



Immigration Detention and the Human Rights of Migrants and Asylum Seekers: Key Challenges

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Human Rights First

**Submission to UN Special Rapporteur on the Human
Rights of Migrants**

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The clothes I was wearing I took off my clothes and gave to them, and they gave us the prisoner's uniform, a green uniform. Our hands were handcuffed and our ankles were tied. I couldn't tell what was day and what was night—there were no windows, and 24 hours light. It was hard to find out what was the time. It was very loud in my room, all the time, 48 detainees, and I could not escape it

– Immigration detainee held in U.S. immigration detention facility in Virginia in 2011

Around the world, states are detaining refugees, asylum seekers and migrants in immigration detention in ways that are inconsistent with human rights conventions and standards.¹ They are often detained without individualized assessments of the need for detention, without access to prompt and independent court review, and in some states are held in jail-like facilities with penal conditions even though their detention is considered “administrative” detention. While states should assess the use of alternatives to detention before detaining an individual, very few states have established systems for assessing and utilizing alternatives to detention in all appropriate cases – even though effective models exist.²

Many states have migration detention systems that are inconsistent with international human rights law and standards. Last year, the United States detained almost 400,000 migrants and asylum seekers in jails and jail-like facilities, often without access to prompt court review of detention.³ The Australian Human Rights Commission has expressed serious concerns about the length of detention for many migrants and asylum seekers in Australia, and has called for an end to Australia's system of mandatory, prolonged and indefinite detention.⁴ Deficiencies in medical care for detained migrants and asylum seekers have been reported over the last few years in Egypt, Libya, the United States and elsewhere.⁵ In January 2010, the Parliamentary Assembly of the Council of Europe concluded that “[t]he detention of asylum seekers and irregular migrants in Council of Europe Member States has increased substantially in recent years” and called on Member States to “comply fully with their obligations under international human rights and refugee law.”⁶ Administrative detention is reported to be on the rise all over the world.⁷

While States have the authority to regulate migration, their immigration enforcement policies and practices—including those relating to administrative detention—must comport with the requirements of international human rights law. Too often though, States' detention policies ignore or fail to fully incorporate key human rights protections.

Over the last few years however, there has been an increase in attention to the significant escalation of migration detention in ways that are inconsistent with international human rights law and standards. The UN High Commissioner for Human Rights has stressed that the human rights treaty

bodies, Special Procedures of the Human Rights Council and the Universal Periodic Review process have all “underscored with increasing urgency concerns about human rights violations related to the detention of migrants, and of asylum seekers.”⁸ The UN High Commissioner for Refugees (UNHCR) issued a comprehensive legal paper on alternatives to detention in April 2011. In addition, the International Detention Coalition issued a major study on the use of alternatives to detention in 2011, identifying effective models and best practices. Some states have pledged reforms, though progress towards implementing reforms has often been uneven.

Reacting to the escalation of migration detention, a March 2009 U.N. General Assembly resolution - entitled *Protection of Migrants* – emphasized that “when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law.” The resolution also called upon States to “respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention.”⁹

Human Rights First welcomes the decision of the Special Rapporteur on the Human Rights of Migrants, Mr. François Crépeau, to focus his report on immigration detention. Not only will this report encourage states to revise policies and practices that are inconsistent with international human rights law and standards, but the report can also serve as an opportunity to address a number of areas in greater depth – including alternatives to detention and the use of penal detention conditions including prison uniforms.

Human Rights First’s submission highlights four areas in which states should be urged to revise their practices to better comply with human rights law and standards – including:

- Individualized assessments of detention rather than automatic detention;
- Alternatives to Detention rather than detention;
- The requirement of prompt and independent court review; and
- Prohibitions against detention in penal or punitive conditions.

These are not the only areas in which state practice is inconsistent with international human rights standards. In fact, significant changes are needed to address other areas in which state practice does not meet human rights standards including with respect to medical care and protection for particular populations including children and persons with disabilities, as well as lesbian, gay, bi-sexual, transgender and intersex (LGBTI) persons in migrant detention.¹⁰

This submission draws on a number of reports and papers prepared by Human Rights First staff in recent years, including: Human Rights First’s 2011 report *Jails and Jumpsuits, Transforming the U.S.*

Immigration Detention System – A Two-Year Review (available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>) and the article “*Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, And Refugees in Immigration Detention*,” written by Eleanor Acer & Jake Goodman, published in the *Georgetown Immigration Law Review*.¹¹

1. Individualized Assessments rather than Automatic Detention

Migrants and asylum seekers should only be detained, or subjected to other restrictions on liberty, after an individualized assessment in which the State demonstrates the need for that detention or other restriction on liberty. As detailed in *Reaffirming Rights: Human Rights Protections Of Migrants, Asylum Seekers, and Refugees In Immigration Detention*, the protection against arbitrary detention contained in Article 9 of the International Convention on Civil and Political Rights (ICCPR) and other human rights conventions requires an individualized determination that detention is necessary.¹² Detention (or other restriction on liberty) will be arbitrary where it is not reasonable and necessary in the circumstances of the particular case and is not proportional to the end sought—an assessment that can only be made through an individualized determination.¹³

Despite these requirements, some states – including Australia and the United States - have “mandatory” or “automatic” detention regimes that require detention on a categorical basis, rather than based on individualized assessments. States should revise laws and policies to eliminate mandatory detention regimes, and should instead require individualized determinations before detention is utilized.

