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Arbitrary Detention of Asylum Seekers and U.S. Commitments under the International Covenant on Civil and Political Rights (ICCPR)

Key Issues and Recommendations for the United States to Consider During the ICCPR Review
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The U.S. detention system for asylum seekers lacks necessary safeguards, including access to prompt court review, to prevent detention from being arbitrary within the meaning of Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"). The United States is a leader in the protection of refugees around the world. When the United States falters on its commitments to refugees and human rights at home, it undermines its ability to promote the protection of refugees and persons displaced due to war, conflict and oppression around the world. As the United States undergoes a periodic review of its compliance with the ICCPR by the Human Rights Committee, Human Rights First urges the U.S. Government to address flaws in the immigration detention system which have led the United States to fall out of compliance with the obligations it assumed when it ratified the ICCPR on June 8, 1992.[1]

This document outlines three areas of U.S. noncompliance with the ICCPR as it relates to the detention of asylum seekers and immigrants, including i) the lack of prompt review by an independent court of the decision to detain; ii) the lack of an individualized determination of the need for detention and the failure to provide periodic review; and iii) detention in jails and jail-like facilities that are not appropriate to an asylum seeker or immigrant's status as an administrative, not criminal, detainee. For each of these areas of noncompliance, Human Rights First offers a corresponding recommendation that the United States could adopt to bring its laws and policies better in line with its obligations under the ICCPR.

U.S. Detention of Asylum Seekers and ICCPR Prohibitions of Arbitrary Detention

Asylum seekers and other immigrants have the right to liberty and the right to be free from arbitrary detention, as guaranteed by Article 9 of the ICCPR and other human rights conventions. The ICCPR provides that "[e]veryone has the right to liberty and security of person" and "[n]o one shall be subjected to arbitrary arrest or detention."[2] Nevertheless, the United States uses a system of "mandatory detention" to automatically hold asylum seekers on arrival in jails or jail-like facilities. Subsequent parole assessments are conducted by U.S. Immigration and Customs Enforcement (ICE), the detaining authority. If ICE denies parole, the asylum seeker cannot appeal to a judge, even an immigration judge. While U.S. immigration judges review ICE custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of "arriving

[1] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371 [hereinafter ICCPR].
[2] Id.

aliens," including asylum seekers.[3] In a 2009 report, Human Rights First documented the cases of many asylum seekers who were detained in penal conditions for months or longer without access to a court custody hearing.[4]

1. ICCPR Article 9(4): Decisions to detain are subject to prompt review by an independent court.

The ICCPR requires that, if detained, migrants and asylum seekers must be provided prompt court review of the need for detention. Article 9(4) of the ICCPR states, "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."[5] Article 9(4) of the ICCPR specifically requires a proceeding before "a court" and requires the court "decide" on the lawfulness of detention "without delay." These points have been emphasized by the Human Rights Committee, the U.N. General Assembly in its Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the U.N. Working Group on Arbitrary Detention.[6] The review must be independent, effective, not just pro forma, and provide a real inquiry into the necessity of detention and include the possibility of the reviewing court ordering release should the detention be found unlawful.[7] After a 2007 mission to the United States, the U.N. Special Rapporteur on the Human Rights of Migrants concluded that the U.S. detention system lacked safeguards that prevent detention from being arbitrary within the meaning of the ICCPR and recommended that "the United States should ensure that the decision to detain a non-citizen is promptly assessed by an independent court," and, in addition, that U.S.

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[3] Provisions located mainly at 8 C.F.R. 1003.19 and 212.5, as well as at 208.30 and 235.3.

[4] *See* Human Rights First's 2009 report "U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison," available at http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

[5] ICCPR, *supra* note 1, article 9(4) (emphasis added); *See* United Nations General Assembly Resolution, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : Resolution / adopted by the General Assembly*, Principle 11, A/RES/43/173, (Dec. 9, 1988), available at http://www.unhcr.org/refworld/docid/3b00f219c.html [hereinafter Body of Principles].

[6] Committee on Human Rights, Communication No. 291/1988, *Torres v. Finland*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990); *See also* U.N. Human Rights Committee, General Comment No. 8, Right to Liberty and Security of Persons, U.N. Doc. HRI/GEN/1/Rev.1 (1982)(describing "the right to control by a court of the legality of the detention" as an "important guarantee.").

