

**PROBLEMS WITH U.S. COMPLIANCE WITH
THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

VIOLATIONS OF THE RIGHTS OF ALIENS

A report to the United Nations Human Rights Committee on the
Second and Third Periodic Report of the United States of America

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I. EXECUTIVE SUMMARY

ICCPR General Comment 15 (Twenty-seventh session, 1986) sets forth the position of aliens under the Covenant. The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Further, Article 13 requires certain due process guarantees for lawfully present aliens who are being removed from the country. ICCPR General Comment 15 also states that States parties should give attention to the position of aliens, both under their law and in actual practice. This report identifies and makes recommendations to address the following violations in U.S. law and practice:

VIOLATIONS OF ARTICLE 13 RIGHT TO DUE PROCESS FOR ALIENS IN REMOVAL PROCEEDINGS

- The U.S. expedited removal procedure does not provide sufficient due process to enable aliens with valid asylum claims to effectively pursue their right against expulsion.
- Immigration inspectors fail to consistently 1) refer asylum seekers for a credible fear review; and 2) inform asylum seekers of their right to credible fear review.
- Detained aliens in expedited removal are not always provided with interpreters.
- Asylum seekers are detained under unsuitable conditions and personnel at the institutions where they are detained are not given adequate training to understand and work with asylum seekers.
- Asylum seekers are denied the right to challenge parole decisions.
- Procedural changes at the Board of Immigration Appeals (“BIA streamlining”) has undermined asylum seekers’ due process rights and may be leading to denials of meritorious asylum claims.
- Limitations on judicial review deny many aliens the ability to challenge the legality of detention and removal orders.
- Whole categories of aliens (for example, asylum seekers who apply after one year in the U.S.) are denied any access to federal court review based on an array of procedural bars.
- The application of the “Material Support of Terrorism” bar to admissibility violates U.S. obligations to ensure access to refugee protection.
- The closure of public immigration court hearings for “special interest removal hearings” violates articles 14 of the ICCPR.
- The U.S. imposes heightened standards that limit the ability of torture survivors to access protection from *refoulement* under the Convention Against Torture (CAT).
- Legislation such as the IIRARA and REAL ID Act have limited the ability of individuals who may be eligible for CAT relief to avail themselves of protection.
- As implemented in the U.S., CAT Article 3 provides an extremely limited form of protection from *refoulement*.
- Additionally, please note that gender based asylum issues are covered in the "Report on Women's Human Rights in the United States under the International Covenant on Civil and Political Rights."

VIOLATIONS OF ARTICLE 13 RIGHT TO EFFECTIVE REMEDY (ACCESS TO COUNSEL) IN REMOVAL PROCEEDINGS

- The U.S. denies access to counsel in expedited removal proceedings.
- The U.S. provides no meaningful access to counsel for individuals in removal proceedings.
- Faced with prolonged confinement in poor conditions, individuals who have valid asylum claims are effectively forced to stipulate to removal.

VIOLATIONS OF RIGHTS OF JUVENILE ALIENS IN REMOVAL PROCEEDINGS (Articles 10, 13 and 24)

- Children's detention facilities fail to meet the requirements of the ICCPR.
- The manner in which children are detained discourages them from pursuing their right to seek asylum and other forms of relief.
- Juvenile aliens' access to counsel is insufficient.

VIOLATIONS OF THE RIGHTS OF LAWFUL PERMANENT RESIDENTS IN REMOVAL PROCEEDINGS (Articles 13, 17, 23 and 24)

- The expansion of deportable offenses and limitations on discretionary relief violates lawful permanent residents' right to family integrity.
- Mandatory removal violates legal permanent residents' right to individualized review.
- The U.S. failure to consider the interests of any minor children violates the right of the child to special protection.

VIOLATIONS OF THE RIGHTS OF MIGRANT WORKERS (Articles 2, 14, 22 and 26)

- The U.S. discriminates against migrant workers through its exclusion of categories of workers from full protection under its labor laws.
- U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, has both directly and indirectly affected the rights to equal protection and nondiscrimination for this vulnerable group of migrant workers in irregular status.
- *Hoffman Plastics* has limited judicial remedies for undocumented workers.
- The U.S. has failed to protect the existing labor rights of migrant workers on the Gulf Coast following Hurricane Katrina.

II. VIOLATIONS OF THE RIGHTS OF REFUGEES, ASYLUM SEEKERS AND OTHER ALIENS IN NEED OF SPECIAL PROTECTION

A. INTRODUCTION

1. In its 1995 Concluding Observations, the Human Rights Committee expressed concern that excludable aliens in the U.S. enjoyed a lower standard of due process. Unfortunately, through a combination of legislative and regulatory changes over the past 10 years, access to due process and effective remedy has been significantly curtailed for aliens who are in the process of being expelled from the U.S. Some of the measures that have impacted the rights of refugees, asylum seekers, and other vulnerable aliens include:

- **The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”)** established the expedited removal system, including the creation of the credible fear screening process for asylum seekers. The expedited removal procedures do not provide sufficient due process to enable aliens with valid asylum claims to effectively pursue their rights against expulsion under Article 13 of the ICCPR.
- **Procedural reform at the Board of Immigration Appeals (“BIA”)** has drastically reduced the possibility of appeal and increased the denials of meritorious claims.
- **The REAL ID Act of 2005 further curtailed judicial review of many issues relevant to removal decisions.** As a result of these changes, most aliens challenging removal now find appeal to a higher authority impossible to obtain, and those whose cases are reviewed are not sufficiently protected against removal.
- **The USA PATRIOT Act of 2001 and the REAL ID Act created a new bar to admissibility for individuals who provide “material support” to a terrorist.** As a result of the material support bar, thousands of refugees who were coerced into providing food or services to terrorist groups have been refused U.S. protection.
- **After 9/11, new administrative practices have allowed immigration judges to close public immigration proceedings deemed to be of “special interest” because of national security.** More than 600 such hearings have taken place.
- **Implementing regulations for the Convention Against Torture have failed to create adequate legal mechanisms and procedures to fully implement the *non-refoulement* obligation.**

2. **In addition, the U.S. fails to provide any meaningful access to counsel in removal proceedings.** The U.S. does not provide counsel and referrals to pro bono attorneys are ad hoc; as a result, most aliens appear in removal proceedings without representation. Aliens in expedited removal cannot contact an attorney until they are referred to a credible fear hearing. Further, prolonged and poor detention conditions have resulted in aliens with valid asylum claims choosing to stipulate to removal rather than waiting in detention for a determination of their cases.

3. **The U.S.’ treatment of juveniles in immigration custody also violates the ICCPR.** Although transfer of custody of “unaccompanied alien children” from DHS to the Office of Refugee Resettlement has improved conditions, their treatment still merits concern, including the commingling of juvenile and adult detainees and the separation of immigrant families. Further, juveniles’ ability to pursue asylum claims are severely impaired by the lack of access to counsel.

**B. VIOLATIONS OF DUE PROCESS IN REMOVAL PROCEEDINGS
(Article 13)**

4. The Committee’s General Comment 15 provides that “[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.” The Comment further provides that “[a]liens have the full right to liberty and security of the person,” and if lawfully deprived of their liberty, “they shall be treated with humanity and with respect for the inherent dignity of their person.”¹

5. While the particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party, the Committee’s General Comment 15 notes, “However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.”² This provision is particularly relevant to asylum seekers, who are “rarely in a position to comply with the requirements of legal entry.”³ Article 31(1) of the Convention relating to the Status of Refugees prohibits the imposition of penalties on refugees whose entry or presence within a country is illegal, so long as there is good cause for such irregular entry or presence.⁴

Expedited Removal

6. Under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”), immigration inspectors at U.S. airports and borders were given the power to order the immediate deportation of persons who arrive in the U.S. without proper travel documents. In Paragraph 237 of its Periodic Report, the U.S. explains that under this procedure, referred to as “expedited removal,” aliens are generally not provided a hearing before an immigration judge unless they are found to have a “credible fear” of persecution or torture in their country of origin.

¹ General Comment No. 15: The Position of Aliens under the Covenant (11/04/1986).

² Id. at para. 9.

³ Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments p. 57) (including the Secretary-General’s background study on refugee matters).

⁴ Generally speaking, any individual who has not secured refugee protection in another country has “good cause” for irregular entry or presence. See e.g., Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 3.1 (UNHCR ed., 2003).

7. The expedited removal procedure does not provide sufficient due process to enable aliens with valid asylum claims to effectively pursue their right against expulsion. Under the expedited removal procedure, an asylum officer can bar a person from entering the United States for five years or life, depending on the particular ground(s) alleged in the case. An officer prepares and implements the decision to order a person removed, providing the asylum seeker with no meaningful opportunity for further administrative or judicial review, thus placing asylum seekers at risk of improper return (*refoulement*).⁵ These same problems with expedited removal also apply to aliens claiming relief from *refoulement* under Article 3 of the Convention Against Torture (“CAT”).

8. Immigration inspectors fail to consistently refer asylum seekers for a credible fear review. Fifteen percent of arriving aliens observed in a 2005 study by the U.S. Commission on International Religious Freedom were not provided a credible fear interview, even though they had expressed a fear of return to the inspector.⁶ Of particular note were seven cases where aliens expressed fear of political, religious or ethnic persecution, which are grounds for asylum under U.S. and international law, and the inspector incorrectly represented on a sworn statement that the applicant had stated that he or she had no fear of return.⁷

9. Immigration inspectors fail to consistently inform asylum seekers of their right to credible fear review. The USCIRF Study observed that failures to refer aliens who expressed a fear of return may have resulted from inspectors failing to apprise aliens of their rights. Although Department of Homeland Security (“DHS”) regulations require inspectors to inform aliens that they may ask for protection if they have a fear of return, in approximately half of the inspections studied by USCIRF, inspectors failed to inform the alien of that right. Notably, aliens who were informed of their right were seven times more likely to be referred for a credible fear determination than those who were not.⁸

10. Detained aliens are not always provided with interpreters. The isolation and confusion many detainees in expedited removal experience is compounded in some cases because they are not provided interpreters. For example, a 2000 report by Human Rights First documents at least ten cases of asylum seekers wrongfully removed under expedited removal and notes that, in at least four of those cases, the asylum seeker was never provided with interpreter services.⁹ This practice also violates ICCPR Article 14.¹⁰

⁵ See 8 U.S.C. § 1225 (b)(1)(C) (providing that except in limited circumstances, “a removal order . . . is not subject to administrative appeal.”); 8 U.S.C. § 1252 (a)(2) (“no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225 (b)(1) . . .”); see U.S. Commission on International Religious Freedom, “U.S. Commission on International Religious Freedom 2005 Annual Report,” available at <http://www.state.gov/g/drl/rls/irf/2005/>.

