

**BRIEFING MATERIALS SUBMITTED TO
THE UNITED NATIONS SPECIAL
RAPPORTEUR ON THE HUMAN RIGHTS
OF MIGRANTS**

Detention and Deportation Working Group

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INTRODUCTION:

Overview of U.S. Immigration Detention and International Human Rights Law on the use of Detention in the US

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BRIEFING MATERIALS -- UN SR VISIT

Materials Submitted by Lutheran Immigration and Refugee Service (LIRS),
in partnership with the Detention Watch Network (DWN)

Overview of U.S. Immigration Detention

In 2006, the U.S. Department of Homeland Security (DHS) arrested over 1.6 million individuals, including both the undocumented and legal permanent residents (LPRs), of which over 230,000 were subsequently held in detention.¹ On average, there are approximately 28,000 people detained on any given day.² The conditions and terms of immigration detention in the U.S. are equivalent to prison, where freedom of movement is restricted, detainees wear prison uniforms, and are kept in a punitive setting. This is the case even though under U.S. law an immigration violation is a civil offense, not a crime. Nevertheless, the U.S. uses a combination of facilities owned and operated by U.S. Immigration and Customs Enforcement (ICE), the enforcement bureau within DHS, in addition to prison facilities owned and operated by private prison contractors and over 300 local and county jails that ICE rents beds from on a reimbursable basis.³ Only half of these immigrants held in detention have actual criminal records yet the majority of them are held in jails where non-criminal immigrants are mixed with the prison's criminal population.⁴

Immigrants may remain detained for months or even years as they go through procedures to decide whether they are eligible to stay in the U.S. or, others after being issued a final order of removal, as the U.S. arranges for their deportation. For all immigrant detainees, ICE reported an average stay of 64 days in 2003 (with 32 percent detained for 90 days or longer).⁵ By contrast, asylum-seekers who were eventually granted asylum spent an average of 10 months in detention, with the longest period being 3.5 years.⁶ Some individuals who have final orders of removal, such as those from countries with whom the U.S. does not have diplomatic relations or those from countries that refuse to accept the return of their own nationals, may languish in detention indefinitely.⁷

Immigrants in detention include asylum-seekers, torture survivors, victims of human trafficking, long-term permanent residents, the sick, the elderly, pregnant women, parents of US citizen children and families. For individuals who have experienced past trauma the prison experience exacerbates feelings of isolation, depression or other mental health problems. A study conducted by Physicians for Human Rights in 2003 found high levels of depression (86%), anxiety (77%), and Post Traumatic Stress Disorder (50%) amongst asylum-seekers in detention.⁸ Even for those individuals who have not experienced extreme levels of trauma in the past, detention is emotionally and financially devastating,

¹ "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, April 2006; www.ice.gov, August 7, 2006; "Detention and Removal Operations: Alternatives to Detention," ICE Fact Sheet dated July 14, 2004, <http://www.ice.gov/pi/news/factsheets/06170detFS2.htm>, last modified March 17, 2006.

² Statement of John P. Torres, Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, DHS, before the House Homeland Security Committee, Subcommittee on Border, Maritime, and Global Counterterrorism. March 15, 2007. Available at <http://hsc.house.gov/SiteDocuments/20070315162647-42745.pdf>.

³ "Treatment of Immigrant Detainees Housed at Immigration and Customs Enforcement Facilities," Office of Inspector General, Department of Homeland Security, December 2006, pp 2, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf.

⁴ "Critics Decry Immigrant Detention Push," Associated Press, June 25, 2006, stating that over 57% of ICE detainees are held in local and county jails.

⁵ US Detention of Asylum Seekers and Human Rights, By Bill Frelick, Amnesty International USA, March 1, 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=296>

⁶ Id. (citing Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture (2003). *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. Boston: PHR.)

