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BACKGROUND BRIEFING NOTE

The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR

The U.S. detention system for asylum seekers lacks the kinds of safeguards that prevent detention from being arbitrary within the meaning of the International Covenant on Civil and Political Rights (ICCPR). ICCPR Article 9(1) prohibits the United States from subjecting asylum seekers to arbitrary detention. Article 9(4) requires that anyone deprived of liberty by arrest or detention is “entitled” to proceedings before a court which will decide “without delay” on the lawfulness of the detention and order release when detention is not lawful.

Under current U.S. law, asylum seekers are subject to mandatory detention upon their arrival in the United States. While they can request release on parole from the immigration authority, now the U.S. Department of Homeland Security (DHS), once they pass through a screening procedure, the release process varies widely across the country, and in some areas of the country, asylum seekers are rarely released. A report, issued in 2005 by the bi-partisan U.S. Commission on International Religious Freedom (USCIRF), confirmed the wide variations in these release practices.¹

There is no process for appealing the DHS decision to detain initially, nor the subsequent decision to deny parole, to a court or to another independent judicial or administrative authority. To further exacerbate the situation, neither immigration law nor regulations spell out the length of time that asylum seekers can be detained while their proceedings are progressing.² The United States has also, over the last

¹ U.S. Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal* (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/ERS_RptVolII.pdf. The Commission, a governmental body that advises the President and Secretary of State on religious freedom matters, recommended significant reforms to the U.S. system for detaining asylum seekers.

² Eleanor Acer, *Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers*, Refuge, vol. 20. no. 3 (2002), p.p. 48-49; Human Rights First, *Refugees Behind Bars* (1999), available at <http://www.humanrightsfirst.org/pubs/descriptions/behindbars.htm>; Lawyers Committee for Human Rights (Now Human Rights First), *Petition to the INS and Department of Justice Seeking a Rule on Procedures for Parole of Detained Asylum Seekers*; January 1999; Frederick N. Tulsy, “Uncertain Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes,” *San*

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five years, initiated several discriminatory detention policies that have targeted asylum seekers based on their nationality.

Asylum seekers are detained in immigration jails in the United States in conditions that are inappropriate for the population – a central finding of the U.S. Commission on International Religious Freedom. As a result of this flawed system, refugees are detained for months – and sometimes years – in prison-like conditions in the United States. For example:

- A Burmese woman, a member of a religious and ethnic minority group, was detained for nearly two years in a Texas immigration jail, even though she would clearly face torture and persecution because of her political views if returned to Burma.³
- A pastor, who fled Liberia after criticizing the use and abuse of child soldiers, was detained for three months in a New Jersey immigration jail.⁴
- A young human rights worker from Cameroon, who was arrested, jailed, and tortured there on three harrowing occasions, was detained for 16 months at New York and New Jersey immigration jails, before he was granted asylum and released.
- Two refugees from the Darfur region of Sudan were detained for about five months in a U.S. immigration jail before being granted asylum and finally released.⁵

A comprehensive medical study, conducted by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, confirmed that asylum seekers detained in these facilities suffer from high levels of depression and post-traumatic stress syndrome (PTSD), and that these conditions get worse, the longer that they are detained.⁶

The United States is currently increasing its detention capacity and has expanded its use of expedited deportation procedures which require “mandatory detention.”

Jose Mercury News, December 10, 2000; Mirta Ohito, “Inconsistency at INS,” *New York Times*, June 22, 1998; Toby Beach & Peter Yost, “INS Jailing Many Asylum Seekers,” *Boston Globe*, November 17, 1998.

³ Rachel Swarns, “Burmese Woman Can Stay,” *New York Times*, June 12, 2006; In re S-K-, 23 I & N Dec. 936 (BIA 2006). (Recognizing eligibility for relief under the U.N. Convention Against Torture, but declining to grant asylum because of her support for the Chin armed wing, even though she presents no danger to U.S. security). The resolution of this woman’s asylum case has been prolonged by the U.S. government’s failure to adequately address the impact of the so-called “material support” bar on asylum cases. See Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum*, (2006) and U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America*, 87th Session, July 10-28, 2006, CCPR/C/USA/Q/3/CRP.4; At the same time, U.S. immigration officers have refused to release her from immigration jail even though she has family in the United States and her identity is not in question.

⁴ David Crary, Associated Press, “Critics Decry Immigrant Detention Push,” *Washington Post*, June 24, 2006.

