

Report Summary

U.S. Detention of Asylum Seekers Seeking Protection, Finding Prison



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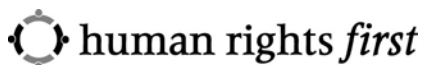
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U.S. Detention of Asylum Seekers

Seeking Protection, Finding Prison

“When I was back home I was in prison [for speaking out for human rights]. I thought that when I got to America I’d be free, but then I was in prison again. I was surprised by that.”

Burmese school teacher who was beaten and jailed for two years by the Burmese government, and then detained by U.S. immigration authorities for seven months in an El Paso, Texas, immigration jail after requesting asylum in the United States¹

IN MARCH 2003, the U.S. Department of Homeland Security (DHS) took over responsibility for asylum and immigration matters when the former INS (Immigration and Naturalization Service) was abolished. With this transfer, DHS was entrusted with the duty to ensure that the United States lives up to its commitments to those who seek asylum from persecution. These commitments stem from both U.S. law and international treaties with which the United States has pledged to abide. Yet, those who seek asylum—a form of protection extended to victims of political, religious and other forms of persecution—have been swept up in a wave of increased immigration detention, which has left many asylum seekers in jails and jail-like facilities for months or even years.

Six years after DHS and its interior immigration enforcement component, U.S. Immigration and Customs Enforcement (known as “ICE”) took over responsibility for immigration detention, the U.S. system for detaining asylum seekers is more flawed than ever. As detailed in this report, thousands of asylum seekers have been detained during these years. In 2007 alone, more than 10,000 asylum seekers were newly detained in the United States. They are held in facilities that are actual jails or are operated like jails. They are often brought in handcuffs and sometimes shackles to these facilities, where they wear prison uniforms, are guarded by officers in prison attire, visit with family and friends only through glass barriers, and have essentially no freedom of movement within the facilities. The cost of detaining these



Refugee from Zimbabwe, who was persecuted due to his pro-democracy advocacy, and was detained at a U.S. immigration detention facility for over three months before being granted asylum. [Photo by Brett Deutsch]

asylum seekers over the past six years has exceeded \$300 million.² During that time, ICE parole policies have become more restrictive, and parole rates for asylum seekers dropped from 41.3 percent in 2004 to 4.2 percent in 2007. ICE has not provided Congressionally-mandated statistics—detailing the number of asylum seekers detained, the length of their detention, and the rates of their release—in a timely or complete manner. The U.S. detention system for asylum seekers, which lacks crucial safeguards, is inconsistent with international refugee protection and human rights standards.

DHS and ICE have increased their use of prison-like facilities by at least 62 percent—with six new mega-facilities added in just the last five years.³ Some of these facilities are located far from legal representation and the immigration courts. More than a third of detained asylum seekers are not represented by legal counsel, even though asylum seekers are much more likely to be granted asylum in immigration court when they are represented.⁴ At these remote facilities, detained asylum seekers often see U.S. immigration judges and asylum officers only on television sets, with immigration court asylum hearings and asylum office “credible fear” interviews (which determine whether an individual will even be allowed to apply for asylum or will instead be summarily deported) increasingly conducted by video. In fact, more than 60 percent of credible fear interviews were conducted by video in 2007. A recent study demonstrated that asylum seekers who have their immigration court asylum hearings conducted by video are about half as likely to be granted asylum.⁵

Through our *pro bono* representation work, and in conducting research for this report, we have learned of many refugees who were jailed for many months—and some for years—in these prison-like facilities before being granted asylum in this country. Many asylum seekers could have been released from detention while their cases were pending, either on parole or through an immigration court custody hearing. Providing asylum seekers with access to fair release procedures does not undermine security. In fact, the Department of Homeland Security’s regulations and guidelines on parole expressly prohibit the release of an individual who presents a risk to the community or a flight or security risk. The case law governing immigration court custody hearings also requires that the individual establish that he or she does not present a danger to others, a threat to national security, or a flight risk.⁶

In some cases, asylum seekers could have been released, at significant savings, to a supervised release program. In fact, while detention costs \$95 each day on average, alternatives to detention cost \$10 to \$14 for each person each day.

Individuals who have been released through these programs have continued to appear for their immigration court hearings at high rates—ranging from 93 to 99 percent. According to ICE, participants in the intensive supervision appearance program (ISAP) demonstrated a 91 percent compliance with removal orders as well.⁷

Here are just a few examples of some of the refugees who have been detained for months or years in jails or jail-like facilities in this country:⁸

- A Guinean human rights activist, who had been abducted by government security forces in his country, was detained for four and a half months in a U.S. immigration jail in New Jersey. He was only released three weeks before being granted asylum by a U.S. immigration court.
- A Baptist Chin woman from Burma was detained in an El Paso, Texas, immigration jail for over two years. ICE denied several parole requests even though she had proof of her identity and family in the U.S.—only paroling her after 25 months in detention. She was subsequently granted asylum in 2008.
- An Afghan teacher who was threatened by the Taliban spent 20 months in detention at three county jails in Illinois and Wisconsin. The teacher was denied release on parole by ICE despite having letters of support from U.S. government officials who knew him because he taught at an educational institution sponsored by U.S. and NATO forces in Afghanistan. After a U.S. federal court found him eligible for asylum, he was finally released from detention on an electronic monitoring bracelet until a final decision granting asylum was made by the immigration judge in early 2009.
- A Tibetan man, who was detained for more than a year and tortured by Chinese authorities after putting up pro-Tibetan independence posters, was detained for 11 months at the Elizabeth Detention Center in New Jersey before being granted asylum by a U.S. immigration court.