⁶ See United States Commission on International Religious Freedom, “Report on Asylum Seekers in Expedited Removal – Volume 1: Findings & Recommendations” (February 2005), (“USCIRF Report”) at 54, available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html.

⁷ USCIRF Report at 53.

⁸ USCIRF Report at 54.

⁹ Human Rights First, “Is This America? The Denial of Due Process to Asylum Seekers in the United

11. Asylum seekers are detained under unsuitable conditions and personnel at the institutions where they are detained are not given adequate training to understand and work with asylum seekers. Most asylum seekers are detained under conditions which may be suitable in the criminal justice system, but are entirely inappropriate for asylum seekers fleeing persecution.”¹¹ The USCIRF Study found that only one facility (out of the 20 that house more than 70 percent of the asylum seekers in expedited removal) informed its line officers or guards which detainees were asylum seekers. In addition, staff at very few facilities were given any training designed to inform them of the special needs and concerns of asylum seekers, such as psychological problems faced by victims of torture.¹²

12. Recommendations With Respect to Expedited Removal:

- The U.S. should improve training and quality assurance practices for inspections officers to ensure that aliens in expedited removal are informed of their right to a credible fear interview and that aliens who express such a fear are, in fact, afforded an interview.
- The U.S. should provide specialized training to enable immigration inspectors and detention facility staff to better understand and work with a population of asylum seekers, many of whom may be psychologically vulnerable due to the conditions from which they are fleeing.
- The U.S. should create a reliable inter-bureau system that tracks real-time data of aliens in expedited removal proceedings. There is currently no capability to track statistics of aliens from the beginning of the expedited removal process from the port of entry, through detention, and up until the completion of the hearing before an immigration judge. Such technology and standards would improve the communication of services to, and direct care of, detainees.

Decisions and Appeals

13. With respect to decisions and appeals, Paragraph 240 of the U.S. Periodic Report explains only that a decision of an immigration judge in a removal hearing may be written or oral and that appeal from the decision lies with the Board of Immigration Appeals (“BIA”). The report fails, however, to address widespread judicial and public criticism of recent BIA procedural reforms that have undermined asylum seekers’ due process rights.

States.” (October 2000).

¹⁰ ICCPR General Comment 13: Article 14: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, A/39/40 (1984) 143 at para 13.

¹¹ U.S. Commission on International Religious Freedom, U.S. Commission on International Freedom 2005 Annual Report, available at <http://www.state.gov/g/drl/rls/irf/2005/>.

¹² USCIRF Report at 69.

14. Asylum seekers are denied the right to challenge parole decisions. Asylum seekers who present themselves at a U.S. port of entry are considered ‘arriving aliens’ who may be ‘paroled’ into the U.S. in order to apply for asylum.¹³ The DHS acts, in effect, as both judge and jailer with respect to parole decisions for asylum seekers. If parole is denied by DHS, the decision cannot be appealed to a judge, even an immigration judge. While immigration judges can review DHS custody decisions for other immigration detainees, they are precluded from reviewing the detention of ‘arriving aliens.’ Thus, asylum seekers may be removed from the U.S. without having had the opportunity to apply for asylum.

15. BIA ‘streamlining’ undermines asylum seekers’ due process rights. In August 2002, the BIA implemented a range of procedural changes, including expanding the use of single-member review of Immigration Judge decisions, making such review the rule rather than the exception for the majority of cases; eliminating *de novo* review of factual issues; expanding the use of summary dispositions and affirmances without opinion; and reducing the size of the BIA from 23 members to 11.¹⁴ In an overwhelming majority of appeals, the BIA is the court of last resort, as parties often do not know how to access the federal courts, are prevented from doing so by language barriers, or cannot afford to seek judicial review. The federal courts, moreover, are not permitted to review many types of immigration decisions, such as a finding of deportability on certain criminal grounds or ineligibility to apply for asylum for filing after the one-year filing deadline. In this context, the quality of the administrative appeal is of paramount importance.

16. In 2003, at the request of a commission of the American Bar Association, the law firm of Dorsey & Whitney prepared a study on the impact of the BIA’s new procedures. The report noted that in many cases, federal courts were finding immigration judge’s opinions to be based on ‘sheer speculation’ or ‘upon a fundamental misunderstanding of the law.’¹⁵ Indeed, numerous federal courts of appeal have criticized immigration judges for what they call ‘a pattern of biased and incoherent decisions in asylum cases.’¹⁶ The Seventh Circuit’s recent decision in *Benslimane v. Gonzales*, illustrates the seriousness of these problems.¹⁷ There, the court commented that ‘the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,’ noting that ‘[i]n the year ending on the date of the argument [September 23, 2005], different panels of this court reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.’¹⁸

¹³ 8 C.F.R. § 1003.19(h)(2)(i)(B).

¹⁴ Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002).

¹⁵ Dorsey & Whitney LLP, *Study Conducted For: American Bar Association Commission on Immigration Policy, Practice and Pro Bono* (July 22, 2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

¹⁶ Adam Lipnik, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005.

¹⁷ *Benslimane v. Gonzales*, 430 F.3d 828 (7th Circuit 2005).

¹⁸ *Id.*

17. BIA “streamlining” may be leading to the denial of meritorious claims. According to the Dorsey & Whitney report, by October 2002, summary affirmances had increased from between two to three percent of all cases to almost 60 percent; at the same time, dispositions in favor of noncitizens declined.¹⁹ Before the reforms, individual petitioners obtained relief in approximately 25 percent of BIA cases; by October 2002, after the reforms had been implemented, that percentage fell to about ten percent.²⁰

18. Recommendations with respect to decisions and appeals:

- Each case should have a written decision that addresses the errors raised by the appellant, the basis for determining that the case was correctly decided below, the specific legal precedents on which the decision is based, and the reason that the case was assigned to a single BIA member. This will ensure that the members give more than cursory review of the record and decision below and provide serious considerations to the issues raised by the appellant, as well as ensuring meaningful judicial review in the courts of appeals.
- Affirmances without opinion should only be allowed where the BIA agrees completely with the decision and the reasoning of the immigration judge.
- Single-member review should not be allowed in any case where judicial review would be foreclosed, such as a finding of deportability on certain criminal grounds or ineligibility to apply for asylum for filing after the one-year filing deadline.
- Reconsideration by a three-member panel of whether or not a case was appropriately decided by a single BIA Member should be available whenever a removal order is affirmed by a single Member.
- *De novo* review is a valuable and time-proven tool and should be reinstated: It allows the BIA to re-examine the facts, clear up any factual errors, mistakes or confusion and decide a case on its true facts. *De novo* review also would reduce the pressures on the federal courts. Judicial review of immigration decisions is paramount and must be preserved, but the federal courts should not be burdened with cases that can be resolved by meaningful administrative review.
- Expand the number of members on the BIA to accommodate the increasing number and complexity of cases before the immigration courts.

Judicial Review

19. The U.S. Periodic Report explains in Paragraph 241 that judicial review of the BIA decisions is generally available via a petition for review in a U.S. Court of Appeals and that aliens, in limited circumstances, may also file a petition for habeas corpus in a federal district court to challenge the lawfulness of his or her detention. The Report fails to explain, however, that recent legislation effectively bars most immigrants challenging removal from seeking judicial review of an order for removal.

¹⁹ Dorsey & Whitney Study.

²⁰ *Id.*

20. Limitations on judicial review deny many aliens the ability to challenge the legality of detention and removal orders. With the enactment in 1996 of the Anti-terrorism and Effective Death Penalty Act (“AEDPA”)²¹ and IIRAIRA, the ability of federal courts to review removal cases was severely constrained. Detained deportable aliens were barred from seeking judicial review in the district courts by way of habeas corpus petitions, and judicial review of removal orders of aliens who had committed a range of crimes were no longer subject to review by any court. IIRAIRA also included numerous provisions designed to protect the discretion of the Attorney General of the U.S. as it related to the removal of aliens. Notwithstanding these sweeping limitations on judicial review, the U.S. Supreme Court held in June 2001 that IIRAIRA did not bar criminal aliens from filing habeas corpus petitions to challenge removal orders, at least to the extent that those petitions raised “pure questions of law.”²² With the enactment of the “REAL ID ACT” in 2005, however, Congress eliminated aliens’ ability to challenge removal orders in federal district courts through habeas corpus petitions.²³ Challenges must now meet a strict 30-day deadline and be brought to the federal circuit court of appeals in the circuit in which the immigration proceedings took place. At the same time, the discretion of immigration judges to make credibility determinations based on asylum seekers’ prior statements, including statements taken during immigration inspection and expedited removal, was enhanced.

21. A recent decision of the U.S. Court of Appeals for the Seventh Circuit exposes the serious human rights concerns raised by this new law. In reviewing a challenge to the denial of protection under the CAT in *Hamid v. Gonzales*, the court explained that it lacked jurisdiction because, although the REAL ID Act abolished habeas corpus review of such claims for aggravated felons²⁴ like Hamid, and although it provided limited jurisdiction for review of constitutional claims and questions of law, Hamid’s claim was that the immigration judge’s decision was not supported by substantial evidence.²⁵ “Unfortunately for Hamid,” the court observed, his argument that the immigration judge wrongly denied him CAT relief does not depend upon any constitutional issue or question of law. Rather, it comes down to whether the IJ correctly considered, interpreted, and weighed the evidence presented – that is to say, whether the conclusion was based on substantial evidence. Because there was no indication that the immigration judge misunderstood the legal standard applicable to CAT claims and no indication that his consideration of Hamid’s claim violated any constitutional standard, there was “no basis, within the limited scope of our jurisdiction to consider the claims of aggravated felons, to find that the IJ erred.”²⁶

²¹ Pub. L. No. 104-132, 110 Stat. 1214.

²² *INS v. St. Cyr*, 533 U.S. 289, 314, 121 S.Ct. 2271, 2287 (2001).

²³ REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (“REAL ID Act”).

²⁴ For a discussion of aggravated felonies and immigration law, see Fn. 71.

²⁵ *Hamid v. Gonzales*, 417 F.3d 642 (7th Cir. 2005)

²⁶ *Id.*

22. Whole categories of persons are denied any access to federal court review based on an array of procedural bars. For example, aliens in the United States who are seeking asylum must file their applications for asylum within one year after their arrival in the United States.²⁷ An application for asylum filed after the one-year deadline may only be considered if there are “extraordinary circumstances” related to the delay in filing the asylum application, and judicial review of decisions relating to the one-year filing deadline is not permitted.