⁷ *Zadvydas v. Davis*, 533 U.S. 678 (2001), held that the US does not have the power to hold non-citizens indefinitely in these situations and required a case-by-case basis review for supervised release of detainees within a reasonable period after the non-citizens are ordered removed. Unfortunately, these reviews mandated by *Zadvydas* have never operated effectively and most detainees do not receive timely custody reviews and fewer are released as a result of these determinations. In a series of reports, the Catholic Legal Immigration Network, Inc. (CLINIC) tracked these review programs and found them to be empty promises for most indefinite detainees. The Supreme Court decided in *Zadvydas* that six months was a reasonable amount of time in which the government should be able to effect removal of non-citizens. This six-month period was reaffirmed in *Clark v. Martinez*, 543 U.S. 371 (2005). For more information see <http://www.cliniclegal.org/Programs/IndefiniteDetainees.html>.

⁸ Id. (citing *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. Boston: PHR and the Bellevue/NYU Program for Survivors of Torture, 2003.)

particularly when it divides families and leaves spouses and children to fend for themselves in the absence of the family's main financial provider.

A high percentage of immigrant detainees are held as a result of mandatory detention laws that require the detention of all immigrants charged with a ground of "inadmissibility" under INA §212(a)(2) or "deportability" under INA §237(a)(2) while in removal proceedings. These grounds involve criminal offenses, including minor or first-time, non-violent offenses for which the person spent no time in jail. Also, subject to mandatory detention are immigrants in expedited removal proceedings under INA §235, a process that speeds up deportation by significantly reducing access to lawyers, hearings and judges. Mandatory detention provisions result in the incarceration of individuals arriving at a port of entry seeking admission to the U.S. Those provisions also lead to the incarceration of individuals who are physically present in the U.S. but either entered without inspection, or have been paroled and are thus not considered legally "admitted" to the U.S.⁹ Mandatory detention laws also affect long-term LPRs with family, property and businesses in the US who have every incentive to pursue relief from removal. Nevertheless, laws enacted by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 significantly increased the number of immigrants subject to mandatory detention and have drastically increased the average number of immigrants held in detention on a daily basis.

In the past decade, the use of detention as an immigration enforcement mechanism has tripled, with detention becoming more the norm than the exception in U.S. immigration enforcement policy. In 1996, the INS¹⁰ had a daily detention capacity of 8,279 beds.¹¹ By 2006, that daily capacity had increased to 27,500 with plans for future expansion.¹² At an average cost of \$95 per person/per day, immigration detention costs the U.S. government \$1.2 billion per year.¹³ Thousands of those in immigration detention are individuals who, by law, could be released. Two such groups are asylum seekers without sponsors for parole¹⁴ and people whose removal orders are over 90 days old and who pose no danger to the community or national security of the United States. For these individuals, holding them any longer than immediately necessary is not only inhumane, it is fiscally irresponsible and an inefficient and ineffective use of detention.

International Law and Detention

Under international human rights law, detention may be justified only when it is necessary and proportional. In many situations, detention of immigrants is not necessary to achieve the goals for which it is used, those goals include the

⁹ Jonathan D Montag, "Detention and Bond Issues in immigration Law," AILA Immigration Law Today, Vol 25/No.6, pg 20, November/December 2006

¹⁰ The Homeland Security Act of 2002 abolished the Immigration and Naturalization Services (INS) and created three separate immigration bureaus now within the Department of Homeland Security. These three agencies consist of the U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). Since 2003, ICE has had jurisdiction over immigration enforcement, including detention and removal responsibilities.

¹¹ U.S. Commission on Immigration Reform, *Becoming An American: Immigration and Immigrant Policy*, September 1997, pp. 139, 140.

¹² DHS Fact Sheet: ICE Accomplishments in Fiscal Year 2006, Release Date: October 30, 2006, stating, "ICE also increased its detention bed space by 6,300 during the fiscal year 2006, bringing the current number of funded beds to 27,500 immigration detainees."

http://www.dhs.gov/xnews/releases/pr_1162228690102.shtm

¹³ "Immigration Enforcement Benefits Prison Firms," The New York Times, July 19, 2006; "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, April 2006; www.ice.gov, August 7, 2006.