2. Alternatives to Detention Rather than Detention

As detailed by UNHCR in its April 2011 legal study, detention should only be used as a last resort after considering alternative measures to detention.¹⁴ In order to establish that detention is necessary, and not arbitrary within the meaning of the ICCPR, States must consider the “less invasive means of achieving the same ends.”¹⁵ The U.N. Working Group on Arbitrary Detention has stressed that administrative detention of migrants should be “the last resort,” noting that “the principle of proportionality requires it to be the last resort.”¹⁶ The Special Rapporteur on the Human Rights of Migrants has emphasized that States should “generally permit detention only as a last resort” and should implement alternatives to detention.¹⁷ In a January 2010 resolution, the Parliamentary Assembly of the Council of Europe stressed that it is “universally accepted that detention must be used only as a last resort” and that “[d]etention should be used only if less intrusive measures have

been tried and found insufficient.”¹⁸ The U.N. General Assembly, in its March 2009 resolution, called on States to “put an end to arbitrary arrest and detention” and to adopt where applicable “alternative measures to detention.”¹⁹

Many states have not developed systems for utilizing alternatives to detention, despite the existence of effective models. Several successful ATD programs have been piloted in the United States over the years, including programs run by the Vera Institute of Justice and by Lutheran Immigration and Refugee Service. These programs documented high appearance rates, and saved government funds by allowing for the release of individuals from more costly immigration detention.²⁰ As detailed in recent studies conducted by the International Detention Coalition, the Lutheran Immigration and Refugee Service and the UNHCR, successful Alternatives to Detention programs, in the United States and around the world, typically include the following components: individualized case assessment, individualized case management including referrals, legal advice, access to adequate accommodations, information about rights and duties and consequences of non-compliance, and humane and respectful treatment.²¹

The United States government has touted the cost savings of a supervised release program it runs through a private contractor. In April 2010, U.S. Immigration and Customs Enforcement (ICE) stated that alternatives to detention cost ICE on average \$8.88 per day²²— more than \$110 less per day than detention.²³ ICE uses two programs including a “full service” program that provides enrollees with “intensive case management, supervision, electronic monitoring, and individual service plans.” The “technology-only” program uses GPS tracking and phone reporting. A recent study on alternatives to detention issued by Lutheran Immigration and Refugee Services describes ICE’s current programs in depth, identifying strengths and shortcomings.²⁴ The contractor that operates the program for the U.S. government has reported that 93 percent of individuals actively enrolled in its alternatives to detention program attended their final court hearings, and 84 percent complied with removal orders.²⁵ Nevertheless, the United States has not yet implemented a nationwide program of alternatives to detention.

States should be urged to develop effective nationwide programs of alternatives to detention and utilize them as alternatives *to detention*, not merely as an additional tool for supervising non-detained populations. These programs should include the components outlined above, such as: individualized case assessment, individualized case management including referrals, legal advice, access to adequate accommodations, information about rights and duties and consequences of non-compliance, and humane and respectful treatment.²⁶

3. Requirement of Prompt and Independent Court Review

When states detain migrants and asylum seekers, they must provide prompt court review of the State detention decision. The fundamental right to court review of a decision to detain is well-established in human rights 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.”²⁷ Regional and other human rights conventions provide similar protections.²⁸

The review must be provided by a court in order to ensure objectivity and independence.²⁹ Indeed, as explained in *Torres v. Finland*, 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...”³⁰ Court review must also be “real” and effective, not just pro forma, providing a real inquiry into the necessity of detention.³¹ (A more detailed discussion of the requirement of prompt and independent court review is included in the article *Reaffirming Rights*.³²)

The U.N. Working Group on Arbitrary Detention has reminded States that a judicial authority “shall *decide promptly* on the lawfulness” of detention.³³ Thus it is not enough that detention be brought under judicial control promptly; the court must actually *decide* on the lawfulness of detention quickly.³⁴ For example, in *Tibi v. Ecuador*, the Inter-American Court of Human Rights ruled that a decision issued twenty-one days after the petition was filed was “clearly an excessive time” and violated the promptness requirement.³⁵

In fact, a number of authorities have stressed that court review should be automatic.³⁶ Guidelines issued by the U.N. High Commissioner for Refugees similarly call for “automatic review before a judicial or administrative body independent of the detaining authority” when detention is used.³⁷ In its January 2010 report, the UN Working Group on Arbitrary Detention stressed that “[d]etention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case.”³⁸

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, in applying ICCPR Article 9(1)’s prohibition against arbitrary detention in *A v. Australia*, 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.”³⁹

The Special Rapporteur on the Human Rights of Migrants and the U.N. Working Group on Arbitrary Detention have repeatedly called on States to provide court review of detention. For example, after a