23. Recommendations with respect to judicial review: The sections of the REAL ID Act that deny judicial review to asylum applicants should be repealed so as to be consistent with the U.S.’ international obligations to protect refugees and asylum seekers.

Material Support of Terrorism Bar to Admissibility (Periodic Report para. 232)

24. The application of the “Material Support of Terrorism” bar to admissibility violates U.S. obligations to ensure access to refugee protection . The USA PATRIOT Act of 2001²⁸ and the REAL ID Act of 2005 expanded the class of individuals who are inadmissible to the U.S. for having provided material support to a terrorist or terrorist organization or contributing to a terrorist act. These changes altered the definition of a foreign terrorist organization, greatly increasing the number of organizations that fall under this label. The definition of “terrorist” now includes “a group of two or more individuals, whether organized or not, which engages, or has a subgroup which engages in” certain enumerated terrorist activities.²⁹

25. While the REAL ID Act granted the U.S. Departments of State and Homeland Security the authority to exempt refugees from the material support bar, neither agency has acted thus far to correct the exclusion of legitimate refugees and asylum seekers.³⁰ A recent study by Georgetown University Law Center found that thousands of refugees seeking protection from the U.S. have had their cases denied or put on indefinite hold by DHS because they, often under threat of death, provided “material support” in the form of goods and services to terrorist groups.³¹ The refugee admissions programs for Colombia and Burma have been nearly shut down by the agencies’ application of the “material support” bar,³² and according to the Department of Homeland Security’s U.S. Citizenship

²⁷ 8 U.S.C. §1158(a)(2)(B)

²⁸ The Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), was signed into law on Oct. 26, 2001.

²⁹ Pub. L. No. 109-13, sec. 103(a) to (b).

³⁰ See, e.g. “The Ever-Expanding Material Support Bar: An Unjust Obstacle for Refugees and Asylum Seekers,” *Int. Rel.* Vol. 83, No. 11, at 466 (Mar. 13, 2006).

³¹ UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, Georgetown University Law Center, (May 2006) (available at www.law.georgetown.edu/news/releases/documents/UnintendedConsequences-RefugeeVictimsoftheWaronTerror.pdf)

³² Jesuit Refugee Services, USA, “JRS works to mitigate effect of ‘Material Support’ legislation,” Dispatches No. 182, Nov. 15, 2005, at <http://www.jrs.net/dispatch/disp.php?lang=en&dispId+dp0511182en#05>.

and Immigration Services (USCIS), 512 asylum cases are on hold because of the material support issue.³³

26. Recommendations related to material support bar to admissibility:

- The U.S. should implement an exception to the “material support” bar for refugees and asylum seekers who involuntarily provide material support to terrorist groups.
- The DHS should establish clear administrative guidelines to prevent improper refugee exclusion.

Special Interest Removal Hearings

27. Although Article 14 of the ICCPR permits a state party to close the court when a public emergency occurs,³⁴ the treaty still requires state parties to publish the judgment from the closed trial regardless of whether national security is a concern.³⁵

28. The closure of public immigration court hearings for “special interest removal hearings” violates articles 14 of the ICCPR. On September 21, 2001, Chief Immigration Judge Michael Creppy issued a memo to all U.S. immigration judges and court administrators requiring a blanket closure of all special interest removal hearings.³⁶ The effect of this memo was to close the courtroom to visitors, family, the press and in some cases, to the detainee’s counsel.³⁷ Furthermore, the memo prohibited personnel from giving out information about the cases in general or on the agency’s 1-800 phone line and prohibited the listing of cases on the court calendars.³⁸ In response to a Congressional inquiry, the Department of Justice only admitted that as of May 2002, they had held 611 special interest removal hearings all of which were closed to the public.³⁹

29. Recommendation: The U.S. should publish the judgments of the special interest removal hearings that have been completed.

Non-Refoulement Protections For Aliens Fleeing Torture

30. In Paragraphs 220-222 of its Periodic Report, the U.S. describes the procedures for the expulsion and return of aliens to countries where they may face torture. While

³³ USCIS Headquarters Asylum Meeting with Community Based Organizations (Feb. 14, 2006).

³⁴ ICCPR, art. 14(1).

³⁵ *Id.*

³⁶ Michael Creppy, *Cases Requiring Special Procedures, Cover letter*, (Sept. 21, 2001), available at <http://newsfindlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> at 1-2 [hereinafter Creppy Memo]. Special interest removal hearings are those hearings which might involved people involved in activity that affected U.S. national security.

³⁷ *Id.* at 1; report from a private immigration attorney in Chicago.

³⁸ Creppy Memo at 2.

³⁹ Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, chp. III p. 6 (2002), available at <http://www.hrw.org/reports/2002/us911/USA0802-02.htm> [hereinafter Human Rights Watch Report].

federal regulations implementing Article 3 of the Convention Against Torture allow individuals to raise Article 3 claims for protection from *refoulement*, the U.S. has failed to create an adequate legal mechanism implementing fully the obligations of Article 3.

31. The U.S. imposes heightened standards that limit the ability of torture survivors to access protection from *refoulement*. Pursuant to the implementing regulations, the claimant must show that “it is more likely than not that he would be tortured” in order to be granted CAT relief. This U.S. evidentiary standard is not consistent with the CAT Article 3 standard of “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The U.S. standard appears to inappropriately raise the evidentiary bar for Art. 3 claims by placing the burden on the claimant to provide proof that there is a likelihood that he or she would be tortured.

32. Further, the U.S. applies a heightened standard regarding government acquiescence in the torture. In 2002, the BIA held that *refoulement* protection does not extend to persons who fear private entities a government is unable to control.⁴⁰ Although at least one U.S. federal appellate court has held that Art. 3 prohibits return when the government in the receiving country is aware of a private entity’s behavior and does nothing to stop it,⁴¹ the United States continues to apply a different understanding of the term “acquiescence” in immigration cases.⁴²

33. IIRARA and REAL ID Act have limited the ability of individuals who may be eligible for CAT relief to avail themselves of protection. (see paras. 7, 20-21 supra on expedited removal and judicial review)

34. CAT Article 3 has been implemented as limited form of protection. In practice, CAT Article 3 is used only an extraordinary form of relief for individuals who are not eligible for asylum or other discretionary forms of relief because of criminal or other bars. It is a limited form of protection that does not allow for permanent residence or family reunification. It allows for removal to a third country without adequate guarantees of protection from return to the country where they fear torture. For these reasons, the U.S. fails to fully implement the obligations of CAT Article 3.

35. Recommendation: The U.S. should change the CAT implementing regulations to make: 1) the evidentiary standards more consistent with the CAT; and 2) CAT protection from *non-refoulement* more accessible to and more durable for individuals fleeing torture and their families.

C. VIOLATIONS OF RIGHT TO EFFECTIVE REMEDY (ACCESS TO COUNSEL) IN REMOVAL PROCEEDINGS (Article 13)

⁴⁰ See *Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000).

⁴¹ See *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. Jun 18, 2003); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. May 16, 2005); and *Perez v. Loy*, 356 F.Supp.2d 172 (D.Conn. Feb 17, 2005).

⁴² See *Matter of S-V*. (fn 39 infra).

36. General Comment 15 provides that “[a]n alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.”

37. In its Periodic Report, the United States of America makes scarce reference to the right to counsel under Article 13, noting in Paragraph 230 that “[a]t the outset of a [removal hearing], the immigration judge must advise the alien of their right to representation, information on pro-bono counsel, and that the alien will have the opportunity to examine and object to evidence and to cross-examine witnesses.” Paragraph 231 reiterates that “[a]n alien in removal proceedings retains the right to representation, at no expense to the government, by qualified counsel of his choice.” Paragraph 239 specifies that an alien convicted of a crime, and thus faced with a “different kind of removal proceeding,” has a similar right to counsel. Paragraph 253 provides that an alien seeking affirmative asylum “may have counsel present at the interview and may submit the affidavits of witnesses” in support of his or her application.

38. The U.S. denies access to counsel in expedited removal. Ordinarily, the Administrative Procedures Act (“APA”) mandates that any person compelled to appear before a federal agency is entitled to be represented by counsel or a qualified representative. In spite of that general right to counsel, a proviso posted in the Federal Register in 1980 removed that right for aliens during a primary or secondary inspection at a port of entry.⁴³ Only if the alien is referred for a credible fear hearing may an individual in detention contact an attorney.⁴⁴

39. The U.S. provides no meaningful access to counsel for individuals in removal proceedings. Although the U.S. acknowledges that individuals in removal proceedings have a right to counsel at no expense to the government, it often fails to provide a meaningful opportunity for aliens to obtain counsel. The U.S. provides a list of local free legal service providers to most detainees, but this system is *ad hoc* and reliant upon the existence and capacity of local charitable organizations. The list is generally not available in translated form in most languages. It is not surprising, therefore, that the Executive Office for Immigration Review (EOIR)’s statistics demonstrate that “most persons in removal proceedings appear *pro se*, and that the lack of counsel has a pronounced, negative impact on case outcomes.”⁴⁵ In every report since 2002, EOIR expressed “great concern” at the “large number of individuals appearing *pro se*.”⁴⁶

⁴³ 45 Fed. Reg. 81732 (Dec. 12, 1980); see also 8 C.F.R. 292.5(b).

⁴⁴ See 8 U.S.C. § 1225 (b)(1)(B)(iv) (“The Attorney General shall provide information concerning the [credible fear] asylum interview . . . to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.”).

⁴⁵ Migration Policy Institute, Insight, No. 4, “Revisiting the Need for Appointed Counsel,” April 2005, at 5.

⁴⁶ In 2003, 52 percent of those facing removal, 130,730 persons, lacked counsel. EOIR FY 2003 Statistical Yearbook at G-1. In 2004, 55 percent of those facing removal, 141,553 persons, lacked counsel. EOIR FY 2004 Statistical Yearbook at G-1. And in 2005, a staggering 65 percent faced removal without representation—204,592 persons. EOIR FY 2005 Statistical Yearbook at G-1.