¹⁴ Asylum-seekers are technically eligible for parole. (see: Memorandum from Office of INS Deputy Commissioner, "Implementation of Expedited Removal," March 31, 1997, reprinted in 74 *Interpreter Releases* (April 21, 1997). §212(d)(5)(A) reads "The Attorney General may, except as provided in subparagraph (B) or in section 214(f), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.") Official DHS policy tends to favor their release so long as their identity has been verified, they have established a credible fear of return, demonstrated they have community ties, and pose no risk to national security. However, the majority of parole release rates are very low and they vary widely depending upon where in the country the individual is detained, ranging from districts that have rather liberal parole policies to districts that parole virtually no one. For example, in FY 2003, only 0.5% of asylum seekers subject to expedited removal were released in the New Orleans district prior to a decision on their case. By contrast, during the same year, in Harlingen, Texas 98% of asylum seekers were released on parole. Despite these dramatic inconsistencies, DHS has not promulgated regulations to promote a consistent implementation of parole criteria. The authority to grant parole rests with ICE, the same authority that detains asylum seekers and there is no independent review of parole decisions, not even by an immigration judge. (See U.S. Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, (Washington, D.C., February 8, 2005)).

protection of community safety or national security, ensuring the appearance of individuals at immigration hearings, or guaranteeing the enforcement of orders of removal.

Provisions of the International Covenant on Civil and Political Rights (ICCPR) as well as provisions of the UN Convention Relating to the Status of Refugees (Refugee Convention) and interpretations of both these instruments by the UNHCR Executive Committee (ExCom) and the UN Human Rights Committee (HRC) specifically prohibit the use of arbitrary detention and deprivations of liberty and preventing States from punishing individuals for seeking refugee protection. The ExCom and HRC interpretations flesh out the definition of "arbitrary" detention and outline the limited situations in which detention can be justified under international law.¹⁵

Article 9 of the ICCPR prohibits arbitrary detention, requiring that any detention be lawful. "Lawful" does not necessarily mean "legal;" just because detention may be in accordance national laws does not mean it is not "arbitrary." The Human Rights Committee (HRC) found,

[A]rbitrariness 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. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹⁶

In individual circumstances, any deprivation of liberty must be considered reasonable and necessary when compared with the benefits of the goal achieved by that deprivation. To meet that test, a deprivation of liberty must be proportional to its intended objective.¹⁷ Under the principle of proportionality, any restrictive measure must be the least intrusive option to achieve the desired result. Any restriction must both serve permissible purposes and be necessary to protect them.¹⁸ In this context, deterrence is an 'arbitrary' reason for detention, as it gives rise to disproportionate and unnecessary detentions. In addition, prolonged detention may be considered arbitrary, particularly without an effective court review. The absence of such a review renders the detention arbitrary.¹⁹ The failure to carry out a final order of removal and actually return the person to their home country may trigger a violation of Article 12 of the ICCPR, unless there was another reason to justify the individual's detention.²⁰

Article 12 of the ICCPR applies to restrictions on movement short of deprivation of liberty and has been interpreted to mean that severe restrictions on movement may be considered a deprivation of liberty.²¹ The provisions of Article 12 can be restricted by national governments, but only when provided by law and when such action is necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. Such action must also be consistent with other established human rights principles.²² Any restrictions placed for these reasons are limited to only that period of time in which the restriction is necessary and justification exists. The restriction on freedom must not continue beyond that period.²³

Article 31(2) of the Refugee Convention limits "restrictions" on the movements of refugees who enter territories illegally to "those which are necessary." Detention must be necessary in each individual case in which it is used. Pursuant to Article 31(1), States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened...enter or are present in their territory

¹⁵ Provisions of the UN Convention relating to the Status of Refugees (Refugee Convention), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Forms of Treatment (CAT) all contain provision related to detention, including the use of detention generally, treatment of individuals in detention, the detention of children, the right to legal assistance for detained individuals, and judicial review of detention.

