victims of domestic violence, and take steps to improve the provision of emergency shelter, housing, child care, rehabilitative services and legal representation for women victims of domestic violence. The State party should also take measures to assist tribal authorities in their efforts to address domestic violence against Native American women.

Immigrants and Asylum-Seekers

15. The Committee is concerned that under certain circumstances mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the Covenant. It is also concerned about the mandatory nature of the deportation of foreigners without regard to elements such as the seriousness of crimes and misdemeanour's committed the length of lawful stay in the U.S., health status, family ties and the fate of spouses and children staying behind, or the humanitarian situation in the country of destination. Finally, the Committee expresses concerns about the exclusion of millions of undocumented immigrants and their children from coverage under the Affordable Care Act and the limited coverage of undocumented immigrants and immigrants residing lawfully in the U.S. for less than five years by Medicare and Children Health Insurance, all resulting in difficulties in access of immigrants to adequate health care (arts. 7, 9, 13, 17, 24 and 26).

The Committee recommends to the State party to review its policies of mandatory detention and deportation of certain categories of immigrants in order to allow for individualized decisions, to take measures ensuring that affected persons have access to legal representation, and to identify ways to facilitate access of undocumented immigrants and immigrants residing lawfully in the U.S. for less than five years and their families to adequate health care, including reproductive health care services.

Detention

20. The Committee is concerned about the continued practice of holding persons deprived of their liberty, including juveniles and persons with mental disabilities under certain circumstances, in prolonged solitary confinement, and about detainees being held in solitary confinement also in pre-trial detention. The Committee is furthermore concerned about poor detention conditions in death row facilities (arts. 7, 9, 10, 17, and 24).

The State party should monitor conditions of detention in prisons, including private detention facilities, with a view to ensuring that persons deprived of their liberty be treated in accordance with the requirements of articles 7 and 10 of the Covenant and the UN Standard Minimum Rules for the Treatment of Prisoners. It should impose strict limits on the use of solitary confinement, both pre-trial and following conviction, in the federal system, as well as nationwide, and abolish the practice in respect of anyone under the age of 18 and prisoners with serious mental illness. It should also bring detention conditions of prisoners on death row in line with international standards.

21. While noting President Obama's commitment to close the Guantánamo Bay facility and the appointment of Special Envoys at the Departments of State and Defence to continue to pursue the transfer of detainees designated for transfer, the Committee regrets that no timeline for closure of the facility has been provided. The Committee is also concerned that detainees held in Guantánamo Bay and in military facilities in Afghanistan are not dealt with within the ordinary criminal justice system after a protracted period of over a decade in some cases (arts. 7, 9, 10, and 14).

The State party should expedite the transfer of detainees designated for transfer, including to Yemen, as well as the process of periodic review for Guantánamo detainees, and ensure either their trial or immediate release, and the closure of the Guantánamo facility. It should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo and military facilities in Afghanistan are dealt with within the criminal justice system rather than military commissions and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

[Concluding observations \(2013\) CRC/C/OPSC/USA/CO/2, 62nd Session](#)

2 July 2013

Training

19. While appreciating the statement made during the dialogue that a major component of the strategic action plan will be enhanced training for the officials most likely to come in contact with trafficking victims, as well as the efforts undertaken by the Department of Justice and the National Coordinator to provide training, domestically and abroad, the Committee is nevertheless concerned that training mainly addresses trafficking. Furthermore, the Committee is concerned that training is not sufficiently child-specific and that it does not contemplate evaluation of the impact of training on actual changes in understanding and behavior.

20. The Committee recommends that the State party extend and strengthen its training activities and ensure that they include all areas covered by the Optional Protocol and are provided to all relevant professionals working with and for children, including judges, public prosecutors, police officers, immigration and customs officers, medical staff, social welfare officers, religious and community leaders, organizations accredited for adoption, media and other professionals and all technical staff concerned.