In examining the U.S. detention system and in providing *pro bono* legal assistance to individual asylum seekers, Human Rights First has interviewed scores of refugees who have been detained in the United States in recent years before being granted asylum by U.S. authorities. We have also visited over ten immigration jails and detention centers in New Jersey, New York, South Carolina, Texas, and Virginia (and were denied access to facilities in California and Illinois), met with local and national immigration officials, reviewed government reports, sought statistics and documents through a series of Freedom of Information Act requests, and interviewed faith-based and other legal providers, clergy and community service groups.⁹ Our recommendations, outlined at the end of this report, do not undermine this country's security. The United States can both maintain its security while also living up to its commitments to those who seek protection from persecution.

Increase in Prison-Like Facilities

“I didn’t expect to be in jail for six months. I’m not a criminal. I didn’t expect to be transported in chains. This is not what I imagined. Especially not from America.”

Refugee from Ethiopia, detained in a Virginia county jail by ICE for six months during 2007 and 2008 before being granted asylum



The 1,904-bed South Texas Detention Center in Pearsall, Texas. More than 2,700 asylum seekers were detained here in fiscal year 2007 alone.

Since 2002, the number of immigrants detained each year has more than doubled—with an increase from 202,000 in 2002 to an estimated population of 442,941 in 2009. Between 2005 and 2008 alone, ICE increased detention beds by 78 percent.¹⁰ While the vast majority of immigration detainees are not asylum seekers, well over 48,000 asylum seekers have been detained in U.S. jails and immigration detention centers from 2003 to 2009. While Congress required U.S. immigration authorities to provide data relating to the detention and parole of asylum seekers, ICE has not provided complete statistical information for these years, and no records for 2005 or 2008 in response to Human Rights First's requests under the Freedom of Information Act. As a

result, we do not know the exact number of asylum seekers detained during this time—only that it certainly exceeds 48,000.¹¹

Between 2003 and 2009, DHS and ICE oversaw:

- An increase of at least 62 percent in the use of prison-like detention for asylum seekers and other immigrants—from 20,662 beds in 2002 to 33,400 beds in jails and jail-like facilities in 2009.¹²
- Treatment of asylum seekers like prisoners in correctional facilities in these jails and jail-like facilities. They are often handcuffed and sometimes shackled when transported, required to wear prison-like uniforms—even when they appear in immigration court in front of a judge—and only allowed to visit with family and friends through a glass partition.
- The opening of a “family” detention facility—housed in a former medium-security prison—to detain 500 asylum seekers, other immigrants, and their families. Children and their parents were all required to wear prison uniforms, until a lawsuit settlement in August 2007 changed this.
- The opening of at least six new mega-detention facilities holding more than 1,000 immigration detainees each, for a total of nearly 10,000 beds.

Facility	Detention Beds
Northwest Detention Center (Wash., 2004)	1,061
South Texas Detention Center (Tex., 2005)	1,904
Willacy Detention Center (Tex., 2006)	3,000
Stewart Detention Center (Ga., 2006)	1,524
Jena Detention Center (La., 2007)	1,162
Otero County Processing Center (N.M., 2008)	1,088
TOTAL	9,739

Human Rights First staff, accompanied by *pro bono* attorneys and representatives of local faith and community groups, visited two of these facilities, including the South Texas Detention Center—a 1,904-bed facility located 57 miles south of San Antonio on the outskirts of the small town of Pearsall. The detention center is surrounded by high barbed wire fences, and looks and feels like a prison. Asylum seekers and other detainees are required to wear prison-like uniforms and are held nearly 24 hours a day in “pods”—large rooms where as many as 100 asylum seekers and immigrant detainees sleep on narrow bunk beds, eat their meals, and use the showers and toilets, which are located behind only a short wall. Asylum seekers held at this facility have come from a number of countries including Burma, China, Colombia, Eritrea, Ethiopia, Honduras, Iraq, and Somalia. More than 2,700 asylum seekers were detained at the facility during 2007 alone.¹³

“[C]ontrary to USCIRF recommendations, DHS’s use of jails and jail-like facilities has increased in the past few years.”

U.S. Commission on International Religious Freedom letter to DHS Assistant Secretary for Policy Stewart Baker, January 8, 2009¹⁴

In a comprehensive 500-page study authorized by Congress and issued in February 2005, the bipartisan governmental U.S. Commission on International Religious Freedom (USCIRF) concluded that it was not appropriate for the United States to detain asylum seekers in prison-like conditions. The Commission recommended that the criteria for release of asylum seekers on parole be put into regulations, and that when detention was necessary, ICE should use less restrictive (yet secure) facilities. Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) have also made clear that, when asylum seekers are detained, “[t]he use of prisons should be avoided.”¹⁵

Instead of decreasing its reliance on jails and jail-like detention, the Department of Homeland Security has actually *increased* its use of these facilities—adding or using, according to Human Rights First’s calculations, more than 9,000 additional immigration detention beds in jails or jail-like facilities since the Commission issued its report in February 2005.¹⁶