2007 mission to the United States, the 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. He recommended that “the United States should ensure that the decision to detain a non-citizen is promptly assessed by an independent court,” and that the U.S. Departments of Homeland Security and Justice “revise regulations to make clear that asylum-seekers can request [their] custody determinations from immigration judges.”⁴⁰ The United States mandatorily detains “arriving” asylum seekers and other undocumented migrants, without providing prompt review of their detention by an independent court or even prompt review by an immigration court (which is not a truly independent court, but instead is housed with the U.S. Department of Justice). The Inter-American Commission on Human Rights, in a 2011 report, also concluded that the U.S. detention system lacks safeguards and measures required under international human rights law, recommending that the United States ensure that immigration courts be allowed to review release decisions made by immigration officers.⁴¹

In 2010, in the course of the Universal Periodic Review conducted by the UN Human Rights Council of U.S. compliance with its international human rights obligations, Human Rights First and other groups urged the U.S. government to provide arriving asylum seekers and other immigrants with the chance to have their custody reviewed before an immigration court.⁴² In December 2010, the U.S. Department of Homeland Security advised that it did not intend to provide for release of arriving asylum seekers through immigration court custody hearings.⁴³

States should revise laws and procedures to provide prompt and independent court review of decisions to detain refugees, asylum seekers and migrants in administrative detention.

4. Prohibitions Against Detention in Penal or Punitive Conditions

“I intend to change the jail-oriented approach of our current detention system, and am in the process of redesigning the system so it meets our needs as an agency that detains people for civil, not penal, purposes.”

*–ICE Assistant Secretary John Morton, March 2010.*⁴⁴

ICCPR Article 10(1) provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”⁴⁵ Similar provisions are included in other human rights conventions.⁴⁶ 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.”⁴⁷

As detailed below, 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 law, detainees. In the context of migrants and asylum seekers, the U.N. Working Group on Arbitrary Detention’s Body of Principles provides specifically that, where detained, immigrants and asylum seekers should be housed in a facility “specifically intended for this purpose.”⁴⁸ At a minimum, they “must be placed in premises separate from those for persons imprisoned under criminal law” or their detention risks being arbitrary.⁴⁹ The Migrant Workers’ Convention provides that “any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to immigration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.”⁵⁰

Refugees and asylum seekers should also not be subjected to punitive or penal detention conditions. Article 31(1) of the Refugee Convention stipulates that contracting States “shall not impose penalties” on asylum seekers because of their illegal entry or presence.⁵¹ While administrative detention is permitted in limited circumstances, the term “penalty” certainly includes imprisonment.⁵² The Executive Committee of the UNHCR has stressed that States should not house asylum seekers with criminal inmates.⁵³ UNHCR’s Detention Guidelines emphasize that, consistent with Article 31, “[t]he use of prisons should be avoided.”⁵⁴ These guidelines also stress that detention “should not be used as a *punitive* or disciplinary measure for illegal entry or presence in the country.”⁵⁵ The guidelines call for “the use of separate detention facilities to accommodate asylum seekers.”⁵⁶

In the context of administrative detention, the U.N. Special Rapporteur on the Human Rights of Migrants has stressed that “[a]dministrative detention should never be of a punitive nature.”⁵⁷ In a 2010 report, the Special Rapporteur emphasized that migrants should not be detained in facilities for criminals and that “[m]igration-related detention centres should not bear similarities to prison-like conditions.”⁵⁸ In a March 2008 report following a visit to the United States, the Special Rapporteur expressed concern about the punitive and “prison-like” nature of detention for immigration detainees in the United States. He concluded 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.”⁵⁹ In a December 2010 report, the Inter-American Commission on Human Rights affirmed that “the conditions of [immigration] detention ought not to be punitive or prisonlike,” and stressed its concern “that this principle is not observed in immigration detention in the United States.”⁶⁰

Individuals who are detained for administrative purposes under the immigration law should be allowed to wear their own clothing, or at the very least civilian clothing that does not resemble uniforms. Medical experts have concluded that wearing prison uniforms has a detrimental effect on detained asylum seekers. After conducting a comprehensive review of the impact of detention on asylum seekers, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture recommended that detained asylum seekers be permitted to wear their own clothing as a “simple, yet important” way for them to be “able to identify themselves as individuals and not as criminals.”⁶¹ The International Organization for Migration in its “Guidelines for Border Management and Detention Procedures involving Migrants: A Public Health Perspective” recognizes that: “Migrants should be permitted to wear their own clothing. In longer term detention centres, there should be a provision for providing fresh clothing to migrants who need clothes.”⁶²

International authorities have expressed concern about the practice of requiring that detained asylum seekers and immigrants wear prison uniforms. As noted above, the U.N. Special Rapporteur on the Human Rights of Migrants, in raising concern about the prison-like nature of immigration detention in the United States, specifically mentioned that immigration detainees were required to wear prison uniforms.⁶³ In its 2010 report on the U.S. immigration detention system, the Inter-American Commission on Human Rights also recommended to the U.S. government that “[d]etainees should be allowed to wear their own clothing.”⁶⁴ Even in the case of non-migrants held on criminal charges pre-trial, the U.N. Standard Minimum Rules for the Treatment of Prisoners provide that “[a]n untried prisoner shall be allowed to wear his own clothing if it is clean and suitable.”⁶⁵