Unaccompanied foreign children, asylum-seekers, refugees and migrants

46. While noting that the TVPA allows trafficking victims to stay in the United States if they suffer extreme hardship involving unusual and severe harm if returned to their home country, the Committee is concerned at the information that the State party is applying a very narrow definition of what constitutes human trafficking and who is eligible for relief. The Committee, while noting the efforts undertaken to screen unaccompanied alien children, is particularly concerned that trafficked children are often treated by government officials as offenders and reiterates its previous concern that they may face return or deportation as unidentified trafficked victims, without determination of their best interest being carried out.

47. The Committee recommends that the State party ensure, inter alia through future reauthorization of the 2008 TVPA and the 2011 Refugee Protection Act that foreign immigrant children victims of the offences covered by the Optional Protocol are not returned or deported. The Committee further recommends that the State party provide immigrant child victims all the necessary services aimed at their physical, psychological and emotional recovery. The Committee further recommends that the State party call for the incorporation of a “best interests determination” for unaccompanied children in all decisions throughout immigration-related procedures and ensure that every unaccompanied child is appointed an independent Child Advocate to protect the child’s best interests in all immigration-related procedures and that every unaccompanied child is represented in all immigration court proceedings by a qualified attorney.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

[Concluding observations \(2013\) CRC/C/OPAC/USA/CO/2, 62nd Session](#)

2 July 2013

Measures adopted to protect the rights of child victims

35. The Committee is concerned that in accordance to the Immigration and Nationality Act (INA) § 212(d)(3)(B)(i), 8 USC § 1182(a)(3)(B)(i), children who provided “material support” to, received “military-type training” from, or fought with non-State armed groups considered to be terrorist organizations by the Department of Homeland Security are refused asylum in the State party. The Committee is also concerned that the State party does not generally grant discretionary exemptions to former child soldiers and does not intend to do so even when the children acted under duress. The Committee is further concerned that the best interests of the child does not play a direct role in determining substantive eligibility under the State party’s refugee definition.

36. The Committee in the light of article 7 of the Optional Protocol recommends that the State party take all appropriate measures to ensure rehabilitation and social reintegration of children victims of acts contrary to the Optional protocol. In this regard, the Committee urges the State party to institute a discretionary exemption from the "terrorist activity" bar to allow the favourable consideration on a case-by-case basis of applications for asylum, refugee protection, or other lasting status for former child soldiers who are otherwise eligible for the protection or benefit they seek. The Committee also recommends that the State party fully takes into account the best interests of the child and the right of the child to have his/her best interests taken into account when making substantive eligibility determinations under the US refugee determination.

II. Special Procedures

Report of the Special Rapporteur on violence against Women, its causes and consequences

Mission to the United States of America

[A/HRC/17/26/Add.5, 17th Session](#)

6 June 2011

C. Violence against women in detention

(b) Explore and address the root causes, including the multiple and intersectional challenges, which lead to the increasing number of immigrant and African-American women in prisons and detention facilities.

(c) Consider alternatives to incarceration, particularly for women detainees who are primary care-givers of their children, given the non-violent nature of many of the crimes for which women are incarcerated, and also in light of laws relating to loss of parental rights.

(m) Improve and adopt national standards to transform the country's immigration detention system into a truly civil model, thus avoiding the custody of immigrant detainees with convicted individuals. These standards should be made legally binding in all detention facilities, including those run by state, local, or private contractors.

(n) Locate immigration detention facilities closer to urban centers where legal services and family members are more accessible.

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,

Mission to the United States of America

[A/HRC/20/22/Add.3, 20th Session](#)

30 March 2012

35. The Special Rapporteur recommends that legislation on detainee medical care be enacted, including the 2011 Refugee Protection Act, which contains important provisions on improving detention conditions, including medical care. The 2010 Performance-Based

National Detention Standards should be finalized and adopted, consistent with international standards, and applied to all detention facilities. An independent oversight system should be established to monitor all facilities where immigration detainees are held.⁵⁵ The DIHS should also establish an independent review panel, which would permit detainees to appeal denials of care. To prevent further abuse and denials of care which may endanger their lives, detainees should have access to legal representation.

Report of the Special Rapporteur on the implication for human rights of the environmentally sound management and disposal of hazardous substances and wastes

⁵⁵ Including non-IHSC (ICE Health Service Corps) staffed facilities.