Deficient Medical Care in Detention

U.S. government assessments and media reports have found serious deficiencies in the health care provided to asylum seekers and immigrants in U.S. immigration detention, including:

- Severe staffing shortages, with nearly 140 medical staff openings and an 18 percent vacancy rate for medical staff;
- 90 deaths of detainees since ICE's inception in 2003, including 13 suicides; and
- Failure to use interpreters to communicate with detainees during medical exams, in some cases leading to dangerous misdiagnoses.¹⁷

For example, a refugee from Somalia was misdiagnosed and given anti-psychotic drugs by the doctor who examined her at an immigration detention center in Elizabeth, New Jersey. Her *pro bono* attorney, recruited by Human Rights First, repeatedly contacted the facility to express concern after two outside doctors reported that she appeared "dull, or drugged," began lactating, and suffered from nausea and vomiting.¹⁸

Detention Without Safeguards

"Parole is available for Mother Teresa."

ICE detention and removal officer at an Arizona facility, early 2008¹⁹



Many of the facilities do not allow detainees to have contact visits. Rather, detainees are only allowed to see their family and friends through plexi-glass.

The current system for detaining asylum seekers who request protection at U.S. airports and borders is inconsistent with international standards.²⁰ Asylum seekers have been detained for months or sometimes for years, even when they can establish their identities, community ties, and that they do not present a flight risk or a danger to the community. The initial detention is "mandatory" under the expedited removal provisions of the 1996 immigration laws. The decision to release an asylum seeker on parole—or to continue his or her detention for longer—is entrusted to local officials with ICE, which is the detaining authority, rather than to an independent authority or court. The parole criteria that are specific to asylum seekers are contained in an ICE policy directive rather than the relevant regulations and have often been ignored by local officials who may base their decisions on other factors, such as the availability of "bed space" at local facilities. The system also fails to provide for regular review of the need for continued detention although an asylum seeker's case may

take months or even years to make its way through the adjudication system.²¹

ICE acts, in effect, as both judge and jailer with respect to parole decisions for asylum seekers. If parole is denied by ICE, the decision cannot be appealed to a judge—even an immigration judge. While immigration judges can review ICE custody decisions for other immigration detainees, they are precluded under regulatory language from reviewing the detention of so-called “arriving aliens,” a group that consists overwhelmingly of the asylum seekers who are detained when they seek protection upon arriving at airports and other U.S. entry points.²²



A pastor from Liberia was detained for three and a half months in a New Jersey immigration jail. He was denied parole and was only released after a U.S. immigration court granted him asylum.

In the years since DHS and ICE took over responsibility for the detention of asylum seekers:

- The rate of release on parole for asylum seekers appears to have dropped. Statistics provided to Human Rights First by ICE indicate that the rate at which asylum seekers who have passed their screening interviews are being released on parole has dropped sharply—from 66.6 percent in 2004 to 4.5 percent in 2007.²³
- ICE issued a more restrictive parole policy for asylum seekers—a policy that is inconsistent with the recommendations of the U.S. Commission on International Religious Freedom. The new policy, issued in November 2007, includes an additional set of assessments, and does not require ICE to determine the eligibility of all detained asylum seekers for parole. As a result, asylum

seekers who are not represented or who do not speak or write English may not be assessed for release on parole.²⁴

- In interviews with Human Rights First researchers, attorneys who work with asylum seekers across the country reported that parole remains difficult to obtain for the asylum seekers whom they believe meet the criteria. In one location, Human Rights First has observed an increased parole rate, though the change may be due to staff changes at the local ICE office.
- In several locations, asylum seekers have been required to post bonds that are simply too high for this population to be able to pay—resulting in many months of additional detention for some asylum seekers.
- While the use of various supervised release and electronic monitoring programs have increased—primarily as the result of some specific congressional funding—ICE has not implemented an effective nationwide program of “alternatives to detention.”
- Asylum seekers are detained on average at least three months (though this average does not take into account longer term detentions across fiscal years), and many are detained for longer. Asylum seekers are held on average longer than most immigration detainees.²⁵

As a result, many asylum seekers who could have been released from detention have been jailed by ICE in U.S. jails and immigration detention centers for months or longer. Here are just a few examples:²⁶

- **Tibetan monk detained in Texas for over a year.** A Tibetan monk, who supported the Dalai Lama and was arrested for participating in pro-Tibetan demonstrations, was detained at an immigration jail in south Texas while his request for asylum was pending. He remained in detention for more than a year even though his attorney had previously made a request to ICE for his release on parole, and he had proof of his identity as well as a sponsor willing to house him. He was only released from detention after the U.S. immigration court granted his request for asylum.

- **Pastor from Liberia detained in New Jersey immigration jail.** A Pentecostal pastor who fled Liberia, after learning he was in danger because he criticized the use of child soldiers by the forces of Charles Taylor, was detained for three and a half months in a New Jersey immigration jail. His request for release on parole, which was supported by religious leaders in West Virginia, Virginia, and Maryland, was denied by ICE. He was only released from detention after he was granted asylum by a U.S. immigration court.
- **Colombian refugee detained in Arizona immigration jail for over a year.** A Colombian refugee, who had been detained and tortured following his participation in a political demonstration in Colombia, was detained in a U.S. immigration jail in Arizona for 14 months even though he could have been released to the care of his U.S. citizen father and daughter. ICE denied his request for release on parole, even after an immigration court had ruled he was eligible for asylum. This refugee was finally released from detention two weeks after the judge's ruling was affirmed on appeal.