⁵ Rachel Swarns, “2 Darfur Men Gain Asylum,” *New York Times*, November 19, 2004; Sewell Chan (Rachel Swarns contributed reporting), “Darfur Strife Behind them, Two Detainees Win Freedom,” *New York Times*, November 21, 2004; Rachel Swarns, “Sudan Conflict Reaches U.S. Immigration Courts,” *New York Times*, September 28, 2004.

⁶ Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2002), p.p. 55-86.

A. Detention is Automatic for Arriving Asylum Seekers

Under a 1996 immigration law, known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the “1996 immigration law”), immigration inspectors at U.S. airports and borders were given the power to order the immediate deportation of people who arrive in the United States without proper travel documents. Many refugees arrive without proper travel documents, unable to obtain them from the governments which they flee. Even asylum seekers who arrive on valid passports have been subject to expedited removal.⁷ While genuine asylum seekers are not supposed to be deported under this summary process – called “expedited removal” – the process is so hasty and lacking in safeguards that mistakes can and do happen.⁸

The ICCPR looks beyond the technical legality of detention under domestic law, presupposing a fair review of the circumstances of the individual to determine the necessity of detention.⁹ The U.N. Human Rights Committee, in examining the detention of a Cambodian asylum seeker in Australia, concluded that detention should be considered arbitrary when it was not necessary in light of all the circumstances of the individual asylum seeker’s case:

The Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not *necessary in all the circumstances of the case*, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context . . .¹⁰

Consistent with Article 9, Article 31 of the U.N. Convention Relating to the Status of Refugees provides that, “Contracting States shall not apply to the movements of such refugees restrictions other than those which are *necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.”¹¹ The Executive Committee of the United

⁷ Asylum seekers who arrive on valid passports have been detained and put into the expedited process when immigration inspectors decided that their visas were invalid for instance, if the individual had not departed the United States on time during a prior visit or if the asylum seeker told inspectors that he wanted to apply for asylum – thereby showing an “immigrant intent” and making the “non-immigrant” visa invalid in the eyes of the immigration inspector. See Human Rights First, *In Liberties Shadow* (2004) p. 12. See also USCIRF Report, *Asylum Seekers in Expedited Removal*, p. 52.

⁸ Eric Schmitt, “When Asylum Requests are Overlooked,” *New York Times*, August 15, 2001; John Moreno Gonzalez, “Amityville Woman Seeks \$8 Million in JFK Mix-Up” *Newsday*, July 12, 2000; Human Rights First, *Is this America?* (2002), available at http://www.humanrightsfirst.org/refugees/reports/du_e_process/du_e_process.htm.

⁹ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (N.P. Engel: 1993), p. 172 (“It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.”)

¹⁰ *A. v. Australia*, United Nations Human Rights Committee, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997), available at www.unhcr.ch/tbs/doc.nsf/

¹¹ U.N. Convention, and Protocol, Relating to the Status of Refugees, 1951 Convention and 1967 Protocol, art. 31(1) available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b66c2aa10> (emphasis added). This protection applies to asylum seekers, a point confirmed in the conclusions of a group of experts convened by the UNHCR to examine issues relating to Article 31. Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies

Nations High Commissioner for Refugees (UNHCR), of which the United States is a member, has concluded that detention of asylum seekers “should normally be avoided” and may only be resorted to “if necessary” and on “grounds prescribed by law” for certain specified reasons relating to the individual asylum seeker.¹² The UNHCR Detention Guidelines similarly provide that, in order to ensure consistency with Article 31, “detention should only be resorted to in cases of necessity.”¹³ A November 2001 roundtable of experts assembled by the UNHCR confirmed that a determination of whether detention is “necessary” for purposes of Article 31 can only be made by considering the individual case of an asylum seeker.¹⁴

U.S. law calls for “mandatory detention” of all asylum seekers who are subject to expedited removal. As a result, asylum seekers who arrive at U.S. airports and borders are held in detention facilities and immigration jails around the country. Those who request asylum after entering the United States are not generally detained.¹⁵

The U.S. Department of Homeland Security has expanded its use of expedited removal – and mandatory detention – within 100 miles of U.S. borders. Not only does this change give Border Patrol Officers the power to order deportations (despite the many flaws in the process), but it also expands the use of mandatory detention for asylum seekers.