¹⁶ "Alternatives to Detention of Asylum Seekers and Refugees," UNHCR Division of International Protection Services, Legal and Protection Policy Research Series, Orphelia Field, April 2006, pp 9. (citing *Van Alphen v. The Netherlands*, HRC Case No. 305/1998, para 5.8).

¹⁷ See *Id* (citing *A v. Australia*, HRC Case No. 560/1993, para 9.2).

¹⁸ See *Id* at 10 (citing HRC General Comment No. 27 on freedom of movement, 2 November 1999 (adopted at 1783rd meeting on 18 October 1999), CCPR/C/21/Rev.1/Add.9, para 14).

¹⁹ See *Id* at 9.

²⁰ "See *Id* at 21 (citing *Cepali v. Sweden*, HRC Case No. 456/1991).

²¹ See *Id* at 7 (citing *Cepali v. Sweden*, HRC Case No. 456/1991, and *Karker v. France*, HRC Case No 833/1998).

²² Article 12(3), ICCPR.

²³ See *Id* at 10 (citing HRC General Comment No. 27 on freedom of movement, 2 November 1999 (adopted at 1783rd meeting on 18 October 1999), CCPR/C/21/Rev.1/Add.9, para 2-5).

without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Some argue that detaining asylum seekers or otherwise restricting their freedom of movement without appropriate justification could amount to a violation within the meaning of Article 31.

The UNHCR Executive Committee Conclusion 44 of 1986 set forth the agreed standards for detention of refugees and asylum seekers. In these standards, there are only four grounds that justify the use of detention when necessary: i) to verify identity; ii) to determine the elements of which the claim to refugee status or asylum is based; iii) to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or iv) to protect national security or public order.

In any situation, international treaties/conventions require that the decision to detain someone should be made on a case-by-case basis after an individualized assessment of the functional need of detaining that individual. For most detainees, this does not routinely happen in the United States, as the policy of mandatory detention requires the detention of whole classes of migrants. When detention does not meet the ends for which it is intended, the government should parole the detained person or release him/her to an alternative to detention program. To serve this end, alternatives to detention should be developed so that detention space is used efficiently, effectively and in accordance with human rights principles.

OVER USE OF IMMIGRANT DETENTION AND ALTERNATIVES TO DETENTION

- *Mandatory Detention, Prolonged Detention, and Indefinite Detention of Non-citizens in the Custody of the Department of Homeland Security*
- *Tracking ICE's Enforcement Agenda*
- *Information on Raids in Massachusetts*
- *The Immigrant Gold Rush: The Profit Motive Behind Immigrant Detention*
- *Alternatives to Detention*

***Mandatory Detention, Prolonged Detention, and
Indefinite Detention of Non-citizens in the
Custody of the Department of Homeland
Security***

Mandatory Detention, Prolonged Detention, and Indefinite Detention of Noncitizens in the Custody of the Department of Homeland Security²⁴

I. Introduction

There are approximately 22,000 people in immigration detention on any given day in the United States.²⁵ It is estimated that by fall of 2007, this number will rise to 27,500.²⁶ Those subject to this detention include U.S. Citizens, long-time Lawful Permanent Residents, veterans, and vulnerable populations. Immigration Detention has not always been the primary enforcement strategy relied upon by the Department of Homeland Security (DHS). In 1954, the Immigration and Naturalization Service (INS) announced that it was abandoning the policy of detention except in rare cases when an individual was considered likely to be a security threat or flight risk.²⁷ A reluctance to impose needless confinement is consistent with the concepts of Individual Liberty and Due Process, long recognized and protected in the American legal system, and by international human rights standards.

Sweeping changes in immigration laws in 1996 drastically increased the number of people subject to mandatory detention, prolonged detention, and indefinite detention. DHS's increasing reliance on detention as an enforcement strategy has meant that many individuals have been unnecessarily detained for prolonged periods without any finding that they are either a danger to society or a flight risk. Additionally, where actual physical removal is impeded by diplomatic relations between the U.S. and certain countries, individuals from those countries have been subject to indefinite detention, despite attempts by the U.S. Supreme Court to limit the Government's ability to indefinitely detain individuals.²⁸

This briefing paper explores legal provisions and practices that result in the mandatory detention, prolonged detention, and indefinite detention of non-citizens in the United States, as well as the effects of the same on detainees and their families. This paper seeks to demonstrate that these types of detention violate the human rights of non-citizens in the U.S.