Impact of Detention on Asylum Seekers

“I was scared. I thought they might beat me, because when I was in Tibet the Chinese beat me all the time.”

Refugee from Tibet, who was in immigration detention in the United States for 11 months before being granted asylum by a U.S. immigration court



The psychological health of detained asylum seekers worsens the longer they remain in detention.

Over the last six years, medical and mental health experts have documented the harmful impact of detention on the physical and mental health of asylum seekers. One report, issued by Physicians for Human Rights (PHR) and the Bellevue/NYU Program for Survivors of Torture, concluded that detention inflicts further harm on what is an already traumatized population. The report found that detained asylum seekers suffer from extremely high levels of anxiety, depression, and Post Traumatic Stress Disorder (PTSD), and that their psychological health worsens the longer they remain in custody. In fact, uncertainty about the length of detention was itself a significant cause of anxiety and mental distress.²⁷

Detention also impacts the ability of an asylum seeker to establish his or her eligibility for asylum. Not only is it more difficult for a detained asylum seeker to gather documentation in support of his or her case, but it is also more difficult for that asylum seeker to secure legal representation. (Unlike in the criminal justice system, the civil immigration system does not provide attorneys for individuals who are unable to afford private counsel.) U.S. government statistics confirm that representation rates are much lower for asylum seekers who are detained in this country: more than a third of detained asylum seekers do not have legal representation. At the same time, multiple studies, based on government statistics, have confirmed that asylum seekers who are represented are three times as likely to be granted asylum.

Some asylum seekers abandon their requests for asylum in the United States, because they cannot bear to be detained any longer in a U.S. immigration jail. Others give up efforts to block their deportation while their cases are on appeal. For example, after over 17 months in a U.S. immigration detention facility and a local jail, a young woman from Colombia decided to accept deportation because she could no longer cope with the stress of detention. A U.S. Court of Appeals subsequently ruled that she had a well-founded fear of persecution in Colombia. The court noted that the asylum seeker had “averred that despite the fact that her ‘fear of persecution is as strong as ever[,]’ the detention was, in her words, ‘affecting me physically and destroying me mentally’ and suggested that her detention in the United States served as a daily and unwelcome reminder of the indignity of detention at the hands of the FARC [an armed guerilla group that had abducted her twice].”²⁸

Financial Cost of Detention



While detention averages \$95 per day, alternatives to detention range from \$10 to \$14 a day, and release through parole has no financial cost each day.

The financial cost of immigration detention has skyrocketed in recent years, with ICE’s detention and removal budget doubling in the past four years. In 2009, ICE will be paying \$1.7 billion for “custody operations.” Releasing eligible asylum seekers on parole, or to a “supervised release” program, is much more cost effective. While detention averages \$95 per day, alternatives to detention range from \$10 to \$14 a day, and release through regular parole incurs no additional daily cost.²⁹ ICE does not report on the amount it spends to detain asylum seekers, who constitute only a portion of detained immigrants—and indeed does not precisely track the number of detained asylum seekers or the actual length of their detention. Using various government statistics, Human Rights First has calculated that ICE spent somewhere over \$300 million to detain asylum seekers from 2003 to February 2009. The costs are likely higher as ICE has not provided to Human Rights First statistics for 2005 or 2008, and ICE does not include longer term detentions in the averages it has provided.³⁰

While costs at different facilities vary, Human Rights First has calculated that:

- ICE spent more than \$12 million to detain over 2,000 asylum seekers at the South Texas Detention Center in Pearsall during 2007;
- ICE spent about \$90,000 to detain a refugee woman from Burma in an El Paso, Texas immigration jail for over two years;
- ICE spent nearly \$115,000 to detain an asylum seeker from Sri Lanka at the Elizabeth, New Jersey detention facility for two and a half years, before releasing him on an electronic monitoring device; and
- ICE spent more than \$15,000 to detain a refugee from Zimbabwe for three months, more than \$20,000 to detain a refugee from Haiti for four months—both in New Jersey—and nearly \$20,000 to detain a Tibetan refugee for eight months in California.³¹

Escalation of Detention in Remote Areas



The 3,000-bed Willacy Detention Center in Raymondville, Texas—nicknamed “Tent City” and “Ritmo”—opened in 2006.

As DHS and ICE have expanded immigration detention over the last few years, they have repeatedly chosen to detain asylum seekers and immigrants in new facilities that are located in areas that are not near *pro bono* legal resources, the immigration courts, and U.S. asylum offices. In too many instances, facilities used by ICE were opened or used for months or even years before a Legal Orientation Program was put in place to provide basic legal information to detainees—a decision which left thousands of asylum seekers and other immigrant detainees without basic legal information and counseling to help them navigate the system and try to obtain legal representation. The remote location of some of these facilities has also made it much more difficult for many of these asylum seekers to secure legal representation.