The Special Rapporteur on the Human Rights of Migrants has expressed concerns about other prison-like conditions, including restrictions on freedom of movement. He urged that contact with family be guaranteed to immigration detainees.⁶⁶ The Inter-American Commission on Human Rights, in its Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, has affirmed that “[p]ersons deprived of liberty shall have the right to . . . [m]aintain direct and personal contact through regular visits with members of their family . . . especially their parents, sons and daughters, and their respective partners.”⁶⁷ The Parliamentary Assembly of the Council of Europe called on Member States to ensure that detention complies with human rights and refugee law, including by ensuring that detainees are accommodated “in centres specifically designed for the purpose of immigration detention and not in prisons.”⁶⁸ The Parliamentary Assembly specifically noted the importance of access to family, friends, and religious or spiritual representatives.⁶⁹

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) Standards state that “[c]onditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of

activities,” and specify that “detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world ... and should be restricted in their freedom of movement with the detention facility as little as possible.”⁷⁰

The Australian Human Rights Commission has urged that, if individuals must be held in immigration detention, that they be held in less restrictive facilities rather than high-security immigration detention centers.⁷¹ The Commission stated that all people in immigration detention should have access to adequate outdoor recreation spaces including grassy and shaded areas, and should have regular opportunities to leave the detention environment on external excursions.⁷²

In the United States, a number of groups have expressed concern about the use of jails and jail-like facilities to detain asylum seekers and migrants in immigration detention. In a major 2005 study authorized by the U.S. Congress, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) found that most of the facilities used by the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) to detain asylum seekers and other immigrants “in most critical respects... are structured and operated much like standardized correctional facilities,” resembling, “in every essential respect, conventional jails.”⁷³ It also found that these facilities were inappropriate for asylum seekers (who were the subject of the study) and recommended that when they are detained, they instead be held in “non-jail-like” facilities.⁷⁴ The Council on Foreign Relations bipartisan task force on immigration policy, co-chaired by Jeb Bush and Thomas McLarty, observed in July 2009 that “[i]n many cases asylum seekers are forced to wear prison uniforms [and] held in jails and jail-like facilities.”⁷⁵ The bipartisan Constitution Project’s Liberty and Security Committee similarly concluded in December 2009 that “[d]espite the nominally ‘civil’—as opposed to ‘criminal’—nature of their alleged offenses, non-citizens are often held in state and local jails; others among them may be held in sub-standard, remote facilities.”⁷⁶

Against this backdrop, the U.S. Department of Homeland Security (DHS) and its component agency ICE announced plans to reform the U.S. immigration detention system – including a commitment to move away from a “jail-oriented” approach to a system designed for ICE’s “civil” detention authority. These reform commitments – announced in late 2009 – followed a series of reports identifying flaws in the U.S. immigration detention system including the October 2009 report prepared for DHS and ICE by a DHS Special Advisor, Dr. Dora Schriro, a longtime expert on prison systems who had previously run the corrections systems in Arizona and Missouri. Dr. Schriro currently serves as Commissioner of Correction for New York City. That report had found:

With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional

incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards *impose more restrictions* and carry more costs *than are necessary to effectively manage the majority of the detained population.*⁷⁷

In October 2011, two years after DHS and ICE announced these reform commitments, Human Rights First issued a report assessing the U.S. government's progress and lack of progress in transforming the U.S. immigration detention system away from its reliance on jail-like facilities to facilities that are more appropriate for civil immigration law detainees. A copy of that report – *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System – A Two Year Review* – accompanies this submission. In that report, Human Rights First concludes that the overwhelming majority of immigration detainees in the United States are still held in jails and jail-like facilities.⁷⁸ The report identifies a number of elements of the jail-like conditions that exist in these facilities including: prison uniforms, highly restricted movement, lack of true outdoor recreation, and lack of contact visitation.⁷⁹ The report concludes that many criminal correctional facilities actually offer less restrictive conditions than those typically found in U.S. immigration detention facilities, and that corrections experts have confirmed that less restrictive conditions can help ensure safety in detention facilities.⁸⁰ Two immigration detention facilities in the United States allow immigration detainees to wear their own clothing – one houses women, and the other detained families, housing men, women and their children. However, the new “template” or model facilities that ICE is developing do not presently allow asylum seekers and other immigrant detainees to wear their own clothing, instead requiring them to wear uniform clothing (though not prison jumpsuits).