II. Mandatory and Prolonged Detention

The U.S. Government detains over 230,000 people a year – more than triple the number of people in detention just nine years ago.²⁹ Currently, non-citizens detained by the Department of Homeland Security are held in several different types of facilities, including “service processing centers”, for-profit prisons, and federal prisons and county jails.³⁰ One of the prime causes of the expansion in immigration detention is new legislation, enacted in 1996, that requires mandatory

²⁴ This briefing was submitted by the Florence Immigrant and Refugee Rights Project and the American Civil Liberties Union on April 18, 2007.

²⁵ Statement of Wesley Lee, Acting Director of Detention and Removal Operations at ICE, before the Senate Judiciary Committee. June 7, 2005.

²⁶ Bill of Rights Defense Committee. Source: <http://www.bordc.org/threats/detention.php>. See Also, “Immigration Enforcement Benefits Prison Firms”, Meredith Kolodner, New York Times, July 19, 2006. <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/62/21244>.

²⁷ Mark Dow, *American Gulag, Inside U.S. Immigration Prisons*, 6-7. University of California Press (2004).

²⁸ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

²⁹ “Detention and Removal of Illegal Aliens,” Office of Inspector General, DHS, April 2006. Also, www.ice.gov, August 7, 2006.

³⁰ Catholic Legal Immigration Network, Inc., Advocacy Topics, Resource: <http://www.cliniclegal.org/Advocacy/detention.html>

detention of many noncitizens in removal proceedings, without any individualized determination that they pose a danger or a flight risk that would actually justify such detention. This section focuses primarily on Section 236(c) of the Immigration and Nationality Act, which requires the mandatory detention, pending removal proceedings, of virtually any noncitizen who is placed in removal proceedings on criminal grounds,³¹. The term “mandatory detention” is also often used to refer to detention of non-citizens who are placed in “expedited removal” proceedings,³² or classified as “arriving aliens.”³³ In fact, the immigration statute does not actually require their detention, but rather permits their release on “parole.”³⁴ In practice, however, because they are not entitled to review of their custody by an immigration judge, their detention is essentially mandatory.³⁵

The Application and Expansion of Mandatory Detention

The 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) resulted in a dramatic expansion of grounds upon which non-citizens could be subject to mandatory detention. AEDPA required the mandatory detention of non-citizens convicted of a wide range of offenses, and IIRAIRA further expanded the list of offenses for which mandatory detention was required.³⁶

As a result of these changes, minor drug offenses -- such as possession of marijuana or other controlled substances, or possession of paraphernalia -- as well as minor theft or other property-related offenses, can result in mandatory detention. Indeed, even individuals who never served any time in prison for their offenses can find that they are suddenly subject to mandatory detention when they are placed in removal proceedings.³⁷

Mandatory Detention violates Due Process

Mandatory detention results in a loss of liberty that is total and severe, and often as great as or greater than the punishment imposed for past criminal convictions.³⁸ By depriving individuals of any opportunity to demonstrate their suitability for release, mandatory detention violates a principle fundamental to our legal system – that people cannot be deprived of liberty without due process of

³¹ INA §236(c) also applies to non-citizens charged with deportability or inadmissibility on terrorism grounds.

³² Expedited Removal is a procedure whereby certain individuals deemed to be inadmissible are automatically removed from the U.S. without an opportunity to see an immigration judge, unless they are found to have a credible fear of return to their home countries. Codified at 8 C.F.R. 235.3(b).

³³ An Arriving Alien, defined in 8 C.F.R. 1001.1(q), generally refers to one who applies for admission at a port of entry. Immigration Judges are not authorized to redetermine the custody of those classified as Arriving Aliens. 8 C.F.R. 1003.19(h)(2)(i)(B).