[7] *See e.g. A v. Australia*, U.N. Human Rights Comm. Communication No. 560/1993, para. 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997)(stating "what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal."); *See also* Committee on Human Rights, Communication No. 291/1988, *Torres v. Finland*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990) (stating that Article 9, paragraph 4, "envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence…"); The Body of Principles defines "judicial or other authority" as "a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence." Body of Principles, *supra* note 5, at 11(f). The requirement in Principle 11 is in addition to the requirement in Principle 32 that "[a] detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful." Body of Principles, *supra* note 5, at 32(1); The Working Group on Arbitrary Detention defined "judicial or other authority" as "a judicial or other authority which is duly empowered by law and has a status and length of mandate affording sufficient guarantees of competence, impartiality and independence." *See* Hum. Rts. Council, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, para. 52, U.N. Doc. A/HRC/7/4, (Jan. 10, 2008); See Hum. Rts. Council, Working Group on Arbitrary Detention, *Report on the Visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers,* U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998) (expressing concern regarding the lack of "a quick judicial remedy" and recommending that each decision to detain be reviewed "by means of a prompt, oral hearing…").

Departments of Homeland Security and Justice "revise regulations to make clear that asylum-seekers can request [their] custody determinations from immigration judges."[8]

While *habeas corpus* should serve as an essential safeguard against arbitrary detention, this protection often does not in practice function as a prompt court review of immigration detention. The Working Group on Arbitrary Detention recently stressed that its jurisprudence "is full of opinions where States have denied the right of habeas corpus, the detaining authorities have refused to obey a judicial release order, the proceedings are unduly delayed, the review is limited to mere technicalities, or States have suspended habeas corpus during periods of emergency."[9] In one recent U.S. case, involving an asylum seeker who was detained for over 5 years, over a year had lapsed between the filing of the petition and the issuance of a ruling by the district court.[10] Not only does it typically take many months or longer for U.S. courts to issue decisions in habeas petitions, but U.S. federal courts have in some cases refused to review detention decisions as long as immigration officials give some reason for detention, and have also at times declined to exercise jurisdiction.[11] While more effective federal court oversight of immigration detention – including through habeas – is necessary, the fact that an individual can file a habeas petition is not a substitute for providing a prompt review of detention by an independent authority.

Recommendation:

- ***The Departments of Homeland Security and Justice*** *should revise regulatory language preventing arriving asylum seekers from accessing a custody determination hearing before an immigration judge. While this is not a substitute for a fully "independent" review,[12] an immigration court custody hearing could provide a basic check on the detention decisions of ICE, the detaining authority, and builds upon an infrastructure that is already in place for other immigrant detainees.*

- *In order to ensure custody hearings are conducted before an impartial adjudicator,* ***Congress*** *should pass legislation guaranteeing prompt and robust habeas review before federal district courts of any decisions to detain asylum seekers and other immigrants.*

[8] U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: Mission to the United States of America*, A/HRC/7/12/Add.2, para. 122-23 (March 5, 2008).
[9] U.N. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, para. 79, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010).
[10] *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075 (9th Cir. 2006) (granting habeas petition for asylum seeker who had been detained for over 5 years).
[11] *See Id*. at 1075 (stating that if a "facially legitimate and bona fide" reason for denying parole is provided, the "denial of parole is essentially unreviewable."); *See also Veerikathy v INS,* 98 Civ. 2591, 1998 U.S. Dist. LEXIS 19360 (E.D.N.Y. Oct. 9, 1998).
[12] In its study on the immigration courts, the American Bar Association found concerns related to fairness in immigration court proceedings due to its lack of independence from the Department of Justice and recommended the establishment of an independent immigration court. *See* American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases,* at ES-7 (February 2010).

2. *ICCPR Article 9(1): Decisions to detain should be based on an individualized determination of the need for detention and be reviewed periodically.*

The protection against arbitrary detention contained in the ICCPR and other human rights conventions requires an individualized determination that detention is necessary, including for asylum seekers and immigrants. U.S. practices of automatically and "mandatorily" detaining asylum seekers in expedited removal does not provide for an individualized assessment of the need to detain and, thus, fail to satisfy this requirement. Even though "mandatory" detention is provided for in the governing U.S. statute, "arbitrariness," as explained by the Human Rights Committee, "is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable in all the circumstances*, for example to prevent flight or interference with evidence."[13]