EOIR's statistics show a correlation between lack of counsel and adverse rulings: In cases involving represented, non-detained immigrants, 34 percent secured relief; but only 23 percent of unrepresented, non-detained immigrants received relief.⁴⁷ Similarly, in cases involving represented detained immigrants, 24 percent secured relief as compared with only 15 percent of their unrepresented counterparts.⁴⁸ More pronounced disparities appear in political asylum cases: 39 percent of represented, non-detained asylum seekers received political asylum compared with 14 percent of unrepresented, non-detained asylum seekers; 18 percent of represented, detained asylum seekers were granted asylum, compared to three percent of unrepresented detained asylum seekers.⁴⁹

40. Faced with prolonged confinement in poor conditions, individuals who have valid asylum claims are effectively forced to stipulate to removal. Individuals in removal proceedings are given the option of stipulation of removal or reinstatement of removal as an alternative to detention.⁵⁰ Amnesty International has reported several cases of individuals who agreed to voluntarily depart the United States, without an opportunity to consult counsel, only after spending months in cellular, solitary confinement without explanation.⁵¹ These individuals agreed to voluntarily depart even though they fear risk by returning to their home countries.⁵²

41. Recommendations with respect to access to counsel:

- The U.S. should provide access to counsel at the border in order to help guarantee that the government's broad powers to admit or bar non-citizens from entry are not used improperly or arbitrarily.
- The U.S. should also move to strengthen the right to counsel by prohibiting expedited removal of non-citizens already present in the interior and should make intentional agency denials of access to counsel an actionable offense.
- The U.S. should provide legal screening of all unrepresented immigrants in removal proceedings by a qualified and impartial attorney. The U.S. should also develop a system of referral for representation of income-eligible non-citizens with potential claims for relief. Finally, the U.S. should develop a system to train and screen attorneys handling such cases.

D. VIOLATIONS OF RIGHTS OF JUVENILE ALIENS IN REMOVAL PROCEEDINGS (Articles 10, 13, and 24)

⁴⁷ Migration Policy Institute, Insight, No. 4, "Revisiting the Need for Appointed Counsel," April 2005, at 6.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ 8 U.S.C. Section 1228 (c)(5).

⁵¹ Amnesty International, "Amnesty International's Concerns Regarding Post September 11 Detentions in the USA," March 2002, at 27-28, 33.

⁵² Id.

42. Article 10 of the ICCPR provides that accused juveniles shall be separated from adults and brought as speedily as possible for adjudication, and be accorded treatment appropriate to their age and legal status.

43. Paragraphs 196-198 and 213 of the U.S. Periodic Report discuss the treatment of juveniles in immigration custody. The Report states that in March 2003, care and custody of unaccompanied alien children (UACs) was transferred from DHS to the Department of Health and Human Services' Office of Refugee Resettlement (ORR). The Report further states that ORR endeavors to place unaccompanied juveniles with a relative or in a licensed shelter care facility.⁵³

44. Children's detention facilities fail to meet the requirements of the ICCPR. Of the 1.9 million alien apprehensions reported by Customs and Border Patrol in Fiscal Year 2004, 122,122 (6.4 percent) were juveniles.⁵⁴ It is projected that in 2006, 7,354 children will be detained by ORR.⁵⁵ A 2003 Amnesty International report estimated that on any given day, 500 unaccompanied juvenile aliens are held in U.S. immigration detention.⁵⁶ Before custody was transferred to ORR, juveniles were often held for months, even years, in punitive conditions pending resolution of their immigration status; in many instances, juvenile immigrants were held alongside juvenile criminal offenders.⁵⁷ Amnesty International reported instances of juveniles being housed with adults, and that juveniles were denied access to appropriate education and exercise, subjected to punitive and degrading treatment, including the excessive use of shackles and restraints and routine strip searches, and spent extended periods in solitary confinement.⁵⁸ Although the transfer of custody to ORR marks an improvement in systemic problems relating to detention of alien children, detention facilities and the standards for release still fail to meet the standards set forth in the ICCPR and in a settlement agreement reached in *Reno v. Flores*, 507 U.S. 292 (1993).⁵⁹ DHS reported in September 2005 that variations in the

⁵³ See 8 C.F.R. §§ 1212.5(a)(3)(i), 1236.3.

⁵⁴ A Review of DHS' Responsibilities for Juvenile Aliens, Department of Homeland Security, Office of the Inspector General, OIG-05-45, September 2005, p. 3.

⁵⁵ The National Center for Refugee and Immigrant Children, presentation dated April, 2006.

⁵⁶ Amnesty International, "United States of America: Unaccompanied Children in Immigration Detention," (June 18, 2003), p. 17.

⁵⁷ *Id.* at 17, 23-24 (only 17 percent of secure facilities that participated in a survey housed unaccompanied children separately from the juvenile offender population).

⁵⁸ *Id.* at 31.

⁵⁹ The Flores agreement directs that when a child is in the custody of the federal government the child will be treated with dignity, respect and special concern for the particular vulnerabilities of children, with essentially three specific obligations to: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the "least restrictive" setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention. The agreement favors release to custodians where consistent with public safety, the safety of the juvenile, and the need for the juvenile to appear for immigration proceedings. See Amnesty International Report, United States of America: Unaccompanied Children in Immigration Detention, June 18, 2003, p. 17.

facilities in which juveniles are held are “sufficient to merit concern.”⁶⁰ For example, some facilities still do not separate juveniles and adults, and juvenile aliens, ranging from babies to teenagers, who were accompanied when originally apprehended can be separated from their parents because of a lack of appropriate detention facilities to accommodate families.⁶¹

45. The manner in which children are detained discourages them from pursuing their right to seek asylum and other forms of relief. When detention is prolonged and conditions are poor, asylum or other forms of relief become dependent not solely on children’s eligibility under international and national law, but on their ability to endure long-term detention.”⁶²

46. Juveniles’ access to counsel is insufficient. Like adults, the U.S. affords unaccompanied juvenile aliens the right to counsel, but not at government expense. As a result, representation depends on the availability of *pro bono* attorneys. Amnesty International reported in 2003 that less than half of detained, unaccompanied children were represented by counsel in immigration court proceedings.⁶³ Although *Flores* requires that children be provided with information regarding the right to counsel, the availability of free legal assistance, and the right to apply for political asylum, Amnesty International’s survey found that 65 percent of surveyed facilities did not provide juveniles with lists of *pro bono* attorneys.⁶⁴ In some instances, children reported that they were given such a list, but that no one explained to them what to do with the list.⁶⁵ Further, DHS reported that, although lists are provided, the contact information on the lists is often inaccurate, and the lists are only available in English and Spanish.⁶⁶ Legal practitioners report that immigration courts do not grant adequate continuances to allow juveniles to locate and obtain counsel.⁶⁷ In some instances where juveniles requested a change of venue in order to be located closer to family, courts have required that the juvenile submit a plea admitting deportability as a condition of granting the change of venue.⁶⁸

47. Recommendations with respect to the treatment of juveniles:

- Detained juvenile aliens should be housed separately from the juvenile offender population and separately from other adults.

⁶⁰ A Review of DHS’ Responsibilities for Juvenile Aliens, p. 13.

⁶¹ Id. at 14, 19.

⁶² Id. at 59.

⁶³ Id. at 2.

⁶⁴ Id. at 45.

⁶⁵ Id.

⁶⁶ A Review of DHS’ Responsibilities for Juvenile Aliens, p. 12.

⁶⁷ Interview with Kathy Moccio, Esq., American Immigration Lawyers Association (April 25, 2006).

⁶⁸ Id.

- All ORR facilities should be made aware of, and adhere to, the requirements of the ICCPR and the *Flores* agreement.
- Juvenile detainees should be afforded the least restrictive environment practicable including efforts towards release where appropriate.
- Detained juvenile aliens should be provided with meaningful access to counsel, including accurate and up-to-date lists of available attorneys, which should be in their own language where possible, and orally translated where written lists in the detainees' language are not available.

III. VIOLATIONS OF THE RIGHTS OF LAWFUL PERMANENT RESIDENTS

A. INTRODUCTION

48. Paragraphs 216-218 of the Periodic Report describe forms of relief and protection from removal that are available to lawful permanent residents of the U.S. Changes to U.S. immigration law in 1996 have, however, expanded the number of offenses and circumstances that can lead to mandatory removal, greatly increasing the likelihood that lawful permanent residents convicted of even minor criminal activity will face mandatory removal. In addition, the new laws preclude individualized consideration of whether the equities of the case, including the impact of removal on an immigrant's family and children, justify a waiver.

49. Under U.S. law⁶⁹, an alien is placed in removal proceedings if he or she is convicted of a crime falling within certain categories.⁷⁰ Prior to 1996, most permanent residents could seek a waiver of deportation on hardship or compassionate grounds. Under former Section 212(c), the grant of waiver would depend on the equities of the case. Factors that were considered included rehabilitation, family ties, length of residence in the community and hardship imposed by return to country of origin.

50. Discretionary hearings under Section 212(c) were limited and then eliminated by two 1996 statutes, and the number of offenses requiring mandatory removal was greatly expanded.⁷¹ Under the current law, mandatory removal can follow a conviction of crimes

⁶⁹ For in depth discussions of U.S. immigration law, see Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and The Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936 (2000); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y. U. L. Rev. 97 (1998); Julie Rannik, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(C) Waiver*, 28 U. Miami Inter-Am. L. Rev. 123 (1996).

⁷⁰ These categories include: (1) a single crime of "moral turpitude" committed within five years of entering the country; (2) any two crimes of moral turpitude committed at any time; (3) any aggravated felony; (4) any drug crime other than first time possession of less than 30 grams of marijuana; (3) certain firearms offenses and (4) other miscellaneous crimes. 8 U.S.C. § 1227(a)(2).

⁷¹ Antiterrorism and Effective Death Penalty Act (AEPDA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

such as shoplifting, receipt of stolen property or simple battery if a one year sentence is imposed.⁷²

51. Further, other changes in immigration law have made it more difficult for immigrants whose offenses do not fall into the “mandatory removal” category to obtain discretionary relief if they have been in the United States for less than seven years.⁷³ Because the definition of “deportable” offenses also has expanded, a permanent resident convicted of simple drug possession or a theft of services crime, such as turnstile jumping or unauthorized cable service may face removal without an opportunity for discretionary relief.⁷⁴

52. Because many lawful permanent residents are no longer entitled to a hearing to consider the impact of removal on their right to family integrity and other factors, it is difficult to determine the exact number of individuals and families affected. Prior to 1996, immigration judges granted discretionary waivers slightly more than half the time.⁷⁵ In 1995 and 1994 respectively, 2,303 and 1,778 waivers were granted.⁷⁶ Since the

⁷² Current immigration law mandates removal if an immigrant is convicted of an “aggravated felony.” Changes in immigration law have greatly expanded the offenses that may be deemed “aggravated felonies, and an offense can be classified an “aggravated felony” even if when it is not aggravated, not a felony and may have no prison term. For instance, the definition of aggravated felony has been expanded to include any crime of violence or theft offense if there is a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(F) & (G). This includes offenses for which the term of imprisonment was suspended and the person never served a day in jail. *See* Patrick Smile, *Immigrants Face Deportation for Minor Offenses*, Inter Press Service, Apr. 29, 1999, 1999 WL 5948369 (discussing the case of Olufolake Olaleye who faced deportation for shoplifting); Susan Levine, *On the Verge of Exile: For Children Adopted from Abroad, Lawbreaking Brings Deportation*, Wash. Post, Mar. 5, 2000, at A1 (discussing the case of Mary Anne Gehris who faced deportation after pulling the hair of another woman and receiving a one year suspended sentence.) Other offenses deemed aggravated felonies, need not carry any minimum sentence. 8 U.S.C. § 1101(a)(43). Prior to 1996, lawful permanent residents who committed “aggravated felonies” were only barred from relief if they served 5 or more years in prison.