³⁴ See 8 U.S.C. 1182(d)(5) (authorizing release on “parole” of noncitizens seeking admission).

³⁵ See generally Briefing Paper on detention of asylum seekers in expedited removal.

³⁶ “Analysis of Immigration Detention policies”, ACLU, August 18, 1999, <http://www.aclu.org/immigrants/detention/11771leg19990818.html>

³⁷ In some cases, individuals receive suspended sentences or a withholding of adjudication. While such orders are meant to mitigate penalties for defendants, they carry the same immigration consequences as regular sentences imposing jail or prison time. In some states, such as Utah, defendants are sentenced to indeterminate sentences (ie. 0-5 years). In immigration proceedings, the higher end of such sentences are considered dispositive in determining immigration consequences of those convictions. An individual who was issued an indeterminate sentence of 0-5 years but served no actual jail time could be subject to the same immigration consequence as one who served the full 5 years

³⁸ Brief of Amici Curiae, on behalf of Citizens and Immigrants for Equal Justice(CIEJ), et al., In the Supreme Court of the United States, *Demore v. Kim*, (hereafter CIEJ Amicus Brief), page 5.

law.³⁹ The policy of mandatory detention strips Immigration Judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk. Instead, certain convictions (and in some cases, merely the admission of an offense) automatically trigger mandatory detention, without affording noncitizens an opportunity to be heard as to whether or not they merit release from custody.

The United States Supreme Court has held that “the Due Process Clause applies to all persons within the United States” regardless of the legality of their presence, and that “Freedom from imprisonment - from government custody detention or other forms of physical restraint, lies at the heart of the liberty that Clause protects”.⁴⁰ Yet, mandatory Detention deprives immigration judges – and even the DHS itself – of the authority to order an individual’s release even when it is clear that the individual poses no danger or flight risk that would warrant such detention, and even when release of the individual would clearly serve the public interest, for example by preventing further harm to U.S. Citizen children and other family members. Nonetheless, in 2003, the Supreme Court upheld the constitutionality of INA 236(c), finding that mandatory detention for the “brief period” of removal proceedings did not violate due process.⁴¹

Mandatory Detention Applies to those convicted of nonviolent offenses

Numerous people are subject to mandatory detention, who are neither a flight risk nor a danger to the community. An individual who is eligible for relief, has strong community ties, and is convicted of a non-violent offense, (ie. possession of drug paraphernalia or shoplifting), would likely not be considered a flight risk nor a danger to the community, but could still be subject to mandatory detention.

Mr. Okeke is a Nigerian citizen who came to the US as an infant, was convicted of a single offense of possession of less than one ounce of cocaine in 1999, at the age of nineteen, and served a six-month sentence. He was then transferred to INS custody and held under 1226c. An outstanding high school athlete who had acceptance letters from 3 colleges and no other criminal history, he ultimately won cancellation of removal. INS waived appeal and he was released. Nonetheless he was detained for 6 months in immigration custody without any opportunity to show that he presented neither a danger nor a flight risk.⁴²

Mandatory Detention applies to Permanent Residents and U.S. Citizens

Many who are subject to the provisions of mandatory detention are long time permanent residents who know far more about the country from which they are facing removal --the United

³⁹ CIEJ Amicus Brief, page 17.

⁴⁰ *Zadvydas v. Davis*, 533 U.S. 678 (2001)

⁴¹ *Demore v. Kim*, 538 U.S. 510 (2003). Notably, the Court found that most removal proceedings were completed in an average of 45 days. In addition, the Court’s holding was based on the fact that the individual in the case had conceded deportability. In fact, many people who are subject to mandatory detention do not concede deportability and have meritorious challenges to removal. Moreover, mandatory detention extends far beyond the brief period contemplated by the Supreme Court in *Demore*. Thus, in the aftermath of *Demore*, a number of courts have distinguished *Demore* on these bases, to strike down mandatory detention.

⁴² Example taken from Brief of Amici Curiae, *Demore v. Kim*, page 17.