B. The Parole Process for Detained Asylum Seekers is Arbitrary

While the 1996 law requires the detention of asylum seekers during the expedited removal process, asylum seekers are no longer subject to expedited removal once they have shown a “credible fear of

(Geneva: November 8 & 9, 2001), available at www.westnet.com.au/jackhsmi/roundtable-summaries.pdf (Conclusion 10 (g) “The effective implementation of Article 31 requires that it apply also to any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure.”)

¹² U.N. High Commissioner for Refugees, Executive Committee Conclusion on Detention of Refugees and Asylum Seekers No. 44 (1986) (“If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order”)

¹³ U.N. High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, Guideline 3 (1999) available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bd036a74>.

¹⁴ “[A]ppropriate provision should be made at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of [Article 31], and that the relevant standards, in particular international human rights law, are taken into account.” Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: November 8 & 9, 2001), available at www.westnet.com.au/jackhsmi/roundtable-summaries.pdf.

¹⁵ In 2002 and 2003, at least 16,000 new asylum seekers were subjected to mandatory detention upon their arrival in the United States. The number of asylum seekers in general, and the number seeking protection at U.S. airports and borders has declined significantly in the last few years. In fiscal year 2002, 10,000 asylum seekers were referred for credible fear interviews, and in fiscal year 2003, 6,000 asylum seekers were referred for credible fear interviews, meaning that at least this many asylum seekers were subject to expedited removal and the mandatory detention provisions: Meeting with Joseph Langlois, Director, Asylum Division, United States Citizenship and Immigration Services, November 12, 2003, copy of minutes on file with Human Rights First.

persecution” – a process that can take several weeks or longer. At this point, they are technically eligible for release on parole if they satisfy the criteria for parole.¹⁶ These criteria are contained in written “guidelines” which state that release from detention on parole “is a viable option and should be considered” for asylum seekers “who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”¹⁷

Over the years, the parole guidelines for asylum seekers, which were issued in a series of Immigration and Naturalization Services (INS) memoranda – rather than in formal regulations – have been applied inconsistently by local immigration offices, with some local officials routinely failing to apply the guidelines.¹⁸ The press, attorneys, human rights organizations, and refugee protection experts have reported extensively on inconsistencies and deficiencies in the administration of the asylum parole guidelines.¹⁹ A 2004 report issued by Human Rights First revealed that the parole guidelines continued to be disregarded in many locations - with *pro bono* attorneys in California, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reporting that the asylum seekers they represented were regularly denied parole from detention despite meeting the parole guidelines.²⁰

The results of this survey were later confirmed by a major report issued by the U.S. Commission on International Religious Freedom in February 2005. The comprehensive statistical analysis conducted by USCIRF showed that while asylum seekers in some areas were routinely released, in other parts of the country, asylum seekers are rarely released, with release rates as low as 0.5% in New Orleans, 3.8% in New Jersey, and 8% in New York.²¹ The Commission also found no evidence that DHS Immigration and Customs Enforcement (ICE) is following its parole criteria, and given the variations in release rates across the country, concluded that the formal release criteria are not being consistently applied. The statistics in the USCIRF report also showed a significant drop in the rate at which local immigration officers have released asylum seekers from these jail-like facilities on parole in the years since September 11.²²

C. Lack of Independent Review

Under U.S. procedures, the decision of whether or not to parole an arriving asylum seeker is entrusted to the Department of Homeland Security (DHS) (and previously to the INS), the same authority that is

¹⁶ Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV); INA § 212(d)(5)(A); 8 Code of Federal Regulations (CFR) § 235.3(c); 8 CFR §212.5(a); Memorandum from Office of INS Deputy Commissioner, “Implementation of Expedited Removal,” March 31, 1997, reprinted in 74 *Interpreter Releases* (April 21, 1997).

¹⁷ Memorandum from Michael A. Pearson, Immigration and Naturalization Service (INS) Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, “Expedited Removal: Additional Policy Guidelines,” December 30, 1997.

¹⁸ Eleanor Acer, *Living up to America’s Values*, p.p. 48-49; Human Rights First, *Refugees Behind Bars*; Tulskey, “Uncertain Refuge: Asylum seekers Face Tougher U.S. Laws, Attitudes.”; Ohito, “Inconsistency at INS.”; Beach & Yost, “INS Jailing Many Asylum Seekers.”

¹⁹ Human Rights First, *In Liberty’s Shadow*, p.p. 12-13; Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (1998); Women’s Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, (1998); Nina Bernstein and Marc Santora, “Asylum Seekers Treated Poorly, U.S. Panel Says,” *New York Times*, February 8, 2005.