Determining whether an individual deprivation of liberty is reasonable and necessary in all circumstances of the case also requires weighing the proportionality of detention against the intended objective.[14] Determinations of necessity are not suited to blanket administrative declarations. Rather they require a careful consideration of the circumstances of an individual case, the state and individual interests at hand, and all possible alternatives to detention.[15] Any determination that detention is necessary should be subject to periodic review, a key procedural safeguard against arbitrary detention. This protection is well grounded in human rights law. The Human Rights Committee has emphasized that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed."[16]

Recommendation:

- ***Congress*** *should amend INA §235 and §236, ending the requirement of subjecting asylum seekers and other immigrants to "mandatory" detention without an individual assessment of the need for detention.*

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[13] *Van Alphen v. Netherlands*, U.N. Human Rights Comm. Communication No. 305/1988, para. 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (emphasis added). This language is cited in other Human Rights Committee cases. *See e.g. A v. Australia*, *supra* note 7 at para. 9.2.

[14] Manifred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 172-73 (Engel, 1993); *A v. Australia*, *supra* note 7, para. 9.2 (noting "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*.") (emphasis added); UNHCR Division of Protective Services, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, UNHCR, POLAS/2006/03, page 9 (April 2006) (stating, "Whether a deprivation of liberty is considered to be reasonable and necessary will also depend on the proportionality of the measure with its intended objective.").

[15] *See* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, para. 148 (Oct. 2001) (written at the request of the Department of International Protection for the UNHCR), available at http://www.jrseurope.org/accompanydetainees/docs/GC%20Detention.pdf; Human Rights Council, Report of the Special Rapporteur on the Human Rights of Migrants, para 50, 65, A/HRC/7/12 (Feb. 2008); U.N. Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1999/63/Add.3 (Dec. 18, 1998) (concluding "alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention"); UNHCR Division of Protective Services, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, UNHCR, POLAS/2006/03 (April 2006) (concluding detention should occur only "as a measure of last resort, after other non-custodial alternatives have proven or been deemed insufficient in relation to the individual.").

[16] *See A v. Australia*, *supra* note 7 at para. 9.4.

- ***The Department of Homeland Security*** *should institute a system for conducting case-by-case detention determinations of all asylum seekers and immigrants it brings into custody in which, based upon individual factors including identity, risk to national security or danger to the community, and flight risk,* ***the government bears the burden of justifying detention****. This system should be dynamic, allowing for review when circumstances change and after set periods of time. As indicated above, reviews of detention decisions should be conducted by an independent court.*

3. *ICCPR Article 10(1): Migrants and asylum seekers should not be detained in punitive or penal conditions.*

ICCPR article 10(1) requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[17] The Special Rapporteur on the Human Rights of Migrants has stressed that Article 10 of the ICCPR requires "that migrants deprived of their liberty should be subjected to conditions of detention that take into account their status and needs."[18] When migrants are subjected to administrative detention, they should be held in conditions that are non-punitive and non-penal, and that take into account their needs and their status as administrative, not criminal, detainees.[19] Consistent with the U.N. Standard Minimum Rules for the Treatment of Prisoners, immigration detainees should also be allowed to wear their own clothing.[20] In a March 2008 report following a visit to the United States, the U.N. Special Rapporteur on Migrants and Human Rights expressed concern about the punitive and "prison-like" nature of immigration detention in the United States, concluding that "[t]he conditions and terms of their detention are often prison-like: freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting."[21]

In addition to the ICCPR, Article 31(1) of the U.N. Convention Relating to the Status of Refugees stipulates that contracting States "shall not impose penalties" on asylum seekers because of their illegal entry or presence.[22] The Executive Committee of the UNHCR has stressed that States should

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[17] ICCPR, *supra* note 1, article 10(1); *See* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, article 5(2) ("All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

[18] Report of the Special Rapporteur on the Human Rights of Migrants, E/CN.4/2003/85, para 54, (2002). The Rapporteur goes on to recommend that "[d]etention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature." Id. para. 73; *See also* Global Migration Group, International Migration and Human Rights, 2008, at 32-33.

[19] The UN Working Group on Arbitrary Detention's Body of Principles relating to immigration detention provides that, when detained, immigrants and asylum seekers should be housed in a facility "specifically intended for this purpose." *See* Body of Principles*, supra* note 5, Principle 9; *See also* Office of the U.N. High Commissioner for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, guideline 3(IV), (February 1999), available at http://www.unhcr.org.au/pdfs/detentionguidelines.pdf, (stating "the use of prisons should be avoided;" and detention "should not be used as a *punitive* or disciplinary measure for illegal entry or presence in the country.") [hereinafter UNHCR Detention Guidelines].