At the same time, asylum seekers and other immigrant detainees increasingly see immigration judges and U.S. asylum officers not in person but only on television screens—with video conferencing equipment being installed in 47 immigration courts and more than 77 other locations, including detention centers. For example, the new facility in Pearsall, Texas—where more than 2,700 “credible fear” asylum seekers were held in 2007—the Willacy Detention Center in Raymondville, Texas, and the Otay Mesa Facility in San Diego, California are all outfitted with video conferencing

equipment. At these facilities, nearly all immigration court hearings are conducted by video. Asylum seekers who have their asylum hearings conducted by video are about half as likely to be granted asylum according to a 2008 study based on immigration court statistics, which was published in the *Georgetown Immigration Law Journal*.³² A finding by the immigration court as to the asylum seeker's credibility is central to the claim. However, the study concludes that the use of video conferencing alters the way a judge perceives an asylum applicant's testimony and the technology does not accurately capture and convey non-verbal elements, some changes in tone, and body language. The U.S. asylum office, a division of the U.S. Citizenship and Immigration Services, conducted over 60 percent of "credible fear" screening interviews by video conference in 2007, primarily through its Houston office. According to statistics provided by the asylum office, the "pass" rates for credible fear interviews conducted in-person and those conducted by video conference are comparable. Statistics also show a substantial drop in credible fear pass rates between 2004 and 2008.³³

Looking Forward: Recommendations

The United States has pledged to treat those who seek asylum in this country in accordance with its commitments under the Refugee Convention and its Protocol, and the International Covenant on Civil and Political Rights, which protects individuals from arbitrary detention. Under international standards, asylum seekers should generally not be detained. When they are, that detention should have adequate safeguards, including procedures to ensure review by an independent authority or court. When some supervision is necessary, alternatives to detention should be used. And when an asylum seeker is detained, he or she should not be held in penal or prison-like conditions.

As the new leadership of the Department of Homeland Security reviews policies, practices, and structures, it has the opportunity to reform detention policies and practices—and to ensure that the Department adequately prioritizes the protection of those who flee to this country in search of refuge. The Secretary of Homeland Security should direct the Department of Homeland Security, Immigration and Customs Enforcement, U.S. Citizenship and Immigration Services, and Customs and Border Protection to implement the reforms outlined in this report. In making some of these changes, the Department of Homeland Security and the Department of Justice will need to work together. The new leadership of the Department of Justice should review and revise the Department's regulations, policies, and practices to ensure that the U.S. meets its commitments to refugees and asylum seekers under both U.S. and international law.

In addition to providing crucial oversight, Congress should also take steps to ensure lasting reforms by passing legislation that puts critical safeguards on the use of detention into law.

A more detailed set of recommendations is included at the end of this report. Outlined below are some critical first steps:

1. Review of Detention by the Immigration Courts

The **Departments of Justice and Homeland Security** should revise current regulatory language to provide arriving asylum seekers with the chance to have their custody reviewed in a hearing before an immigration court, a safeguard afforded other immigration detainees.³⁴ In revising these provisions, the regulations should make clear that any bond requirements should be appropriate to the circumstances and means of the asylum seeker, and that the immigration courts can direct that an individual be released into an alternatives to detention program.

The **U.S. Congress** should also enact legislation providing these asylum seekers with access to immigration court custody hearings to ensure lasting change by putting this change into law as well.

2. Other Reforms to Limit Unnecessary Detention

In addition to ensuring immigration court review of detention for asylum seekers, the **Department of Homeland Security and Immigration and Customs Enforcement** should reform the parole process and create a nationwide program for supervised release or other alternatives to detention.

- **Reform the Parole Process.** The Department of Homeland Security, Immigration and Customs Enforcement, should issue regulations providing for the release of an asylum seeker who can establish identity, has ties to the community, satisfies the credible fear standard, and does not pose a danger to the community. Asylum seekers who are determined by immigration courts to be entitled to asylum or withholding of removal should be released.
- **Create a Nationwide System of Supervised Release.** When an asylum seeker is not eligible for release on parole and some additional supervision is determined to be necessary, the individual should be assessed for

release to a supervised release program or other alternative-to-detention program. These programs should include community support mechanisms, such as case managers, referrals to legal and social service providers, and assistance accessing information relating to immigration proceedings. Electronic monitoring devices (ankle bracelets) should only be used when determined to be necessary after a fair and individualized assessment, and should not be used in a manner that restricts freedom of movement to such an extent as to essentially constitute continued custody.

3. Stop Using Jail-like Facilities

The **Department of Homeland Security and Immigration and Customs Enforcement** should stop using jails and jail-like facilities to detain asylum seekers and other immigration detainees. The Department should also end the practice of detaining families. Instead, asylum seekers should be:

- Released from detention on parole or through an immigration court custody hearing if they meet the applicable criteria; or
- Released to a supervised release program, or other alternative to detention program, if some supervision of the release is necessary.

When asylum seekers are detained—during the period of initial “mandatory” detention under the U.S. expedited removal statute, or if continued detention is determined to be necessary after a fair and individualized assessment—they should not be held in penal or prison-like facilities, but rather in facilities where they can wear their own clothing and the conditions of their detention are not prison-like, as outlined below.

4. Stop Opening Remote Facilities and Ensure Adequate Legal and Other Support *Prior* to Using Facilities

The **Department of Homeland Security and Immigration and Customs Enforcement** should stop opening and using facilities located in remote areas that are far from legal representation resources, immigration courts, or an adequate pool of medical staff.