⁷³ Although the 1996 statutes provide for cancellation of removal, under Section 240A, it requires seven years of continuous residence of which 5 must be as a legal permanent resident. 8 U.S.C. § 1229b. Section 212(h) allows the Attorney General to waive inadmissibility in cases of extreme hardship to a citizen or lawfully resident parent, spouse or child, but again it does not apply to residents who have not continuously resided in the U.S. for seven years or have been convicted of an “aggravated felony.” 8 U.S.C. § 1182(h)(i)(B). Although discretionary waivers under former § 212(c) also required seven years residence, the time period continued to run through the deportation proceedings. The new law provides that the commission of a deportable crime stops the clock for counting continuous residence. 8 U.S.C. § 1229b(d)(1). This means that if a permanent resident commits a deportable crime within the first seven years of residence, he or she cannot qualify for discretionary relief and will be subject to de facto mandatory deportation. *See* Morawetz, 113 Harv. L. Rev. at n. 32 and accompanying text.

⁷⁴ *See* Morawetz, *id.* at notes 33-35 and accompanying text. A controlled substance conviction is a deportable offense. 8 U.S.C. § 1227(a)(2)(B). In addition, commission of a “crime of moral turpitude” for which a one year sentence may be imposed within an immigrant’s first five years of residence is grounds for deportation. 8 U.S.C. § 1227(a)(2)(A)(i).

⁷⁵ *Mapp v. Reno*, 241 F.3d 221, 230 (2d Cir. 2001); *Martinez v. Ashcroft*, 2002 U.S. Dist. LEXIS 8822 (D.N.Y. 2002).

⁷⁶ Rannik, 28 U. Miami Inter-Am. L. Rev. at n. 80.

end of 1995, however, the U.S. has made it a priority to greatly increase the number of “criminal” removal proceedings.⁷⁷

*Don Beharry entered the U.S. as a seven year old lawful permanent in 1983. His sister and six year old daughter are U.S. citizens and his mother is a permanent resident. In November 1996, Mr. Beharry was convicted of second degree robbery for stealing \$714 from a coffee shop. He received a two and a quarter to four and a half year sentence. In 1997, the INS commenced deportation proceedings. Under the 1996 changes in immigration laws, Mr. Beharry was deemed to have committed an aggravated felony and thus ineligible for a hearing to consider the impact of his removal on his right to family life.*⁷⁸

*Alfien Gordon was admitted to the U.S. at age 11 as a lawful permanent resident. His parents, brother, fiancée and minor daughter are all U.S. citizens. In 1999, he was convicted of the criminal sale of a controlled substance in the 5th degree. Under the 1996 changes in immigration laws, Mr. Gordon was deemed to have committed an aggravated felony and thus ineligible for a hearing to consider the impact of his removal on his right to family life.*⁷⁹

B. VIOLATIONS OF THE RIGHTS OF LAWFUL PERMANENT RESIDENTS UNDER THE ICCPR (Articles 13, 17, 23 and 24)

53. The expansion of deportable offenses and limitations on discretionary relief violates lawful permanent residents’ right to family integrity. Articles 17 and 23 of the ICCPR require that interference with family integrity and association cannot be arbitrarily imposed. The Committee has held that “the exclusion of a person from a country where close members of his family are living can amount to an interference [with the right to family integrity] within the meaning” of ICCPR Articles 17(1) and 23(1).⁸⁰

⁷⁷ Morawetz, 113 Harv. L. Rev. at n. 78 and accompanying text.

⁷⁸ Although a federal district court, granted Mr. Beharry a habeas writ, holding that because the definition of aggravated felony changed after Mr. Beharry committed his crime, he should be entitled to a discretionary relief hearing under Section 212(h), *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002), the Second Circuit reversed and remanded the case based on Mr. Beharry’s failure to exhaust administrative remedies. 329 F.3d 51. Subsequent appellate cases have rejected the argument that relief under Section 212(h) is appropriate where the crime was committed prior to the change in the law. See *Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005).

⁷⁹ *Gordon v. Mule*, 153 Fed.Appx. 39 (2d Cir. 2005)(in its decision, the Second Circuit stated that “international law does not entitle petitioner to a hearing regarding the effects of his deportation on his U.S. citizen family members.”)

⁸⁰ *Aumeeruddy-Cziffra et al v. Mauritius*, Communication No. 35/1978, U.N.Doc. CCPR/C/12/D/35/1978, at ¶ 9.2(b)(2)(i)(2) & (3)(1981) (holding that where amendment to Mauritian immigration law resulted in the loss of residence status for the “alien husbands” of Mauritian women and husbands could remain only at the grace of the Interior Minister “not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands [constitutes] an interference ... with [] family life.”).

54. This Committee has recognized that States Parties should be allowed significant scope to enforce their immigration laws. However where removal interferes with the right to family life, the interference cannot be arbitrary. Instead, the state must make a reasonable determination of whether the interference with family life is proportionate to the state's interests in removing a specific individual on a case by case basis.⁸¹ In addition to a hearing and procedural safeguards, the Committee has noted that the arbitrariness determination "extends to the reasonableness of the interference with the person's rights under Article 17 and its compatibility with the purposes, aims and objectives of the Covenant."⁸² The European Convention similarly mandates application of a proportionality test to the expulsion of non-citizens with strong family ties to the deporting nation and/or very few links to the country to which they would be sent even in instances where the noncitizen has criminal convictions.⁸³

55. Unlike the Canadian cases where this Committee has found that Canada provided petitioners an opportunity to raise the issue of family integrity and Canadian authorities properly weighed petitioners' interests against state interests in deportation,⁸⁴ in mandatory removal cases and cases where permanent residents are not eligible for discretionary relief, the U.S. fails to consider whether the interference with family life is

⁸¹See, e.g., *Stewart v. Canada*, Communication No. 538/1993, U.N.Doc. CCPR/C/79/Add.105, ¶ 12.10 (1996) (finding deportation was not arbitrary where "due consideration was given in the deportation proceedings to the deportees family connections"); *Winata v. Australia*, Communication No. 930/2000, U.N.Doc. CCPR/C/72/D/930/2000 (2001) (in light of petitioners' 14-year residence in Australia and the Australian citizenship of their 10-year-old child, Australian government did not properly balance interest in enforcing immigration law with the interference with petitioners' family life).

⁸²*Canepa v. Canada*, Communication No. 558/1993, U.N.Doc. CCPR/C/59/D/558/1993, ¶ 11.4 (1997)

⁸³*Moustaquim v. Belgium* (12313/86) [1991] ECHR 3 (18 February 1991) (deportation of Moroccan national who lived in Belgium with his immediate family from the age of two until 21 was disproportionate to state interests despite a lengthy record of petty criminality). See, e.g., *Yildiz v. Austria*, No. 37295/97, ECHR (31 Jan. 2003) (deportation for shoplifting and traffic offenses of father with small child violated right to family life); *Boultif v. Switzerland*, No. 54273/00 (2001) (despite a robbery conviction, danger to society was not proportionate to hardship of removing a petitioner married to a Swiss woman who was unlikely to be able to follow him to Algeria); *Mokrani v. France*, No. 52206/99, ECHR (15 July 2003) (expulsion of drug trafficker who lived his entire life in France, was seriously involved with a French woman and had no ties with his country of origin was disproportionate to the legitimate state interest); *Mehemi v. France* (25017/94) [1997] ECHR 77 (26 September 1997) (barring deportation of Algerian national whose parents, brothers, sisters, wife and three minor children were all French citizens); *Slivenko v. Latvia*, 2003 ECHR 498, No. 48231/99 (9 Oct. 2003), (although the Latvian government asserted a national security interest in expelling a husband posted to Latvia as a Soviet military officer in 1977 expelling him would violate the right to family life where he married and raised his child in Latvia).

⁸⁴*Canepa, id.* at ¶ 9.3, 11.4, 11.5 (where Immigration Appeal Board considered all relevant factors and weighed the petitioner's rights against the state's interest and where he had neither spouse nor children in Canada, had not shown that deportation to Italy would irreparably sever ties with his remaining family in Canada and had an almost continuous record of conviction from age 17 to 31, Committee could not conclude that deportation constituted an arbitrary interference with his family); *Stewart v. Canada*, Communication No. 538/1993, U.N.Doc. CCPR/C/79/Add.105, ¶ 12.10 (where Canadian Immigration Appeal Division is empowered to revoke deportation "having regard to all circumstances of the case" and petitioner was given ample opportunity to present evidence of family connections and Immigration Appeal Division considered the evidence but concluded the family connections did not justify revocation of deportation order where petitioner had 42 convictions, Committee cannot conclude that the deportation was unlawful or arbitrary.)

proportionate to the state's interest in deportation. Indeed, as a procedural matter, there is no opportunity to even raise the issue of family integrity.

56. Mandatory removal violates legal permanent residents' right to individualized review. Mandatory removal violates Article 13's requirement that an individual facing deportation "be allowed to submit the reasons against his expulsion and to have his or her case reviewed by [a] competent authority." Further, without individualized hearings, non-citizens cannot present evidence of the hardship deportation would inflict on their families, including minor children. The Human Rights Committee has concluded that Article 13 "is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise."⁸⁵ In both *Hammel v. Madagascar*⁸⁶ and *Giry v. Dominican Republic*,⁸⁷ the Committee held that the Covenant had been violated because aliens were not afforded an opportunity to submit the reasons against their expulsion. The European Convention similarly recognizes the right of lawfully resident aliens to submit reasons against their expulsion in fair proceedings.⁸⁸

57. The U.S. failure to consider the interests of any minor children violates the right of the child to special protection. Article 24 provides that the every child shall have the "the right to such measures of protection as are required by his status as minor, on the part of his family, society and the State." The Human Rights Committee has recognized that Article 24 requires consideration of the interests of minor children in deportation proceedings.⁸⁹ This interpretation is in accord with international and domestic laws recognizing that the child's right to special protection requires that the interests of any minor children be taken into account as a primary consideration during the removal process.