²⁰ Human Rights First, *In Liberty’s Shadow*, p. 13.

²¹ USCIRF, *Asylum Seekers in Expedited Removal*, p.p. 71-89

²² USCIRF Report, *Asylum Seekers in Expedited Removal* (Between 2001 and 2003, the release rate fell by 27 per cent).

charged with seeking to detain and deport the individual. The DHS, in effect, acts as both judge and jailer with respect to parole decisions. Asylum seekers are not brought before a court that is charged with assessing the need for their continued detention. And, when the DHS denies parole to an arriving asylum seeker, the law does not provide for an appeal of this determination to an independent judicial authority, or even an immigration judge.²³

While immigration judges can review DHS custody decisions for other immigration detainees, DHS has taken the position that immigration judges are precluded from reviewing the detention of so-called “arriving aliens,” a group that includes asylum seekers who arrive at airports and borders.²⁴

This lack of prompt and meaningful court review of decisions to detain asylum seekers is a clear violation of U.S. obligations under international law. Article 9(4) of the ICCPR provides that:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may, decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.²⁵

This provision applies to all detainees, including immigration detainees.²⁶ The U.N. Human Rights Committee in its decision in *Torres v. Finland*,²⁷ explained that Article 9(4) of the ICCPR “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence....” In the case of *A v. Australia*, the U.N. Human Rights Committee, in finding that a limited court review did not satisfy the requirements of Article 9(4), emphasized that court review “must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law,” and must be “in its effects, real and not merely formal.”²⁸ The UNHCR Detention Guidelines call for procedural guarantees, when a decision to detain is made, including “automatic review before a judicial or administrative body independent of the detaining authorities.”²⁹

²³ 8 C.F.R. § 3.19; 8 C.F.R. §3.19(h)(2)(i)(B).

²⁴ 8 CFR § 1003.19 (h)(2)(i)(B). While a few asylum seekers have tried to file federal habeas petitions, it often takes months or years for federal courts to decide a petition, making the effort pointless for many asylum seekers. See e.g. *Nadarajah v. Gonzalez* 443 F.3d 1069, 1075 (9th Cir. 2006) (federal district court’s denial of a habeas petition issued one year after asylum seeker filed petition).

²⁵ ICCPR, art. 9(4), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371 (entered into force Mar. 23, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

²⁶ U.N. Human Rights Committee, General Comment 8/16 (“The important guarantee laid down in paragraph 4 [of article 9], i.e. the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention.”); U.N. Commission on Human Rights, resolution 1997/50, Commission on Human Rights, U.N. doc. E/CN.4/RES1997/50, 15 April 1997 (Requesting that Working Group on Arbitrary Detention “devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy”).

²⁷ *Torres v. Finland*, U.N. Human Rights Committee, Communication No. 291/1988 (2 April 1990) (concluding that asylum seeker’s detention during period in which he was unable to appeal detention order to court violated ICCPR Article 9(4)).

²⁸ *A v. Australia*, U.N. Human Rights Committee, Communication No. 560/1993 (3 April 1997) U.N. Doc. CCPR/C/59/D/560/1993 (finding that a court review, which was limited to a finding that the asylum seeker was indeed a “designated person” within the meaning of Australia’s Migration Amendment Act, did not satisfy the requirements of Article 9(4) of the ICCPR).

²⁹ UNHCR Detention Guidelines; See also UNHCR Exec. Comm. Concl. 44 (“Detention measures taken in respect of refugees or asylum seekers should be subject to judicial or administrative review”).

D. No Limit on the Length of Detention

Neither U.S. statutes nor regulations specify a limit on the length of time an asylum seeker may be detained while his or her removal and asylum proceedings are pending.³⁰ The press and human rights groups have documented numerous examples of asylum seekers who have been detained for lengthy periods of time.³¹ Statistics contained in the USCIRF report revealed that about 32% of arriving asylum seekers are jailed for 90 days or more.³² However, others are held for significantly longer periods of time.