The **Department of Homeland Security and Immigration and Customs Enforcement** should work with the **Department of Justice** and **U.S. Citizenship and Immigration Services** to ensure that legal orientation presentations, access to adequate legal representation, full medical staffing, immigration judges and asylum officers (in-person, and not by video conferencing), and pastoral care are actually in place and funded *before* detaining asylum seekers or other immigrants at a facility.

Both the **immigration courts** and the **U.S. Citizenship and Immigration Services asylum office** should devote adequate staffing to—and **Congress** should provide adequate funding to—conduct asylum hearings and credible fear interviews in person and in a timely manner. ICE should not open and use facilities in areas that will not be accessible for immigration judges and asylum officers. The immigration courts should stop conducting asylum merit hearings by video.

5. Improve the Conditions of Detention

Detention Should Not Be Based on a Penal Model. The detention standards should be revised to provide for detention in which individuals can, for example: wear their own clothing (rather than prison uniforms); have contact visitation (as opposed to visits through plexi-glass barriers) with family and friends; and have freedom of movement within the secure facility (so they can use outdoor areas, libraries, indoor recreation, or cafeteria areas during the course of the day). Officers should not wear prison guard uniforms, but should be dressed in an alternate uniform, such as a white shirt and tan pants. Handcuffs and shackles should not be used in facilities or during transportation absent extraordinary circumstances. Some of these changes could, and should, be made at some facilities immediately.

Medical and Mental Health Care Must Be Improved. The Department of Homeland Security and ICE should take steps to improve the provision of medical and mental health care at all facilities where asylum seekers and other immigrant detainees are held, seeking input from independent experts and medical professionals, many of whom have provided detailed recommendations on improving medical care.³⁵ These reforms should ensure that:

- Medical units have an appropriate level of staffing *prior* to detaining asylum seekers and other immigrants at a facility, and a mechanism to ensure that detainees are removed from facilities that do not have adequate medical staffing.
- Interpretation services are appropriately used during medical visits at all facilities, including by creating a mechanism and/or form to evaluate and monitor the use of interpreters by medical staff at facilities.
- Mental health care should include specialized counseling for survivors of torture and trauma.

Congress should continue to provide increased oversight on issues relating to detainee health care and deaths, and should pass legislation mandating improved medical care and the independent investigation of detainee deaths.

6. Protection Mechanisms at the Department of Homeland Security

The **Secretary of Homeland Security** should:

- **Create an Asylum and Refugee Protection Office within the DHS Secretary's Office.** This office should ensure that policies, practices and legal interpretations relating to asylum seekers and refugees are consistent with this country's legal commitments and that the reforms recommended in this report are implemented. This office, as detailed in the recommendations at the end of this report, should be provided with the resources, staffing and authority to oversee policies and practices relating to asylum seekers and refugees throughout DHS.
- **Maintain a Senior Refugee and Asylum Policy position** in the DHS policy office, and provide sufficient staffing and resources.
- **Strengthen the Deputy Secretary's** capacity and chain-of-command authority to ensure that the Asylum and Refugee Protection Office's directives and guidance are followed by the various immigration-related agencies.
- **Direct the DHS General Counsel** to make asylum seeker and refugee protection a priority.

7. Provide Timely and Accurate Statistics

The **Department of Homeland Security** should ensure that **Immigration and Customs Enforcement** improves its systems for tracking data relating to the detention of asylum seekers, including data reflecting the number of detained asylum seekers, their age, their gender, the location of their detention, the length of their detention, and their parole or release from detention. This information, which is required by law to be provided annually to Congress and to the public on request, should be provided to both Congress and the public immediately after the end of each fiscal year in a timely manner.

8. Improve Conduct of Expedited Removal

The **Department of Homeland Security** should ensure that **U.S. Customs and Border Protection (CBP)** implements critical reforms recommended by the U.S. Commission on International Religious Freedom, ensures that procedures designed to protect asylum seekers from being returned to persecution are followed, and stops detaining asylum seekers who arrive with valid visas that are considered invalid by CBP solely because the individual requests asylum.

U.S. Citizenship and Immigration Services should request and allocate appropriate funding so that credible fear interviews are conducted in person and in a timely manner; and conduct an assessment of the decline in the credible fear grant rate, the decline in referrals for credible fear interviews and the impact of video conferencing on the conduct and outcomes of credible fear interviews.

Congress should authorize the U.S. Commission on International Religious Freedom to conduct a review of the expanded use of expedited removal and its impact on asylum seekers, and should provide appropriate funding for this assessment.

Endnotes

¹ Throughout the report, quotes from asylum seekers and refugees are drawn from our interviews of detained and formerly detained asylum seekers, unless otherwise noted. As the majority of these individuals have already been granted asylum by U.S. authorities and have such been recognized as “refugees” by the U.S. government, we will sometimes use the term “refugee” to refer to them.