While the United States has only taken some steps towards transforming its system away from a reliance on prisons and penal facilities, the U.S. acknowledgment that its immigration detention system uses facilities designed for “penal” detention purposes rather than for civil immigration detention could encourage other states to acknowledge their use of inappropriate facilities to detain migrants and asylum seekers. In fact, many other states also detain asylum seekers and migrants in prisons and other facilities that are inappropriate for migrant and asylum seeker populations. In its January 2010 resolution on the detention of asylum seekers and irregular migrants, the Parliamentary Assembly of the Council of Europe expressed concern about the increasing use of prisons and other facilities which are inappropriate for detaining asylum seekers and irregular migrants.⁸¹ The Australian Human Rights Commission has concluded that many of Australia's detention facilities “have harsh and prison-like conditions,” and has stressed that in many facilities “high wire fences, a lack of green open space, walled-in courtyards, ageing buildings, pervasive security features, cramped conditions and a lack of privacy combine to create an oppressive atmosphere.”⁸²

States should not detain asylum seekers and migrants in jails or prison-like conditions and environments. States should not require immigration detainees to wear prison jumpsuits or other uniforms; should not deny them contact visits with family; should not deny them meaningful outdoor access; and should not detain them in prison-like facilities that unnecessarily restrict freedom of movement. When asylum seekers and migrants are detained (which consistent with international human rights law should only be as a last resort, based on an individualized assessment, following an assessment of the potential use of alternative measures, and with prompt and independent court review), they should be held in conditions that allow them to wear their own clothing, have contact visits with family, and enjoy freedom of movement within even a closed facility and its grounds. Of course, even with more appropriate detention conditions, detention can still be—and is—penal in nature when it runs afoul of other human rights protection—for example, when detention is not necessary, reasonable, or proportionate, or is unnecessarily prolonged.⁸³

Conclusion and Summary of Recommendations

While states are continuing to detain migrants and asylum seekers in ways that are inconsistent with international human rights standards, the report of the Special Rapporteur on the Human Rights of Migrants should help not only to shine a light on detention policies that are inconsistent with human rights law, but also to encourage States to reform these flawed policies. These reforms should include changes to:

- Ensure asylum seekers and migrants are only detained after individualized assessments, and eliminate automatic and mandatory detention approaches;
- Implement effective nationwide programs of alternatives to detention (as alternatives *to detention* not merely as an additional tool for supervising non-detained populations) that include individualized case assessment, individualized case management and referrals, legal advice, access to adequate accommodations, information about rights and duties and consequences of non-compliance, and humane and respectful treatment; and
- Revise laws and policies to provide prompt and independent court review of decisions to detain refugees, asylum seekers and migrants held in administrative detention; and
- Improve the conditions of detention, so that immigration detainees are not held in jails, prisons or prison-like facilities, ensuring that they have extended outdoor access, contact visits with family, the ability to enjoy free movement within facilities and are allowed to wear their own clothing (and non-uniform civilian clothing) rather than requiring them to wear uniforms or prison clothing.

¹ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶¶ 54-65, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010); Eur. Parl. Ass., *The Detention of Asylum Seekers and Irregular Migrants in Europe*, 1st Part Sess., Res. 1707, ¶ 4 (Jan. 28, 2010). *See also* G.A. Res. 63/184, Preamble, U.N. Doc. A/RES/63/184 (Mar. 17, 2009) (listing many of the relevant conventions); *See generally* International Detention Coalition, <http://idc.rfbf.com.au/> (last visited Aug. 28, 2010) (listing of reports on migrant detention).

² *See generally* Jesuit Refugee Service Europe, *From Deprivation to Liberty, Alternatives to Detention in Belgium, Germany and the United Kingdom* (December 2011), available at <http://idcoalition.org/jrs-europe-report/>; *See* Lutheran Immigration and Refugee Service (LIRS), *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, 2001.

³ Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* 14 (2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detentionreport.pdf>; Human Rights First Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review: United States of America (New York: Human Rights First, 2010), p. 5, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF_UPR_Submission_HRC/April_2010.pdf.

⁴ Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network, at pp. 4-5, August 2011.

⁵ *See* Eleanor Acer and Jake Goodman, *Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention*, 24 Geo. Immigr. L.J. 507, 509 (citing Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* 74 (Sept. 2009), available at http://www.hrw.org/sites/default/files/reports/italy0909webwcover_0.pdf, and other sources).

⁶ Eur. Parl. Ass., *supra* note 1 at ¶ 1, 9.

⁷ Eur. Parl. Ass., *supra* note 1, ¶ 1; Jesuit Refugee Services, *Alternatives to Detention of Asylum Seekers* 2, Oct. 2008, available at http://detention-in-europe.org/images/stories/jrs%20europe%20paper_alternatives%20to%20detention.pdf (“The use of administrative detention of migrants, including asylum seekers, as a tool to manage migration is becoming increasingly widespread and frequent.”); Shyla Vohra, *Detention of Irregular Migrants and Asylum Seekers*, in *International Migration Law* 49, 63-64 (Ryszard Cholewinski, Richard Perruchoud & Euan Macdonald eds., 2007). *See also* Press Release, U.N. High Comm’n for Refugees, UNHCR Disappointed at Australian Decision to Reopen Detention Centre for Asylum-Seekers (Apr. 20, 2010), available at <http://www.unhcr.org/4bcd99956.html>.