58. The European Court of Human Rights has stated that "it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child."⁹⁰ Canadian and Australian courts, relying on the Convention on the Rights of the Child, have reached similar conclusions.⁹¹

59. The Inter-American Commission has also applied the "best interests" principle in the immigration context. In a 2000 report on the status of asylum seekers in Canada,⁹² the

⁸⁵ Human Rights Committee, General Comment No. 15 (1986), U.N.Doc. HRI/GEN/1/Rev.5 (2001), at 129.

⁸⁶ Communication No. 155/83 (1987), U.N.Doc. Supp. No. 40 (A/42/40) at 130 (1987).

⁸⁷ Communication No. 193/85 (1990), U.N.Doc. Supp. No. 40 (A/45/40) at 38 (1990).

⁸⁸ See Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1, entered into force Nov. 1, 1988, E.T.S. No. 117; cf. European Convention, Art. 3.

⁸⁹ Communication No. 930/2000, U.N.Doc. CCPR/C/72/D/930/2000 at ¶ 7.

⁹⁰ *Olsson v. Sweden* (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 33-34, § 72. See also *Scozzari and Giunta v. Italy*, ECHR, 13 July 2000 (citing *Olsson*).

⁹¹ *Baker v. Canada*, [1999] 2 S.C.R. 817 (Can.), ¶¶ 69-70 (reading statute in light of CRC to allow alien mother of four citizen children relief); *Minister for Immigration and Ethnic Affairs v. Teoh*, [1995] 128 A.L.R. 353 (Austl.) (administrative decisions must conform with CRC).

⁹² See *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee*

Commission held that “[t]he absence of any procedural opportunity for the best interests of the child to be considered in proceedings involving the removal of a parent or parents raised serious concerns.”⁹³ While the state has the right and duty to maintain public order through immigration control, “that right must be balanced against the harm that may result to the rights of the individuals concerned in the particular case.”⁹⁴

60. Recommendation: Lawful permanent residents who are placed in removal proceedings after committing criminal offenses should have access to discretionary waiver hearings that consider whether the interference with the right to family life and the rights of any children involved are proportionate to the U.S.’ interest in removal.

IV. VIOLATIONS OF THE RIGHTS OF MIGRANT WORKERS

A. INTRODUCTION

61. The United States of America is the top migrant-receiving nation in the world, with the largest international migrant population in the world.⁹⁵ Between twenty-eight and thirty million migrants live in the United States.⁹⁶ While migrants make up less than eleven percent of the total population, they make up fourteen percent of the nation’s labor force and twenty percent of the low-wage labor force.⁹⁷ Included in the country’s migrant population are an estimated 9.3 million undocumented migrants,⁹⁸ approximately six million of whom are undocumented migrant workers.⁹⁹

Determination System, OAS Doc. OEA/Ser.L/V/II.106 Doc. 40 rev., February 28, 2000.

⁹³ *Id.* at ¶ 159.

⁹⁴ *Id.* at ¶ 166.

⁹⁵ UNITED NATIONS, POPULATION DIV. DEP’T OF ECON. & SOC. AFFAIRS, INT’L MIGRATION 2002, *available at* <http://www.un.org/esa/population/publications/ittmig2002/Migration%202002.pdf>. The term “migrant” is employed for all foreign born individuals in the United States, and not just those who are here on a temporary basis. Similarly, the term “migrant worker” is used here consistent with the definition in the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.

⁹⁶ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, THE FOREIGN-BORN POPULATION IN THE UNITED STATES 1 (2000).

⁹⁷ URBAN INST., BRIEF NO. 4, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (November 2003), *available at* http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf.

⁹⁸ JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (Jan. 12, 2004), *available at* http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf. Mexicans comprise approximately 57 percent of that group, people from other Latin American countries comprise 23 percent, Asians comprise approximately 10 percent and 10 percent come from all other parts of the world. *Id.* at 1.

⁹⁹ B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.—MEXICO MIGRATION TALKS 7 (2002), *available at* <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf>. See also JEFFREY S. PASSEL, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE, *available at* <http://pewhispanic.org/files/reports/46.pdf>, noting that nearly 80-85% of the new migrants to the U.S. from Mexico are unauthorized.

62. Migrants, both documented and undocumented, work long hours at the lowest-paid and most dangerous jobs in the U.S. economy. In states with high percentages of migrants, three out of every four tailors, cooks, and textile workers are migrants.¹⁰⁰ Migrants are also over represented as taxicab drivers, domestic workers, waiters, parking lot attendants, and sewing machine operators.¹⁰¹ One out of every five workers in the animal slaughter and processing industry, and approximately one out of every four workers in the landscaping industry is an unauthorized migrant.¹⁰² The manufacturing sector employs nearly 1.2 million undocumented migrant workers, the services sector employs 1.3 million, and one million to 1.4 million undocumented migrant workers labor in our fields.¹⁰³

63. The above industries that rely on migrants, particularly those that rely on unauthorized migrants, are known for frequent violations of wage, hour, and overtime payment laws. A 2000 U.S. Department of Labor survey found that 100 percent of poultry processing plants were noncompliant with federal wage and hour laws.¹⁰⁴ Just under half of the garment-manufacturing businesses in New York City were found to be out of compliance with the Fair Labor Standards Act (governing minimum wage and overtime pay) in 2001.¹⁰⁵ A 2004 study from DOL data found that 54% of contractors in the Los Angeles garment industry violated the minimum wage law.¹⁰⁶ A survey in agriculture that focused on cucumbers, lettuce, and onions revealed that compliance with labor and employment laws in these industries was unacceptably low.¹⁰⁷ The U.S. Department of Labor found in 2000 that 60% of US nursing homes routinely violated overtime, minimum wage, or child labor laws.¹⁰⁸ And last year, a survey of hundreds of New York City restaurants found that more than half were violating overtime or minimum wage laws.¹⁰⁹ In the more extreme cases, often in the agricultural or domestic worker sectors of the economy, workers find themselves in situations of servitude or forced labor.

64. The net effect of high concentration of migrants in certain industries and low compliance records in those industries has resulted in a dramatic income gap between

100THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 215 (James P. Smith & Barry Edmonston, eds., 1997), National Academy Press (1997), *available at* <<http://www.nap.edu/books/0309063566/html/index.html>>

101. *Id.* at 215.

102. Passell, *supra* n. 4, p. 29.

103. LOWELL & SURO, *supra* note 5 at 7–8.

¹⁰⁴ U.S. Department of Labor, FY 2000 Poultry Processing Compliance Report (2000).

¹⁰⁵ Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act, DAILY LAB. REP. (BNA) 87 (May 6, 1996).

¹⁰⁶ David Weil, *Compliance With the Minimum Wage: Can Government Make a Difference?* available at http://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf.

¹⁰⁷ U.S. Department of Labor, Compliance Highlights 1,3 (Nov. 1999).

¹⁰⁸ U.S. Department of Labor, Nursing Home 2000 Compliance Fact Sheet, available at http://www.dol.gov/esa/healthcare/surveys/printpage_nursing2000.htm.

¹⁰⁹ Restaurant Opportunities Center of New York and New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry*, Jan. 25, 2005, available at <http://www.rocny.org/documents/ROC-NYExecSummary.pdf>.

migrants and native-born workers. The average income per person born in the United States was \$24,300 in 2003, and legal migrants earned \$20,400, while unauthorized migrants earned just \$12,000 per person, less than half their native born counterparts.¹¹⁰

65. Furthermore, many of the industries in which migrant workers are over-represented involve dangerous working conditions. The rate of injury and death among migrant workers is alarmingly high, and increasing. Of the foreign born workers who were fatally injured at work in 2004, 60 percent were Latino. A recent investigation found that every day, a Mexican worker dies on the job in the United States.¹¹¹ In 2004, the fatality rate among Latino workers was 19 percent higher than the fatal injury rate for all U.S. workers. At the national level, fatal injuries to immigrant Latino workers increased 11 percent from 2003 to 2004.¹¹²

Esmeralda Morejon worked at a hinge factory in California. She developed ovarian cancer which required surgery. She requested time off from her employer under California's family leave law, and was fired. Ms. Morejon took her employer to court for back pay under state law. The court said that since Morejon had used false documents to get her job, her culpability excluded her from protection of the law, even if her employer also had violated the immigration law when it hired her. Morejon v. Terry Hinge and Hardware, 2003 WL 22482036 (Cal.App, 2 Dist. 2003).

Miners at the Co-Op Mine in Utah labor underground and earn between \$5.25 and \$7 per hour, with virtually no health or retirement benefits, even though the going rate for coal mining jobs is about \$20 per hour with benefits. When they tried to organize a union, their employer locked them out of their work for over ten months in 2004. In fall of that year, the company issued letters to union activists claiming that the workers needed to resubmit information regarding their immigration status, or be fired. When the employees did not provide additional information, they were fired. The issue is still being decided by the courts, but if any of the workers are shown to be undocumented, they will not get any remedy for the time that they have been out of work.

B. VIOLATIONS OF THE RIGHTS OF MIGRANT WORKERS (Articles 2, 14, 22, and 26)

66. The U.S. improperly denies and fails to ensure various ICCPR rights to categories of non-citizen workers in violation of Articles 2, 22 and 26 of the ICCPR. In particular, the U.S. discriminatorily denies certain migrant workers and agricultural and domestic workers freedom of association rights and effective access to the juridical process and to

¹¹⁰ Passell, supra n. 4, p. 30.

¹¹¹ Justin Pritchard, *A Mexican Worker Dies Each Day, AP Finds*, NEWSDAY (Mar. 14, 2004).

¹¹² Scott Richardson: *A visual essay: Fatal work injuries among foreign-born Hispanic workers*, MONTHLY LABOR REVIEW, (October 2005), available at <http://www.bls.gov/opub/mlr/2005/10/ressum.pdf>.

the courts in a number of circumstances.¹¹³ Migrant workers in irregular status and certain guestworkers are refused access to attorneys under federally-funded legal services programs, in violation of Art. 14.¹¹⁴ Further, no nationwide policy protects these migrants in irregular status who are victims of labor law violations from disclosure of their status and deportation as a consequence of their involvement in judicial proceedings.

67. The U.S. discriminates against migrant workers through its exclusion of categories of workers from full protection under its labor laws. In paragraph 42 of the Second and Third Periodic Report of the United States, the U.S. states that, “Aliens who are admitted and legally residing in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant rights and protections of citizens...” The U.S. report implies by omission that aliens NOT admitted and legally residing in the U.S. are not afforded Covenant protections. This is inconsistent with the treaty language that the rights of the Covenant apply to “all individuals within its territory and subject to its jurisdiction” (art. 2, para. 1), as well as the Human Rights Committee’s interpretation that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹¹⁵

68. The U.S. position that only “legal aliens” are guaranteed equal protection of the law has resulted in a patchwork of laws and remedies, some of which protect workers in irregular status, and others of which do not. US law has also developed a series of exclusions from the law for both certain industries in which migrants are overrepresented, and for particular classes of migrants.