² The total number of asylum seekers was obtained by adding the number of detained asylum seekers for the last 7 months of fiscal year 2003 through February 2009. For years 2003, 2004, and 2006, the number of detained asylum seekers was obtained from ICE’s section 903 reports under the Haitian Refugee and Immigration Fairness Act. (ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2007 (2008)*; ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2006 (2007)*; ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2004 (2005)*; ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2003 (2004)*). They are 8,137, 11,909, 5,761, and 9,971 respectively. For 2005, 2008, and 2009 (through February), the number of detained asylum seekers was calculated by using the number of individuals who were found to have credible fear of persecution: 8,469 for fiscal year 2005, 3,128 for fiscal year 2008, and 1,618 for the first five months of fiscal year 2009 (credible fear statistics provided by U.S. Citizenship and Immigration Services). No data on the number of affirmative and defensive asylum seekers for these years has been made available by ICE. For each year, the number of asylum seekers was then multiplied by the average length of detention, and then by the average daily cost of detention. The average length of 64 days is used for 2003 as provided in the 2003 report (ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2003 (2004)*), and the average length of 71.5 days is used for remaining years, as was reported in the 2004 report – the last year for which this information is provided (ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2003 (2004)*). The average costs of detention used are \$85 for 2003, \$80 for 2004, \$85 for 2005, \$95 for 2006 and 2007, \$97 for 2008, and \$95 for 2009.

³ In 2002, the former INS used 20,662 jail-like detention beds (21,262 beds minus 600 beds at the non-jail-like Broward Transitional Center facility). Department of Justice, “Fiscal Year 2000 Performance Report and Fiscal Year 2002 Performance Plan: Strategic Goal Five.” This number grew to 33,400 immigration detention beds in 2009. James T. Hayes, Jr., Director, Office of Detention and Removal Operations, “Health Services for Detainees in U.S. Immigrations and Customs Enforcement Custody,” before the House Appropriations Committee, Subcommittee on Homeland Security (March 3, 2009).

⁴ Jaya Ramji Nogales, Andrew Schoenholtz and Phillip Schrag, *Refugee Roulette: Disparities in asylum adjudication*, 60 Stan. L. Rev. 295, 340 (2007).

⁵ 2,723 out of 4,420 credible fear interviews conducted by video in 2007 – all from the Houston asylum office. Information provided by USCIS, at Asylum Office Headquarters liaison meeting (June 17, 2008 and March 9, 2009). Frank M. Walsh and Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 271 (2008).

⁶ The regulations on parole state that aliens may only be paroled if “the aliens present neither a security risk nor a risk of absconding.” 8 C.F.R. § 212.5. The most recent ICE guidelines on parole, as well as the previous guidance from 1997 and 1998, also provide that parole may only be considered for those who are not a flight or security risk. ICE, “Parole of Arriving Aliens Found to Have a ‘Credible Fear’” (Nov. 6, 2007). Also, see, e.g., *Matter of Patel*, 15 I.&N. Dec. 666 (BIA 1976); *Matter of Spiliopoulos*, 16 I.&N Dec. 488 (BIA 1987); *Matter of Guerra*, 24 I.&N Dec. 37 (BIA 2006).

⁷ Average cost of detention is \$95 a day. By contrast, alternatives to detention programs cost \$10 to \$14 a day. Response of Julie Myers to Senator Edward Kennedy’s Questions on the Nomination to be Assistant Secretary of ICE (Oct. 3, 2007). Appearance rates for alternatives to detention programs: ICE Fact Sheet: Alternatives to Detention (March 16, 2009), available at

<http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>. See also, Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume 1 (Aug. 2000), Esther Ebrahimian, “The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention,” *Detention Watch Network News*, (Aug./Sept. 2000).

⁸ Profiles are drawn from interviews Human Rights First conducted with detained and formerly detained refugees and pro bono attorneys in 2008 and 2009, unless otherwise noted.

⁹ For additional information, please refer to the “Methodology” section in the full report.

¹⁰ CRS Report for Congress, *Immigration-Related Detention: Current Legislative Issues* (April 28, 2004); Testimony of James T. Hayes, Jr., Director, Office of Detention and Removal Operations, “Hearing on Health Services for Detainees in ICE Custody,” before the House Appropriations Committee Subcommittee on Homeland Security (March 3, 2009); Department of Homeland Security, “DHS Announces \$12.4 Billion for Border Security & Immigration Enforcement” (Jan. 31, 2008), available at http://www.dhs.gov/xnews/releases/pr_1201803940204.shtm.

¹¹ See explanation of calculation of “48,000” number in endnote 4.

¹² See endnote 3.

¹³ ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2007 (2008)*.

¹⁴ The U.S. Commission on International Religious Freedom was created by Congress through the International Religious Freedom Act of 1998 to provide data and independent policy recommendations to the President and Congress on religious repression and intolerance. The members of the Commission are experts in the fields relevant to the issue of international religious freedom and are appointed by the President and Congressional leaders from both parties. See www.uscirf.gov for additional information.

¹⁵ U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. I, p. 68; UNHCR, *Guidelines on Detention of Asylum-Seekers* (Feb. 1999).

¹⁶ ICE opened or began using the following detention facilities following the Commission’s report: South Texas Detention Center (1,904 beds); Willacy Detention Center (3,000 beds); Stewart Detention Center (1,524 beds); T. Don Hutto Family Detention Center (512 beds); Bristol Detention Center (128 beds); LaSalle Detention Center (1,160 beds); Otero County Processing Center (1,088 beds).