⁸ *See* U.N. High Comm’r for Human Rights, *Opening Remarks, delivered to Panel Discussion on Human Rights of Migrants in Detention Centers* (Sept. 17, 2009), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/BBD29A58B74B878CC1257635005778E6>.

⁹ G.A. Res. 63/184, *supra* note 1, ¶ 17; *see also* G.A. Res. 64/166, ¶ 3(b), U.N. Doc. A/Res/64/166 (Mar. 19, 2010); Global Migration Group, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation* (Sept. 30, 2010), p. 7, available at <http://www.globalmigrationgroup.org/uploads/news/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf>.

¹⁰ *See e.g.*, Human Rights First, *Persistent Needs and Gaps: the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees: An Overview of UNHCR's Response to LGBTI Refugees and Recommendations to Enhance Protection (September 2010)* available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/Persistent-Needs_LGBTI_Refugees_FINAL.pdf.

¹¹ *See generally* Human Rights First, *Jails and Jumpsuits, Transforming the U.S. Immigration Detention System – A Two-Year Review* (October 2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf>; Acer and Goodman, *Reaffirming Rights*.

¹² 24 Geo. Immigr. L.J. (2010), 507, 515-16.

¹³ *Id.*

¹⁴ *See* Alice Edwards, *The Optional Protocol to the Convention Against Torture and the detention of refugees*, I.C.L.Q. 2008, 57(4), 789-825.

¹⁵ *C v Australia*, Human Rights Committee, Human Rights Committee. 76th Sess. Comm. No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (Oct. 28, 2002) (detention became arbitrary when state did not consider “imposition of reporting obligations, sureties or other conditions”)

- ¹⁶ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 59, U.N. Doc. A/HRC/13/30 (Jan. 18, 2010).
- ¹⁷ U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 50, 65, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008).
- ¹⁸ Eur. Parl. Ass., *Detention of asylum seekers and irregular migrants in Europe*, Res. No. 1707, ¶ 3 (Jan. 28, 2010); see 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) (“alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention”); Office of the U.N. High Comm’r for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 3, (Feb. 1999), available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> (“alternatives to detention . . . should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case.”).
- ¹⁹ G.A. Res. 63/184, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/184 (Mar. 17, 2009).
- ²⁰ Human Rights First, *U.S. Detention of Asylum Seekers*, p. 63-67; Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program—Volume 1* (New York: Vera Institute of Justice, 2000), p. ii, iii.
- ²¹ Edwards, *Back to Basics*, p. 84; International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Melbourne: International Detention Coalition, 2011), p. 7-9; LIRS, *Unlocking Liberty*.
- ²² Publicly quoted costs for ATDs vary. DHS’s FY 2009 nationwide ATD plan reported that ATDs cost \$8.88 per day. DHS/ICE, *Report to Congress: Alternatives to Detention Nationwide Program Implementation*, April 1, 2010, note 4. At a conference held by the Migration Policy Institute, former ICE Assistant Secretary Julie Myers Wood (who served under President George W. Bush) said that the average daily cost of ATDs was \$6.84. Migration Policy Institute, “Plenary Session III: Detention Reform—Standards, Alternatives, and Vulnerable Populations,” 8th Annual Immigration Law & Policy Conference, April 26, 2011.
- ²³ Human Rights First calculation, based on ICE’s projected daily detention cost of \$122.
- ²⁴ Lutheran Immigration and Refugee Services, *Unlocking Liberty* at 29-34; Human Rights First, *Jails and Jumpsuits*, at 27.
- ²⁵ BI Incorporated, *Intensive Supervision*, p. 4, 5, 17, 21. See also LIRS, *Unlocking Liberty* (“The case management described by ICE [in the full-service program], however, does not rise to the level of intensive, ongoing coordination of referrals to community-based services that defines traditional case management service delivery models.”)
- ²⁶ Edwards, *Back to Basics*, p. 84; International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (Melbourne: International Detention Coalition, 2011), p. 7-9; see also LIRS, *Unlocking Liberty*.
- ²⁷ International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, 371 [hereinafter ICCPR].
- ²⁸ American Convention on Human Rights, art. 7(6), Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter Am. Convention on Human Rights]; European Convention on Human Rights and Fundamental Freedoms, art. 5(4), Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention]; Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc. A/44/49, art. 37 (Nov. 20, 1989) [hereinafter Convention on the Rights of the Child].
- ²⁹ *Torres v. Finland*, UN GAOR, 45th Sess., Supp. No. 40, UN Doc. A/45/40 (1990), ¶ 7.2 (Article 9, ¶ 4, “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence...”); see Acer and Goodman, *Reaffirming Rights*, p. 518-24.
- ³⁰ *Id.*
- ³¹ See e.g., *A v. Australia*, U.N. Human Rights Comm., Comm. No. 560/1993, ¶ 9.5, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (stating “what is decisive for the purposes of article 9, ¶ 4, is that such review is, in its effects, real and not merely formal.”); see also Acer and Goodman, *Reaffirming Rights*, p. 519-20.
- ³² Acer & Goodman, *Reaffirming Rights*, pp 518-524.
- ³³ See U.N. Comm’n on Human Rights, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4, (Jan. 10, 2008) (emphasis added); see U.N. Comm’n on Human Rights, 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”).
- ³⁴ See ICCPR, *supra* note 27, art. 9(4); European Convention, *supra* note 28, art. 5(4); Am. Convention on Human Rights, *supra* note 28, art. 7(6).
- ³⁵ *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 134 (Sept. 7, 2004). Though the court in *Tibi* was considering a criminal detainee, the court’s interpretation of article 7(6) is also applicable to other deprivations of liberty.
- ³⁶ See ECOSOC, U.N. Comm’n on Human Rights, *Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, Submitted Pursuant to Commission on Human Rights Resolution 2002/62*, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30 2002) (prepared by Gabriela