3 September 2012

B. Displacement

32. The Special Rapporteur heard the accounts of women survivors of the shame that they had experienced during the relocation process, when they were subjected to examinations with Geiger counters while naked and hosed down with liquid in the presence of their male relatives, as well as enduring on-site analysis of their pubic hair by American male personnel. In this context, many women, in particular those from Rongelap Atoll, were stigmatized, which affected their prospects for marriage and motherhood. In order to prevent such incidents from recurring, In the interests of non-recurrence the Special Rapporteur urges all States to adhere to the Guiding Principles on Internal Displacement, which identify the rights and guarantees relevant to the protection of persons from forced displacement and their protection and assistance during displacement, as well as during return or resettlement and reintegration. Guiding Principle 8, which declares that displacement should not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected, is particularly relevant.

33. Displacement due to the nuclear testing, especially of inhabitants from Bikini, Enewetak, Rongelap and Utrok Atolls, has created nomads who are disconnected from their lands and their cultural and indigenous way of life; for example, the Marshallese engaged in migratory practices to gather different types of cultural goods (ranging from fish, fruits and medicines to materials for housing) from the islands and atolls. Today, they are unable to perform these migratory practices and harvest their cultural goods because, in some cases, the islands and atolls have been contaminated by nuclear fallout. In addition, it should be considered that, in their matriarchal society, land is passed from mother to child; displacement from their lands has denied Marshallese women the right to exercise their cultural and other rights and their role as custodians of land in society.

35. New thinking on the issue of redress includes concepts that encourage the consultation of groups, including indigenous groups, on what they deem fit or what they consider to be adequate redress, because the notion of monetary compensation is not appropriate in some contexts. In this connection, article 28 of the Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples to redress, which may include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources that the indigenous

peoples have traditionally owned or otherwise occupied or used, and that have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

63. The Special Rapporteur recommends that the Government and relevant State actors of the Marshall Islands:(e) Engage in a broad consultative process, including with victims, families of victims, victims' associations and other relevant civil society actors, on outstanding issues and measures required to address any long-term human health and environmental effects of the testing, with particular emphasis on solutions aimed at reconciling the traditional land tenure system with durable solutions to displacement;

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Mission to the United States of America

[A/HRC/26/25/Add.4, 26th Session](#)

6 May 2014

52. The Working Group also received information on violations of the limited protection available to children and information that negative impacts on the rights of children disproportionately affected the children of migrants. The Working Group notes prior concerns expressed with regard to child labour in the United States agricultural sector by ILO and the Committee on the Rights of the Child (CRC/C/OPSC/USA/CO/2 paras. 25 and 26), and recommends that the Government and companies in the agricultural sector address such concerns as a matter of priority so as to ensure that the rights of children are effectively protected in the context of agricultural business activities.

78. The Working Group held meetings in Washington, D.C. and Arizona with representatives of indigenous peoples, who highlighted the adverse impacts on indigenous peoples from past and present business activities, in particular the extractive industries. In submissions to the Working Group, the National Congress of American Indians, the International Indian Treaty Council, the Navajo Nation Human Rights Commission, and the San Carlos Apache Tribe noted impacts on the environment, land and water and on sites of economic, cultural and religious significance to Native Americans, leading to displacement, and adverse impacts on, inter alia, the rights of individuals to the enjoyment of the highest attainable standard of health; to an adequate standard of living, including food; to safe drinking water and sanitation; and to the right of self-determination for indigenous peoples. Native American representatives further highlighted the imperative that federal authorities consult with Native American Governments when taking decisions in relation to business activities that may impact on indigenous peoples and welcomed recent federal Government initiatives in this regard. However, they also highlighted continuing obstacles to ensuring effective protection by state authorities from present potential impacts and to accessing effective remedy for past impacts.

102. The Working Group would like to make the following more specific recommendations:

(i) The Working Group recommends that the Government and companies in the agricultural sector address concerns expressed by international bodies with regard to child labour in the United States agricultural sector as a matter of priority, so as to ensure that the rights of children are effectively protected in the context of agricultural business activities;

**Human Rights Liaison Unit
Division of International Protection
UNHCR
October 2014**