The failure to specify a limit on the length of time that an asylum seeker can be detained while his case is pending is problematic under international law. In *A v. Australia*, the U.N. Human Rights Committee recognized that “every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed.”³³ The U.N. Working Group on Arbitrary Detention, in its Deliberation No. 5, has set forth a number of guarantees to be considered in assessing whether an asylum seeker’s deprivation of liberty is arbitrary under international law. One of these guarantees provides that: “A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.”³⁴

E. U.S. Practices Discriminate against Asylum Seekers Based on Nationality

The principle of non-discrimination is central to both international refugee law and international human rights law. Article 3 of the Refugee Convention (incorporated through the 1967 Protocol) requires signatory nations to “apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin.” In accordance with this central tenet, the UNHCR Detention Guidelines recommend that any decision to detain an asylum seeker should “only be imposed in a non-

³⁰ While the U.S. Supreme Court has recognized that indefinite detention would raise serious due process concerns under the U.S. Constitution, and has held that the indefinite detention of persons subject to final orders of removal violates the immigration statute, the U.S. Department of Justice has argued that these holdings are limited to cases involving final orders of removal. See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding in case of persons who previously entered the U.S. that statutory provision governing detention after final order of removal, read in light of the Constitution’s requirements, does not permit indefinite detention); *Clark v. Martinez*, 543 U.S. 371 (2005) (applying the same holding to persons who have not been admitted to the U.S.); *Nadarajah v. Gonzales* 443 F.3d 1069, 1075 (9th Cir. 2006) (holding, contrary to government’s position, that general detention statutes do not authorize indefinite detention of non-citizens whose claims for asylum or other relief are still pending).

³¹ Human Rights First, *Refugees Behind Bars*, p.p. 6-7; M. Clancy, “Nigerian Finally Wins Asylum After Long Fight,” *Herald News*, July 20, 2001 (Nigerian refugee granted asylum after 3 years and 4 months in detention); D. Malone, “Man Locked up for Four Year but Convicted of Nothing,” *Dallas Morning News*, April 1, 2001 (Sri Lankan asylum seeker detained for four years); C. Hedges, “Immigrant Detained for 3 and a half years Emerges from Labyrinth,” *New York Times*, November 6, 2000 (Congolese refugee granted asylum after three and a half years in jails and detention facilities); B. Walth, “Asylum Seekers Greeted With Jail,” *Oregonian*, December 10-15, 2001 (Liberian asylum seeker detained for six years, Chinese asylum seeker detained over two years, Sri Lankan asylum seeker detained for four years); Dan Mallone, “851 Detained for Years in INS Centers – Many are Pursuing Asylum,” *Dallas Morning News*, April 1, 2001.

³² USCIRF, *Asylum Seekers in Expedited Removal*, p. 75.

³³ *A v. Australia*, U.N. Human Rights Committee, Communication No. 560/1993 (3 April 1997) U.N. Doc. CCPR/C/59/D/560/1993

³⁴ U.N. Working Group on Arbitrary Detention, Deliberation No. 5, Principle 7, UN doc. E/CN.4/2000/4, 28 December 1999, Annex II.

discriminatory manner.”³⁵ The November 2001 expert roundtable convened by UNHCR agreed, concluding that “[r]efugees and asylum seekers should not be detained on the grounds of their national, ethnic, racial or religious origins”³⁶

Consistent with the 1967 Protocol and Refugee Convention, the ICCPR obliges all contracting states to ensure to “all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind”³⁷ The ICCPR also specifies that this principle of non-discrimination includes national or social origin, birth or other status.³⁸

In the months following September 11, the press began documenting cases in which asylum seekers from Arab or Muslim backgrounds who would previously have been released from detention on parole were denied release. For instance, two Christian women who fled Iraq were denied parole in Miami, even though one of the women had strong community ties – her sister is a U.S. citizen and her mother a U.S. legal permanent resident. A young Iraqi man who had fled forced conscription by the Iraqi regime was denied parole even though he had a U.S. citizen brother and parents who also lived in the United States.³⁹

In the wake of the September 11 attacks, over 1,200 non-citizens – primarily men of Arab or Muslim background – were detained by the U.S. government. The Justice Department’s Inspector General has extensively documented a range of disturbing abuses, including lengthy detentions without charges, denial of access to counsel, and abusive treatment.⁴⁰ While the vast majority of these individuals were not asylum seekers, some refugees were caught up in this wave of detentions.⁴¹

During 2001 and 2003, the Department of Justice and DHS initiated nationality based detention policies targeting Haitian asylum seekers and asylum seekers from thirty-three nations and two territories – mostly Middle Eastern and other Muslim countries and territories.⁴² Under these initiatives, federal authorities invoked national security concerns to justify policies that called for the detention of asylum seekers who presented no risk to the public.⁴³ In fact, these policies have actually deprived those asylum seekers of the opportunity to demonstrate that they do not present a risk and instead merit release on parole.