¹⁷ See, e.g. GAO, “Alien Detention Standards: Observations on the Adherence to ICE’s Medical Standards in Detention Facilities,” GAO-08-869T (June 2008); Dana Priest and Amy Goldstein, *Washington Post*, May 11, 2008; Nina Bernstein, “Few Details on Immigrants Who Die in Custody,” *New York Times* (May 5, 2008); Department of Homeland

Security, Office of Inspector General, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities," December 2006. Information on openings available at: Department of Homeland Security Division of Immigration Health Services, "Job Listings", (2009), available at <https://jobs-dih.s.icims.com/jobs/search?ss=1&searchKeyword=&searchLocation=&searchCategory=&searchRadius=5&searchZip=>. Vacancy rate from testimony of Julie L. Myers, Assistant Secretary of U.S. Immigration and Customs Enforcement (ICE), "Hearing on Problems with Immigration Detainee Medical Care" (June 4, 2008). On detainee deaths, see, Testimony of Dora Schiro, "Hearing on Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody" (March 3, 2009); see also Dana Priest and Amy Goldstein, "Suicides Point to Gaps in Treatment" (May 13, 2008). On Failure to use interpreters, see, Dana Priest and Amy Goldstein, "Suicides Point to Gaps in Treatment" (May 13, 2008); see also Testimony of 'Asfaw', Refugee from Ethiopia who was given the wrong medication without the use of an interpreter, "Hearing on Problems with Immigration Detainee Medical Care," (June 4, 2008).

¹⁸ Testimony of Ann Schofield Baker, Pro Bono Attorney for Amina Mudey, McKool Smith, "Hearing on Problems with Immigration Detainee Medical Care," before House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law (June 4, 2008).

¹⁹ Quote as reported to Human Rights First by representative of legal service provider in Arizona.

²⁰ See sections of report titled "Penal Detention Inappropriate Under International Standards," and "Arbitrary Detention Under International Law."

²¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, (entered into force March 23, 1976). Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party, provides that all detained individuals shall be entitled to have the lawfulness of their detention reviewed by a court. The lack of such review renders the detention of arriving asylum seekers arbitrary. See also Human Rights First, Background Briefing Note: The Detention of Asylum Seekers in the United States: Arbitrary Under the ICCPR (Jan. 2007). 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." United Nations High Commissioner for Refugees (UNHCR), *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* (Feb. 1999); See also UNHCR, Executive Committee, *Conclusion on Detention of Refugees and Asylum Seekers*, No. 44 (1986).

²² 8 CFR §1003.19 (h)(2)(i)(B). The majority of "arriving aliens" processed under expedited removal are not referred for credible fear interviews and are summarily removed.

²³ ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2004* (2005); ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2007* (2008).

²⁴ ICE, "Parole of Arriving Aliens Found to Have a 'Credible Fear'" (Nov. 6, 2007).

²⁵ ICE, *Report to Congress: Detained Asylum Seekers Fiscal Year 2007* (2008) (showing an average length of detention of 93.8 days for asylum seekers detained in fiscal year 2007). By comparison, the average length of detention for immigration detainees overall was 26.9 days in fiscal year 2007. ICE, *Fact Sheet: Detention Management* (Nov. 20, 2008), available at http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm.

²⁶ Profiles are drawn from interviews Human Rights First conducted with formerly detained refugees and legal service providers, including those conducted in 2008 and 2009 in preparation for this report.

²⁷ Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003).

²⁸ *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 339 (3rd Cir. 2008).

²⁹ Response of Julie Myers to Senator Edward Kennedy's Questions on the Nomination to be Assistant Secretary of ICE (Oct. 3, 2007).

³⁰ Leslie Berestein, "Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector Into a Revenue Maker," *The San Diego Union-Tribune* (May 4, 2008); ICE, "Fact Sheet: Fiscal Year 2009" (Oct. 23, 2008), available at <http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.doc>. For calculation of overall cost and information on number of asylum seekers detained, see above endnote 4. Also see explanation in endnote 2 about 2007 statistics.

³¹ Information on length of detention of the cases cited was obtained during Human Rights First interviews with formerly detained asylum seekers. Number of asylum seekers at the South Texas Detention Center and the cost of detention at the New Jersey facility were provided by ICE. Cost of detention for the El Paso facility was calculated based on the average cost of detention for ICE Service Processing Centers (\$119.28); Leslie Berestein, "Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector Into a Revenue Maker," *The San Diego Union-Tribune* (May 4, 2008). Cost of detention for the California facility: Anna Gorman, "Cities and Counties Rely on U.S. Immigrant Detention Fees," *Los Angeles Times* (March 17, 2009).

³² EOIR, "Fact Sheet: EOIR's Video Conferencing Initiative" (Sept. 21, 2004); GAO, "Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement," GAO-06-771 (Aug. 2006), p. 18; Frank M. Walsh and Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 271 (2008).

³³ 2,723 out of 4,420 credible fear interviews conducted by video in 2007 – all from the Houston asylum office. Information provided by USCIS, at Asylum Office Headquarters liaison meeting (June 17, 2008 and March 9, 2009). Information on credible fear interview pass rates also provided by USCIS.

³⁴ These provisions are located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3.

³⁵ See, e.g., Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody* (Feb. 2009); Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention* (Feb. 2009); Amnesty International, *Jailed Without Justice* (March 2009); Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003).



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