69. Federal law protects against discrimination on the basis of race, ethnicity, national origin, religion and gender. But, with limited exceptions, there is no protection against discrimination based on immigration status. The Immigration Reform and Control Act (“IRCA”) of 1986 protects citizens and certain categories of legally authorized migrants from discrimination on the basis of their citizenship status. But not only do those provisions not apply to undocumented migrants, they also exclude from protection legal migrants who fail to demonstrate their intent to become citizens in their failure to apply for citizenship within six months of becoming eligible to do so.¹¹⁶

¹¹³ The US has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which also includes these rights. However, as the Committee has noted, the ICCPR applies to economic, social and cultural rights such as those mentioned here, and the general principle of equality in Article 26 applies whether or not specific rights are also covered in other international instruments. *S.W.M. Broeks v. the Netherlands*, Communication No. 172/1984 U.N. Doc CCPR/C/OP/2 At 196 (1990), ¶¶ 12.1 and 12.3.

¹¹⁴ The Inter-American Court of Human Rights also addressed this right in its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, OC-18, ¶¶ 121, 160.

¹¹⁵ ICCPR General Comment 15 (Twenty-seventh session, 1986): The Position of Aliens under the Covenant, A/41/40 (1986) 117 at para. 2. See also para. 1 “...In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”

¹¹⁶ 8 U.S.C.A. § 1324b(3).

70. The federal Migrant and Seasonal Agricultural Worker Protection Act, a specialized law that covers terms and conditions of employment for agricultural workers, excludes certain seasonal migrants admitted under a federal program known as the H-2A visa program, from coverage. This exclusion applies to approximately 40,000 workers yearly.¹¹⁷

71. Through the Legal Services Corporation, Inc., the federal government provides funding for the provision of free legal aid to income eligible individuals. In 1996, Congress amended the law under which this money is granted prohibiting any legal aid program receiving federal funds from representing unauthorized migrants.¹¹⁸ Furthermore, the Legal Services Corporation-funded entities are prohibited from representing certain seasonal migrants coming under the H-2B visa program available to employers seeking unskilled laborers on a seasonal or temporary basis.¹¹⁹

72. In addition, domestic workers and agricultural workers (who are primarily of Latino ancestry) are explicitly excluded from certain protections set out in the federal Fair Labor Standards Act which guarantees a minimum wage and overtime pay, the National Labor Relations Act, (guaranteeing freedom of association) and the Occupational Safety and Health Act (protecting health and safety on the job).

73. U.S. Supreme Court jurisprudence has both directly and indirectly affected the rights to equal protection and nondiscrimination for this vulnerable group of migrant workers in irregular status. The US Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), limited judicial remedies for undocumented workers who are illegally fired from their work for exercising freedom of association rights guaranteed under Art. 22. The decision found undocumented workers are not entitled to compensation for lost wages, the only individual remedy for such violations. While the US government report submitted to this Committee, at ¶ 343, makes reference to the Hoffman decision, it does not make reference to the effects of that decision, both on freedom of association rights and on other labor rights. The *Hoffman* decision has had a negative spill-over effect into other areas of labor and employment laws as applied to migrant workers in an irregular status.

74. The U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* held that undocumented workers who are illegally fired from their work for exercising freedom of association rights are not entitled to compensation for lost wages, in direct violation of Article 22. Compensation for lost wages is the only individual remedy available under the National Labor Relations Act, and the deprivation of this remedy effectively denies these workers their rights to freedom of association. The International Labor Organization and the Inter-American Court of Human Rights have each condemned this practice.

¹¹⁷ 8 U.S.C.A. § 1324(b)(3); 29 U.S.C.A. § 1802(8)(B)(2), (10)(B)(iii).

¹¹⁸ 45 C.F.R. § 1626.3.

¹¹⁹ Id; 45 C.F.R. § 1626.4.

75. In its Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, OC-18, the Inter-American Court on Human Rights recently held that discrimination of this nature against persons on the basis of immigration status would violate Articles 2 and 26 of the ICCPR.¹²⁰ The Court's decision made clear that countries have the right to decide under what conditions foreigners may enter its borders, but once a worker enters into an employment relationship, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."¹²¹ It then outlined the different labor rights which it said were fundamental and must be respected by member countries under the principal of non-discrimination.¹²²

76. Specifically, the Inter-American Court of Human Rights stated that irregular migrants "possess the same labor rights as those that correspond to other workers . . . and [the State] must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them."¹²³

77. *Hoffman Plastics has limited judicial remedies for undocumented workers.* Following the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, some state courts have refused to accord undocumented workers compensation for wages lost due to work-related injuries and on-the-job discrimination. At the federal level, U.S. law against citizenship discrimination does not protect these workers. In addition, the Equal Employment Opportunity Commission charged with monitoring and enforcing the federal anti-discrimination laws in the United States, rescinded its earlier policy of pursuing back pay on behalf of undocumented workers, although it maintains that unauthorized migrants are still covered by anti-discrimination statutes.¹²⁴

78. The issue of the availability of back pay under state discrimination laws has not been fully addressed by the state courts since *Hoffman*, but while back pay at the state

¹²⁰ Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, OC-18. ("OC-18") OC-18 explicitly covers all OAS Member States that have ratified the ICCPR and is based upon the fundamental principle of equality and non-discrimination found in the ICCPR as well as other international and regional human rights instruments. See ¶ 60 of OC-18.

¹²¹ Id. at ¶¶ 134.

¹²² In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

¹²³ OC-18, ¶ 160.

¹²⁴ U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Jun. 27, 2002) available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

level *may* remain unaffected, there have been some state court decisions that have harmed undocumented workers. For example, both New Jersey and California courts have concluded that victims of discrimination who are undocumented have no right to certain forms of compensation.¹²⁵

79. In the workers compensation arena, while most state courts and agencies have granted undocumented migrants the full range of benefits claimed, including medical benefits and lost wages, in at least two states, Michigan, Pennsylvania, courts have said that undocumented workers may not be entitled to compensation for lost wages because of injuries, following the reasoning employed in the *Hoffman* decision. In New Hampshire, a worker who has lost wages after an injury was also considered not entitled to full compensation.¹²⁶ In New York, the highest level court has decided that injured workers' immigration status may be relevant to the amount of monetary compensation they may seek.¹²⁷ In other states, workers fear retaliation – such as prosecution for document fraud and ultimately removal – if they pursue their full rights under the law.¹²⁸

80. The U.S. has failed to protect the existing labor rights of migrant workers on the Gulf Coast following Hurricane Katrina. A country's compliance with nondiscrimination provisions must encompass the provision of practical access to enforcement mechanisms: otherwise, formal legal protections serve no purpose on the ground. The US has come under harsh criticism for its diminishing efforts to protect all workers' rights. As illustrated by the example noted above, the US has been especially negligent in providing migrant workers on the Gulf Coast with practical access to protection against the violation of their rights violates the principle of equality before the law.¹²⁹

Juan was recruited from a day labor site in Houston by a contractor from Biloxi, Mississippi to assist in post Hurricane Katrina clean-up efforts. He traveled to the Mississippi Gulf Coast on a bus provided by the labor contractor, thinking that he had finally found the steady job he needed to support his family. Upon his arrival, however, Juan was informed that he

¹²⁵ See, *Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal.App, 2 Dist. 2003) A New Jersey court held that a worker claiming discriminatory termination under New Jersey's Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court recognized that there might be cases where "the need to vindicate the policies of the LAD ... and to compensate an aggrieved party for tangible physical or emotional harm" might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. A.D. 2004), cert. denied 849 A.2d 184 (2004).

¹²⁶ *Rosa v. Partners in Progress, Inc.*, 868 A2d 994 (N.H. 2005).

¹²⁷ *Balbuena v. IDR Realty, LLC*, --- N.E.2d ---, 6 N.Y.3d 338, 2006 WL 396944 N.Y. 2006).

¹²⁸ *Sanchez v. Eagle Alloy*, 658 N.W. 2d 510 (Ct. Apps. Mich 2003); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A.2d 99 (Pa, 2002); *Doe v. Kansas Dep't of Human Resources*, 90 P.3d 940 (Sup. Ct. Kansas 2004).

¹²⁹ See, *MIGRANT WORKERS ON THE GULF COAST: Human rights abuses in the wake of Katrina, A Preliminary Report to the Inter-American Commission on Human Rights*, The Transnational Worker Rights Clinic, University of Texas School of Law and Equal Justice Center (MARCH 2006).

*owed the contractor \$3,000 for the cost of transportation, which he would have to “work off” as part of his wages. At the end of two weeks of full-time work, Juan received his first paycheck. The amount was only \$150.*¹³⁰

81. On September 6, 2005, DHS announced that it would not sanction employers for failing to verify the work authorization of their employees, as required under Section 274A of the Immigration and Nationality Act.¹³¹ Shortly thereafter, on September 8, the executive exercised his emergency powers to suspend key provisions of the 1931 Davis-Bacon Act¹³² in the Katrina-affected zone. Davis-Bacon is Depression-era legislation which requires federal contractors to pay a “prevailing wage”—that is, the average regional wage for the particular type of work being performed—on any job with a value of over \$2,000. The executive proclamation pointed out that the suspension “*will permit the employment of thousands of additional individuals.*”¹³³

82. The suspension of Davis-Bacon, coupled with the waiver of employment eligibility verification requirements, provided an immediate and powerful impetus for employers to bring unauthorized migrants to the Gulf Coast.¹³⁴ Latin American migrant workers, it was observed, were put to work doing “the dirtiest cleanup work, often in the employ of those big companies, and often for less money than local workers might insist on.”¹³⁵ National attention to the situation intensified when a large number of unauthorized workers were detained by immigration officials while working at Belle Chasse Naval Air Station south of New Orleans. The workers’ presence was reported by a former employee of one of the government contractors operating on the air station base. He, like other local workers, had been fired by the company because, as he saw it, they were being replaced by lower-paid, unauthorized workers.

83. Because of the tensions created by employer and government practices, and raids such as the one conducted at Belle Chasse, migrant workers on the Gulf Coast are even more wary than usual about approaching government authorities regarding employment problems, no matter how severe they might be. One Latin American worker told the Houston Press that after a previous interaction with

¹³⁰ From *MIGRANT WORKERS ON THE GULF COAST: Human rights abuses in the wake of Katrina, A Preliminary Report to the Inter-American Commission on Human Rights*, The Transnational Worker Rights Clinic, University of Texas School of Law and Equal Justice Center (MARCH 2006).