³⁵ UNHCR Detention Guidelines.

³⁶ Summary Conclusions, Geneva Expert Roundtable, 11(c).

³⁷ ICCPR, Art. 2(1).

³⁸ ICCPR, Art. 26.

³⁹ Richard A. Serrano, “Ashcroft Denies Wide Detainee Abuse,” *Los Angeles Times*, October 17, 2001; Richard A. Serrano, “Judge Denies Young Iraqi’s Bid to Join Family,” *Los Angeles Times*, January 14, 2002; Andres Viglucci and Alfonso Chardy, “Iraqi Christians get caught up in a Security Web,” *Miami Herald*, December 26, 2001; Jody Benjamin, “Mideast Detainees Await Freedom,” *South Florida Sun-Sentinel*, December 8, 2001.

⁴⁰ Amnesty International, *Amnesty International’s Concerns Regarding Post September 11 Detentions in the USA*, (2002) (AI Index: AMR 51/044/2002); Jim Edwards, “Attorneys Face Hidden Hurdles,” *New Jersey Law Journal*, December 3, 2001.

⁴¹ Jody A. Benjamin, “Iraqi Refugees Cleared by FBI Could Still Face Deportation,” *South Florida Sun-Sentinel*, December 12, 2001.

⁴² Department of Homeland Security, “Operation Liberty Shield”, press release, March 17, 2003, available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml “Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period.”

⁴³ *Id.*

“Operation Liberty Shield”

One of these initiatives was launched in March 2003, on the eve of war with Iraq. As part of “Operation Liberty Shield,” DHS announced that it would detain for the duration of their asylum proceedings, asylum seekers from the thirty-five nations and territories “where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.”⁴⁴ The effect of Operation Liberty Shield was to deprive asylum seekers from these mostly Arab or Muslim nations of the opportunity to have the necessity of their detention assessed on an individualized basis. After much public criticism, this policy was officially terminated, though attorneys around the country continued to report that asylum seekers from Arab and Muslim countries were being routinely detained for the duration of their asylum proceedings.⁴⁵

The Haitian Detention Policy

The other initiative is a special policy aimed at Haitians who flee to the United States by sea. Following the arrival in Florida of two boats carrying Haitian asylum seekers, the United States took a series of steps which had the effect of depriving these and other Haitians of meaningful and individualized assessments of the need for their detention.

In early December 2001, a boat carrying about 170 Haitian men, women, and children arrived off the coast of Florida. The INS, which had total control over their detention, instituted a blanket policy of denying parole to these and other Haitian asylum seekers. In October 2002, a second boat arrived, with more than 200 Haitian men, women and children swimming ashore near Key Biscayne, Florida. Unlike the first group of Haitians, these asylum seekers – simply because they had set foot on land before being detained – were entitled to seek their release in a bond re-determination hearing before an immigration judge.

In response to the arrival of these two boats carrying Haitian asylum seekers, the Administration took a series of steps which had the effect of depriving these and other Haitian asylum seekers of meaningful and individualized assessments of the need for their detention.

- For the initial group of Haitians and any others whose detention was under exclusive INS control, the INS and now DHS continued a detention policy of denying parole to Haitian asylum seekers who came to the United States by sea.
- Following the arrival of the October 2002 boat, the INS began invoking its recently expanded detention power by suspending the decisions of immigration judges to release asylum seekers on bond. The Attorney General had expanded this detention power after the September 11 attacks –

⁴⁴ Department of Homeland Security, “Operation Liberty Shield”; Human Rights First, *In Liberty’s Shadow*, p. 24. (DHS refused to officially disclose the list of affected nationalities, stating that the complete list was “law enforcement sensitive”). The list appears to have included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen as well as Gaza and the West Bank; See also Ricardo Alonso-Zaldivar, “Showdown With Iraq; Rights Groups Blast Policy to Detain Asylum Seekers”, *Los Angeles Times*, March 19, 2003; Human Rights First, *In Liberty’s Shadow*, p.p. 24-25.