[20] *See* United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, para. 88(1).

[21] *See supra* note 8 at para. 28.

[22] Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). The U.S. is bound by articles 2-34 of the Refugee Convention as party to the 1968 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267.

not house asylum seekers with criminal inmates.[23] UNHCR's Detention Guidelines emphasize that, consistent with Article 31, "[t]he use of prisons should be avoided."[24] These guidelines also stress that detention "should not be used as a *punitive* or disciplinary measure for illegal entry or presence in the country."[25] The guidelines call for "the use of separate detention facilities to accommodate asylum seekers."[26]

In a comprehensive report issued in 2005, the bi-partisan U.S. Commission on International Religious Freedom (USCIRF) found that asylum seekers in the United States were being detained in prison-like facilities that are inappropriate for a non-criminal population.[27] USCIRF concluded that US immigration detention facilities housing asylum seekers are structured and operated like correctional facilities in virtually all important aspects. At these facilities, the Commission noted 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); and 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.[28]

USCIRF recommended that the U.S. stop detaining asylum seekers in prison-like conditions. Nevertheless, U.S. immigration authorities increased their use of prisons and prison-like facilities in the years after the 2005 USCIRF report. In its 2009 report, Human Rights First documented this increase in prison-like detention, finding that in nearly all facilities, ICE detains asylum seekers in penal and penitentiary-like conditions: asylum seekers and other immigrant detainees are stripped of their own clothing and given prison uniforms, not allowed any contact visits with family or friends, and lack meaningful privacy and access to outdoor recreation."[29] In addition to concluding that "freedom of movement within the facilities is restricted," the report also documented the excessive use of handcuffs and shackles.

In August and October 2009, ICE and DHS announced their commitment to move away from a "jail-oriented approach" to immigration detention, recognizing that immigration detention should be

[23] U.N. High Commissioner for Refugees, Executive Committee Conclusion on Detention of Refugees and Asylum Seekers No. 44, para. (f) (1986).
[24] UNHCR Detention Guidelines, *supra* note 19; *See* Expert Roundtable, supra note 31, para. 10(k) (noting that in relation to article 31(2) "the use of prisons should be avoided.").
[25] Id. at guideline 3(IV).
[26] Id. at guideline 10, paragraph 3.
[27] United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Volume I: Findings and Recommendations, Page 4 (Feb. 2005), available at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf.
[28] Id.
[29] *See* Human Rights First, US Detention of Asylum Seekers: Seeking Protection, Finding Prison, *supra* note 4, pages 17-29; United States Commission on International Religious Freedom, *supra* note 27, pages 68-69.

approached in a "civil" rather than "penal" manner.[30] Although some steps have been taken to begin this transition, the last 12 months have produced few tangible changes. For example, detained asylum seekers and other immigration detainees are still wearing prison uniforms in immigration detention centers across the country. To bring the system better in line with international human rights standards, DHS should implement the recommendations below as part of its detention reform efforts.

Recommendation:

- ***The Department of Homeland Security/Immigration Customs Enforcement (ICE)*** *should move forward on its commitment—announced by Assistant DHS Secretary John Morton in August 2009 and outlined by DHS Secretary Janet Napolitano in October 2009—to move away from a penal model of detention.[31] As soon as possible this year, ICE should take steps to ensure that when asylum seekers and others are detained, they are allowed to wear their own clothes (rather than prison uniforms) and that their guards are dressed in civilian uniforms (rather than correctional uniforms). The use of handcuffs and shackles should be discontinued except in exceptional and necessary circumstances. Detainees should be provided with contact visits with family, greater freedom of movement, and regular outdoor access. ICE should reduce its use of penal facilities to detain immigrants, and transition to a more limited use of non-penal facilities when detention is necessary. ICE must also move forward on crucial reforms to improve the medical care in detention.*

[30] *See* Press Release, Immigration and Customs Enforcement, ICE Announces Major Reforms to Immigrant Detention System (Aug. 6, 2009), *available at* http://www.ice.gov/pi/nr/0908/090806washington.htm; Press Release, ICE, Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives (Oct. 10, 2009), *available at* http://www.ice.gov/pi/nr/0910/091006washington.htm.
[31] Id.