See also, *Broken Levees, Broken Promises*, Southern Poverty Law Center (2006), available at <http://www.splcenter.org/pdf/static/IJPorleans.pdf>.

¹³¹ DEPARTMENT OF HOMELAND SECURITY, *Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims*, September 6, 2005, available at <http://www.dhs.gov/dhspublic/display?content=4788>

¹³² 40 U.S.C. § 3140 et. seq.

¹³³ See White House Press Releases, Sept. 8, 2005, available at www.whitehouse.gov/news/releases/2005/09/20050908-5.html.

¹³⁴ See Keith Plocek, *Shortchanged*, HOUSTON PRESS, February 9, 2006, available at http://www.houstonpress.com/Issues/2006-02-09/news/feature_print.html.

¹³⁵ *Id.*

New Orleans police, he was not willing to complain about his unpaid wages.¹³⁶ In fact, he did not even report being the victim of armed robbery for fear that he would only anger police or arouse their suspicion.

84. According to information presented before the Inter-American Commission on Human Rights by the Mississippi Immigrants' Rights Alliance on March 3, 2006, the U.S. Department of Labor ("DOL") has explicitly discontinued its investigatory function on the Gulf Coast and has refused to assist workers with complaints against specific employers.

85. This lack of practical access to legal protection is part of a vicious circle that begins and ends with discrimination. The U.S. government's failure to provide workers with such access has resulted in continued suffering and exploitation for workers, at the expense of their basic human dignity. The authors recognize that the U.S. government is not obligated under international law to provide absolutely equal treatment to migrant workers with respect to every provision of domestic law. The government has the prerogative to draw distinctions in discrete cases for purposes of achieving policy objectives, so long as those distinctions do not rise to the level of discriminatory treatment within the framework of human rights law. In this case, however, when injured workers are denied full access to emergency medical treatment, or are too afraid to report even serious crimes committed against them, it is clear that the effects of the U.S. policy are no longer proportional to the stated goals, and that the distinction constitutes unlawful discrimination.

86. Recommendations with respect to migrant workers' rights:

- The U.S. should ratify the Migrant Workers' Convention.
- The U.S. Congress should repeal federal industry-based and immigration status-based limitations on labor rights; provide "whistleblower" protection, including lawful immigration status, for victims of labor law violations; and repeal restrictions on Legal Services Corporation funded legal aid programs that prohibit them from providing legal representation to individuals on the basis of their immigration status.
- The U.S. Congress should include fully enforceable labor rights for all categories of immigrants in federal immigration reform legislation. In addition, federal immigration reform legislation should include provisions for regulating abusive contractors and joint responsibility for violations of labor law.
- The U.S. Administration should invest additional funds in workplace inspections for labor violations in industries frequented by immigrant workers. In addition, the U.S. should adopt a federal policy which includes a clear "firewall" between labor enforcement and immigration enforcement; that is, to make it clear that a workers' immigration status is never a subject of questioning in a labor dispute.

¹³⁶ Keith Plocek, *Shortchanged*, HOUSTON PRESS, February 9, 2006, available at http://www.houstonpress.com/Issues/2006-02-09/news/feature_print.html.

V. SUMMARY OF RECOMMENDATIONS

Recommendations Related to Refugees, Asylum Seekers and Other Aliens in Need of Special Protection

Recommendations with respect to expedited removal:

- The U.S. should improve training and quality assurance practices for inspections officers to ensure that aliens in expedited removal are informed of their right to a credible fear interview and that aliens who express such a fear are, in fact, afforded an interview.
- The U.S. should provide specialized training to enable immigration inspectors and detention facility staff to better understand and work with a population of asylum seekers, many of whom may be psychologically vulnerable due to the conditions from which they are fleeing.
- The U.S. should create a reliable inter-bureau system that tracks real-time data of aliens in expedited removal proceedings. There is currently no capability to track statistics of aliens from the beginning of the expedited removal process from the port of entry, through detention, and up until the completion of the hearing before an immigration judge. Such technology and standards would improve the communication of services to, and direct care of, detainees.

Recommendations with respect to decisions and appeals:

- Each case should have a written decision that addresses the errors raised by the appellant, the basis for determining that the case was correctly decided below, the specific legal precedents on which the decision is based, and the reason that the case was assigned to a single BIA member. This will ensure that the members give more than cursory review of the record and decision below and provide serious considerations to the issues raised by the appellant, as well as ensuring meaningful judicial review in the courts of appeals.
- Affirmances without opinion should only be allowed where the BIA agrees completely with the decision and the reasoning of the immigration judge.
- Single-member review should not be allowed in any case where judicial review would be foreclosed, such as a finding of deportability on certain criminal grounds or ineligibility to apply for asylum for filing after the one-year filing deadline.
- Reconsideration by a three-member panel of whether or not a case was appropriately decided by a single BIA Member should be available whenever a removal order is affirmed by a single Member.
- *De novo* review is a valuable and time-proven tool and should be reinstated: It allows the BIA to re-examine the facts, clear up any factual errors, mistakes or confusion and decide a case on its true facts. *De novo* review also would reduce the pressures on the federal courts. Judicial review of immigration decisions is paramount and must be preserved, but the federal courts should not be burdened with cases that can be resolved by meaningful administrative review.

- Expand the number of members on the BIA to accommodate the increasing number and complexity of cases before the immigration courts.

Recommendations with respect to judicial review: The sections of the REAL ID Act that deny judicial review to asylum applicants should be repealed so as to be consistent with the U.S.’ international obligations to protect refugees and asylum seekers.

Recommendations related to material support bar to admissibility:

- The U.S. should implement an exception to the “material support” bar for refugees and asylum seekers who involuntarily provide material support to terrorist groups.
- The Department of Homeland Security should establish clear administrative guidelines to prevent improper refugee exclusion.

Recommendations related to Special Interest removal hearings: The U.S. should publish the judgments of the special interest removal hearings that have been completed.

Recommendation related to non-refoulement protections for aliens fleeing torture: The U.S. should change the Convention Against Torture (CAT) implementing regulations to make: 1) the evidentiary standards more consistent with the CAT; and 2) CAT protection from *non-refoulement* more accessible to and more durable for individuals fleeing torture and their families.

Recommendations with respect to access to counsel:

- The U.S. should provide access to counsel at the border in order to help guarantee that the government’s broad powers to admit or bar non-citizens from entry are not used improperly or arbitrarily.
- The U.S. should also move to strengthen the right to counsel by prohibiting expedited removal of non-citizens already present in the interior and should make intentional agency denials of access to counsel an actionable offense.
- The U.S. should provide legal screening of all unrepresented immigrants in removal proceedings by a qualified and impartial attorney. The U.S. should also develop a system of referral for representation of income-eligible non-citizens with potential claims for relief. Finally, the U.S. should develop a system to train and screen attorneys handling such cases.

Recommendations with respect to the treatment of juveniles:

- Detained juvenile aliens should be housed separately from the juvenile offender population and separately from other adults.
- All ORR facilities should be made aware of, and adhere to, the requirements of the ICCPR and the *Flores* agreement.
- Juvenile detainees should be afforded the least restrictive environment practicable including efforts towards release where appropriate.

- Detained juvenile aliens should be provided with meaningful access to counsel, including accurate and up-to-date lists of available attorneys, which should be in their own language where possible, and orally translated where written lists in the detainees' language are not available.

Recommendation related to lawful permanent residents in removal proceedings

Lawful permanent residents who are placed in removal proceedings after committing criminal offenses should have access to discretionary waiver hearings that consider whether the interference with the right to family life and the rights of any children involved are proportionate to the U.S.' interest in removal.

Recommendations related to migrant workers' rights

- The U.S. should ratify the Migrant Workers' Convention.
- The U.S. Congress should repeal federal industry-based and immigration status-based limitations on labor rights; provide "whistleblower" protection, including lawful immigration status, for victims of labor law violations; and repeal restrictions on Legal Services Corporation funded legal aid programs that prohibit them from providing legal representation to individuals on the basis of their immigration status.
- The U.S. Congress should include fully enforceable labor rights for all categories of immigrants in federal immigration reform legislation. In addition, federal immigration reform legislation should include provisions for regulating abusive contractors and joint responsibility for violations of labor law.
- The U.S. Administration should invest additional funds in workplace inspections for labor violations in industries frequented by immigrant workers. In addition, the U.S. should adopt a federal policy which includes a clear "firewall" between labor enforcement and immigration enforcement; that is, to make it clear that a workers' immigration status is never a subject of questioning in a labor dispute.

ADDENDUM: PENDING IMMIGRATION REFORM LEGISLATION

Currently, significant immigration reform is being debated in the U.S. Congress. A wide range of proposals have been introduced, including both extremely restrictive enforcement proposals and guest worker programs that would allow some undocumented aliens a chance to become citizens.

In December 2005, the U.S. House of Representatives passed **the Border Security, Antiterrorism, and Illegal Immigration Control Act of 2005** (H.R. 4437). There was very little debate on H.R. 4437, which, if enacted, would severely restrict due process rights of aliens and threaten the United States' ability to provide protection to asylum-seekers. In the Senate, a bill introduced by Senator Specter ("the Specter mark") contained equally troubling provisions, as did S. 2454, a bill introduced by Senate Majority Leader Frist. The Senate failed to vote on the proposed legislation in April 2006.

87. Some of the most troubling provisions of the pending legislation that would impact immigration due process and violate Article 13 of the ICCPR include:

- Making unauthorized presence in the U. S. a felony, which would make a person ineligible for future legal immigration such as asylum (H.R. 4437 and S. 2454);
- Expanding the definition of aggravated felony for deportation purposes to include relatively minor offenses with no possibility of waiver for family or other reasons (H.R. 4437, Specter mark, and S. 2454). H.R. 4437 and S. 2454 would also make the change retroactive.
- Expanding the use of expedited removal and allow the removal of any alien, including lawful permanent residents, without a court hearing if the government alleges that the person has an aggravated felony or firearm conviction (Specter mark and S. 2453); and
- Limiting judicial review of cases and access to federal courts (H.R. 4437, Specter mark and S. 2454).

88. Further, the Specter mark and S. 2454 include new detention provisions which would significantly expand mandatory detention and long-term detention for asylum-seekers and others. In particular, persons who are deportable but cannot be removed directly to their home country would be detained indefinitely. If enacted, this legislation would overturn the U.S. Supreme Court's *Zadvydez* decision, which limits post-order detention. *Zadvydez* has been a significant improvement on the previous system of indefinite detention, bringing the U.S. into compliance with the Covenant and addressing an issue raised by the Human Rights Committee in its 1995 Concluding Observations (para. 298).