⁴⁵ Human Rights First, *In Liberty’s Shadow*, p.p. 24-25 (for a detailed discussion of “Operation Liberty Shield”).

a change that was justified in part “to prevent the release of aliens who may pose a threat to national security.”⁴⁶

- In November 2002, the INS issued a notice authorizing expedited removal of Haitian and other migrants who arrive by sea – with the exception of Cubans. The notice contended that a “surge” in illegal migration by sea “threatens national security” by diverting Coast Guard resources. The change was aimed at ensuring that Haitians arriving in the future would not have the right to seek release from detention from an immigration judge.⁴⁷
- In March 2003, the new Department of Homeland Security asked the Attorney General to review the immigration appeal board’s decision to release an 18-year-old Haitian asylum seeker on bond, and to direct that release decisions for other Haitians also be stayed.⁴⁸
- On April 17, 2003, the Attorney General issued a sweeping decision, in a case known as *In re D-J-*, which cited national security in concluding that the 18-year-old Haitian was not entitled to an individualized assessment of the need for his detention, and directed immigration judges and the immigration appellate board to consider national security arguments in future detention custody decisions. The Attorney General asserted that “aliens from countries such as Pakistan” were using Haiti as a “staging point for migration to the United States.”⁴⁹

These steps are detailed in various Human Rights First publications, including *In Liberty’s Shadow* and in Human Rights First’s amicus brief submitted to the U.S. Court of Appeals for the Eleventh Circuit in the case of *Moise v Bulger*.⁵⁰ This detention policy has continued to affect Haitian asylum seekers.⁵¹

F. Inappropriate Conditions and Psychological Harm

The U.S. Commission on International Religious Freedom’s report, issued in February 2005, concluded that asylum seekers were detained in prison-like facilities which are inappropriate for a non-criminal population. The Commission surveyed 19 detention facilities that housed more than 70 percent of all aliens subject to Expedited Removal in 2003. The Commission also found that these conditions create a serious risk of long-term psychological harm.

⁴⁶ Review of Custody Determinations, 66 Fed. Reg. 54909 54909-54912 (2001).

⁴⁷ Department of Justice, “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act,” (Order No. 2243-02), November 13, 2002, available at <http://www.immigration.gov/graphics/lawsregs/fr111302.pdf>

⁴⁸ DHS Under-Secretary for Border & Transportation Security, Asa Hutchinson, Referral of Decision to the Attorney General, March 20, 2003.

⁴⁹ *In re D-J-*, 23 I & N Dec. 572 (A.G. 2003), at 579.

⁵⁰ Human Rights First, *In Liberty’s Shadow*; Human Rights First, *Amicus brief, Haitian Detention Policy*, (July 2002) available at http://www.humanrightsfirst.org/asylum/amicus/haitian_am_brief.pdf; Women’s Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, (1998); Florida Immigrant Advocacy Center, *Securing Our Borders: Post 9/11 Scape-goating of Immigrants*, (2005), available at <http://fiacfla.org/reports/securingborders.pdf>; Eleanor Acer, *Living up to America’s Values*.

⁵¹ Florida Immigrant Advocacy Center, “Post-9/11 Laws and Policies are Closing United States to Refugees and Immigrants Nationwide, Says Major New Report”, press release, May 6, 2005, available at <http://fiacfla.org/pressreleases.php#85>; Women’s Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*; Megan McKenna and Joanne Kelsey, “An opportunity for U.S. to finally do right by Haitian refugees,” *Baltimore Sun*, January 11, 2006, available at <http://www.womenscommission.org/newsroom/articles/BaltSun.shtml>.

In its report, the Commission concluded that DHS detention facilities housing asylum seekers are structured and operated like correctional facilities in virtually all important aspects. At these facilities, the Commission found:

- Widespread use of segregation, isolation, or solitary confinement for disciplinary reasons;
- Significant limitations on the privacy, personal freedom, and individuality afforded to detainees;
- A scarcity of private, individual toilets and showers for detainee use outside the presence of others;
- Use of physical restraints on detainees in 18 of the 19 facilities;
- Sight and/or sound surveillance in virtually all housing units, and 24-hour surveillance lighting in all units;
- Security related searches of all detainees in the general living and housing areas;
- Multiple “counts” throughout the day to monitor detainee whereabouts (a single facility refrained from this technique);
- Lack of staff training focused on the special needs and concerns of asylum seekers, and even less training designed to enable the staff to recognize or address the specific problems of victims of torture or trauma; and
- Failure to provide access to the updated legal materials listed in DHS detention standards.⁵²

An earlier study, conducted by medical experts with Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture had documented the significant harm that asylum seekers suffer while in immigration detention. The study confirmed:

- In case after case, the government’s practice of imprisoning asylum seekers inflicts further harm on an already traumatized population;
- Detained asylum seekers suffer extremely high levels of anxiety, depression and Post Traumatic Stress Disorder. 86% of the interviewed asylum seekers suffered significant depression, 77% suffered anxiety and 50% suffered from Post Traumatic Stress Disorder;
- The already poor psychological health of asylum seekers worsens the longer that they are detained; and
- Asylum seekers suffer verbal abuse by immigration inspectors at U.S. airports, as well as verbal abuse and other mistreatment at the hands of officers staffing detention facilities.⁵³

Recommendations

The United States should bring its laws and practices relating to the detention of asylum seekers into line with international standards and U.S. traditions of fairness. Asylum seekers should not be subject to automatic or mandatory detention, and should only be detained in those cases where detention is found to be necessary. The need for detention should be determined in a hearing before a court or similar independent authority.

⁵² USCIRF, *Asylum Seekers in Expedited Removal*, p. 239.

⁵³ Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture, *From Persecution to Prison; Human Rights First*, “Refugees Seeking Asylum Suffer Behind Bars: Groundbreaking Medical Study Documents Harm Suffered by Detained Asylum Seekers”, press release, June 17, 2003, available at www.humanrightsfirst.org/media/2003_alerts/0617.htm

Thorough reform of the U.S. detention system for asylum seekers will require a combination of legislative, regulatory and administrative actions – as well as a change in the training of DHS staff who are entrusted with assessing the need to detain individual asylum seekers.

Our recommendations include:

Review by an Immigration Judge. The United States should ensure that the decision to detain an asylum seeker is promptly assessed by an independent court.

- The Department of Homeland Security and the Department of Justice should work together to ensure that arriving asylum seekers, like other immigration detainees, have the chance to have their custody reviewed in a hearing before an immigration judge. DHS and DOJ should revise regulations to make clear that asylum seekers can request these custody determinations from immigration judges.
- The U.S. Congress should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system. This legislation should also provide for the right of asylum applicants to seek review of parole decisions by immigration judges.

Codify INS/DHS Parole Guidelines in Formal Regulations. The INS/DHS asylum parole guidelines should be codified into formal regulations so that asylum seekers who meet the parole criteria – criteria which include posing no danger to the community, community ties, establishing identity, and satisfying the “credible fear” standard – can be released from detention on parole. These regulations should also specify that:

- A quality assurance procedure and an internal DHS review process should be implemented to ensure the fairness and accuracy of parole determinations.
- An asylum seeker’s identity may be established through various kinds of evidence including the submission of identity documentation or sworn statements from individuals who can attest to the asylum seeker’s identity.

Non-discrimination. Detention policies should not discriminate against asylum seekers on the grounds of race, religion, national origin, or any other immutable characteristic. The basic principle of non-discrimination is central to international refugee and human rights law, as well as U.S. law.

Children. DHS should ensure that minors who seek asylum are not detained by DHS but are in fact promptly transferred into the care of the Office of Refugee Resettlement. Congress should enact legislation to ensure that children are provided with pro bono representation and guardians. In December 2005, the Senate passed The Unaccompanied Alien Child Protection Act of 2005 (S 119), and legislation has since been introduced that, if advanced, would ensure that unaccompanied children would be housed in shelters or foster care or with their families, and minimum care standards for detention.

Alternatives to Detention. Asylum seekers should generally not be detained. In cases where it is determined that some degree of supervision is needed, DHS should consider alternatives to detention – with a presumption in favor of the least restrictive alternative - including supervised release, and for women with children, release to facilities operated by non-profit agencies. Alternatives might also include use of refugee accommodation centers, group homes, supervised release programs, release to a guarantor, or release on bond.

Improve Detention Conditions. Asylum seekers should no longer be detained in inappropriate prison-like facilities. When detention is necessary (rather than an alternative to detention or parole), asylum seekers should be held in more humane facilities – as recommended by the U.S. Commission on International Religious Freedom. Asylum seekers should not be co-mingled with criminals or held in remote county and local jails. The Department of Homeland Security should issue regulations codifying the existing detention standards relating to access and conditions of detention. All asylum seekers should be provided with appropriate medical care, including professional counseling for survivors of torture, rape or gender-based persecution. All detention facilities that house women seeking asylum should be staffed with female officers and female health care staff.

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