Rodriguez Pizarro) [hereinafter Special Rapporteur on Migrant Workers]; Office of the U.N. High Comm'r for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Guideline 5(iii), (Feb. 1999), available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> (as a “minimum procedural guarantee”, asylum seekers should be entitled “to have the decision subjected to an automatic review”) [hereinafter UNHCR Detention Guidelines]. The Special Rapporteur on the Human Rights of Migrants has explained that “[e]ven when the law guarantees the right to judicial review, other circumstances may undermine it. When the migrant must take the initiative for such review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.”

³⁷ UNHCR Detention Guidelines, *supra* note 36, Guideline 5(iii).

³⁸ U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 61, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010).

³⁹ *A v. Australia*, *supra* note 31, ¶ 9.4.

⁴⁰ The Special Rapporteur on the Human Rights of Migrants, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development, Addendum: Mission to America*, ¶¶ 122-23, delivered to the U.N. Human Rights Council, U.N. Doc. A/HRC/7/12/Add.2, (Mar. 5, 2008) (prepared by Jorge Bustamante) [hereinafter *Mission to America*].

⁴¹ IACHR Report, ¶ 139, 418, 529, 431.

⁴² See Human Rights First Submission to the Office of the High Commissioner for Human Rights, Universal Periodic Review: United States of America (New York: Human Rights First, 2010), p. 5, available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF_UPR_Submission_HRC/April_2010.pdf.

⁴³ Janet Napolitano, DHS Secretary, letter to NIJC Executive Director, re: Petition for Rulemaking to Create Presumption of Parole for Arriving Asylum Seekers Who Pass a Credible Fear Interview,” December 10, 2010, p. 4, on file with Human Rights First.

⁴⁴ Fiscal 2011 Appropriations: Homeland Security, Before the Senate Appropriations Comm., 111th Cong. (March 18, 2010) (testimony of John Morton, Assistant Secretary, Immigration and Customs Enforcement), available at http://www.dhs.gov/ynews/testimony/testimony_1271443011074.shtm.

⁴⁵ ICCPR, *supra* note 27, art. 10(1); see Am. Convention on Human Rights, *supra* note 28, art. 5(2) (“All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”). Human rights law also provides protections against “cruel, inhuman, or degrading treatment or punishment.” Universal Declaration of Human Rights, art. 5, available at <http://www.un.org/en/documents/udhr/>; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, Annex G.A. Res. 46 (XXXIX 1984), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985) (entered into force on June 26, 1987) [hereinafter *Convention against Torture*]; ICCPR, *supra* note 27, at art. 7; American Convention on Human Rights, *supra* note 28, art. 5(2); European Convention, *supra* note 28, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

⁴⁶ *Convention against Torture*, *supra* note 45; Am. Convention on Human Rights, *supra* note 28, art. 5(2); European Convention, *supra* note 28, art. 3.

⁴⁷ Report of the Special Rapporteur on Migrant Workers, *supra* note 36, ¶ 54. The Rapporteur recommended that “[d]etention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.” *Id.* at 73. See also Global Migration Group, *supra* note 9, at 32-33. “Status” as used here refers to the distinction between those detained for administrative purposes and those detained on criminal grounds.

⁴⁸ U.N. Comm’n on Human Rights, Working Group on Arbitrary Detention, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Regarding the Situation of Immigrants and Asylum Seekers*, Principle 9, U.N. Doc. E/CN.4/2000/4/Annex 2 (Dec. 28, 1999).

⁴⁹ *Id.*

⁵⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17(3), Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter *Migrant Workers Convention*].

⁵¹ Convention Relating to the Status of Refugees, July 28, 1951, art. 31, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter *Refugee Convention*].

⁵² Though “penalties” is not a defined term, it clearly includes imprisonment. In addition, significant scholarship argues that the term “penalties” applies to situations outside the purely criminal context. UNHCR Division of Protective Services, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, UNHCR, ¶ 15, POLAS/2006/03 (Apr. 2006) (citing Ryszard Cholewinski, *Enforced Destitution of Asylum Seekers in the United Kingdom*, 10(3) INT’L J. REFUGEE L. 462 (1998); Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection, at 185 n.27, 226 n.103 (June 2003) (written at the request of the UNHCR); Alice Edwards, *Tampering with Asylum: The Case of*

Australia, 15(3) INT'L J. REFUGEE L. 192 (2003)). UNHCR Division of Protective Services has stated, "it is arguable that detaining asylum seekers or otherwise restricting their freedom of movement without appropriate justification, could amount to a penalty within the meaning of article 31." *Id.*

⁵³ U.N. High Comm'r for Refugees, Executive Committee Conclusion on Detention of Refugees and Asylum Seekers No. 44, ¶ (f) (1986).

⁵⁴ UNHCR Detention Guidelines, *supra* note 36, Guideline 10(iii) (noting that in relation to article 31(2) "the use of prisons should be avoided").

⁵⁵ *Id.*, Guideline 3(iv) (emphasis added).

⁵⁶ *Id.*, Guideline 10(iii).

⁵⁷ Special Rapporteur on the Human Rights of Migrant Workers, *supra* note 36, ¶ 54.

⁵⁸ Special Rapporteur on the Human Rights of Migrants, August 2010 report A/65/222, ¶ 87.

⁵⁹ Mission to America, *supra* note 40, ¶ 28.

⁶⁰ IACHR Report, p. 85.

⁶¹ Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison*, p. 191.

⁶² International Organization for Migration, *Guidelines for Border Management and Detention Procedures Involving Migrants*, 2010, ¶ 1.2.3.

⁶³ UNHCR, Mission to the United States of America, ¶ 28.

⁶⁴ IACHR Report, ¶ 436(i).

⁶⁵ U.N. Econ. & Soc. Council (ECOSOC), 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, ¶ 88(1) (hereinafter cited as Standard Minimum Rules for the Treatment of Prisoners). International standards also confirm that unconvicted persons should be treated in ways, and detained only in conditions, that are appropriate to their unconvicted status. Principle 8 of the Body of Principles provides that "[p]ersons in detention shall be subject to treatment appropriate to their unconvicted status." UN Body of Principles, principle 8. The United Nations Standard Minimum Rules for the Treatment of Prisoners and the American Convention on Human Rights also require states distinguish between the convicted and unconvicted, and detain the unconvicted only in conditions appropriate to their status. See Standard Minimum Rules for the Treatment of Prisoners, ¶ 84-5 (referencing "untried prisoners" who "are presumed to be innocent and shall be treated as such."); Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, art. 5(4), available at <http://www.unhcr.org/refworld/docid/3ae6b36510.html> ("Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons."). The Body of Principles provides that unconvicted persons "shall, whenever possible, be kept separate from imprisoned persons." UN Body of Principles, principle 8.

⁶⁶ Mission to America, *supra* note 40, ¶ 28; see also Report of the Special Rapporteur on the Human Rights of Migrants, *supra* note 17, ¶ 87.

⁶⁷ Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, at Principle XVIII, 2008.

⁶⁸ *Id.*, ¶ 9.2.2.

⁶⁹ *Id.*, ¶ 9.2.8.

⁷⁰ See Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Text of the Convention and Explanatory Report*, European Treaty Series, No. 126., CPT/Inf/E (2002), Rev. 2010, paragraph 79, available at <http://www.cpt.coe.int/en/documents/eng-convention.pdf>.

⁷¹ Australian Human Rights Commission, Submission to the Joint Select Committee on Australia's Immigration Detention Network, at p. 8, Aug. 2011.

⁷² *Id.* at p. 9 – 10.

⁷³ US Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal, Volume I: Findings & Recommendations* (Washington, DC: USCIRF, 2005), p. 189; US Commission on International Religious Freedom, *Expedited Removal Study Report Card: Two Years Later* (Washington, DC: USCIRF, 2007), p. 5.

⁷⁴ USCIRF, *Asylum Seekers in Expedited Removal*, p. 189.

⁷⁵ Council on Foreign Relations Independent Task Force on U.S. Immigration Policy, *Independent Task Force Report No. 63—U.S. Immigration Policy* (New York: CFR, 2009), p. 32 (hereinafter CFR Report on Immigration Policy).

⁷⁶ Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* (Washington, DC: Constitution Project, 2009), p. 1.

⁷⁷ 2009 DHS/ICE Report, p. 2-3 (emphasis added).

⁷⁸ Human Rights First, *Jails and Jumpsuits*, 3.

⁷⁹ *Id.* at p. 7 – 11.

⁸⁰ *Id.*, 1.

⁸¹ Eur. Parl. Ass., *supra* note 1.

⁸² *Id.* at 39.

⁸³ Under Article 31 of the Refugee Convention, refugees should not be penalized for their illegal entry if they present themselves without delay and show good cause for their illegal entry. For asylum seekers and refugees, detention can amount to a penalty when, for example, asylum seekers are deprived of liberty for the mere reason of illegal entry or when detention fails the necessity test under Article 31(2) of the Refugee Convention. *See* Edwards, *Back to Basics*, p. 11, n. 64; *see also* Noll, ‘Article 31(Refugees lawfully in the country of refuge),’ p. 1243, ¶ 96.