States --, than the country to which they are facing removal. Indeed, the stronger their family, community, and property ties to the U.S., the greater the impact of their detention and absence. Although Lawful Permanent Status does not terminate when one is detained, but only when a final order of removal is entered against an individual, lawful residents can be mandatorily detained until there is a final resolution in their case.

Mandatory detention even extends to U.S. citizens. That is because, for those who are not born in the US, proving U.S. citizenship is a legally and factually intensive process, requiring documentation of their own and their families history over many years.⁴³ U.S. Citizenship may be acquired or may exist in derivative form and therefore legally complex determinations must be made in order for citizenship to be established. Mandatory detention policies often prevent a Citizen's ability to gather proof of citizenship at all, or in an expedited manner. Even in cases where individuals were born in the U.S., verification of this citizenship can be burdensome and can take months or more, during which individuals may remain detained.

Mr. V was born in the U.S., in the State of Utah. At age 19, returning from a visit to Mexico, he tried to legally enter the U.S. by presenting an original birth certificate to border patrol at the U.S.-Mexico border in Nogales, Arizona. He was verbally insulted by Border Patrol officers who locked him in a room and told him that he would be detained until he admitted Mexican citizenship. Mr. V, after hours of coercion and confinement, falsely admitted that he was a citizen of Mexico, and was immediately deported to Mexico. Subsequently, Mr. V attempted admission into the U.S., this time by bringing his father to the Port of Entry and was successfully admitted as a U.S. Citizen. Years later, Mr. V was placed into DHS custody as a result of a conviction that subjected him to mandatory detention. He again raised the issue of his U.S. Citizenship, providing the Government and the Courts with copies and originals of his U.S. birth certificate. The Government, despite promises to expeditiously verify Mr. V's birth in the U.S., delayed the case for roughly 4 months, before removal proceedings were terminated and Mr. V was released.

Mandatory Detention results in the Detention of People Fleeing Persecution and breaches the obligations of the United States to Asylum Seekers

The United States, along with more than 130 other countries, has agreed to be bound by international treaties that seek to protect refugees by guaranteeing their right to apply for asylum. These include the 1951 United Nations' convention relating to the Status of Refugees and the 1967 United Nations' Protocol relating to the Status of Refugees.⁴⁴ The Refugee Act of 1980 enshrined these international obligations in U.S. domestic law.⁴⁵

Mandatory Detention provisions, including the placing of individuals in Expedited Removal, subject asylum seekers to prolonged and unwarranted detention, despite their not presenting any danger or flight risk. This can result in re-traumatization for torture survivors and others who are escaping past persecution. For example, many asylum seekers have lost family members, friends,

⁴³ CIEJ Amicus Brief, page 11.

⁴⁴ "The Needless Detention of Immigrants in the United States," CLINIC, August 2000. <http://www.cliniclegal.org/Publications/AtRisk/atrisk4.pdf>

⁴⁵ "The Needless Detention of Immigrants in the United States", page 3.

and colleagues to violence or been tortured by prison guards or police officers. Detention, then, can evoke the very conditions that these individuals fled.⁴⁶ Mandatory Detention leads to the unnecessary incarceration and confinement of individuals who fled dangerous situations to seek protection in the U.S., who have well-founded fears of persecution and torture in their home countries, and whose asylum applications will ultimately be granted.

Mandatory Detention obstructs access to legal assistance

Detention impairs an individual's ability to obtain counsel and present cases in removal proceedings, which are highly adversarial proceedings. Approximately ninety percent of DHS detainees go through removal proceedings without representation.⁴⁷ Despite the adversarial and legally complex nature of removal proceedings and the severe consequences at stake, detainees are not afforded appointed counsel. This is explored further in the Briefing Paper regarding Due Process and Access to Legal Counsel.

Detention impacts an individual's ability to earn income thereby also impeding the ability to retain counsel. To make matters worse, DHS can transfer detainees hundreds or thousands of miles away from their home cities without any notice to their attorneys or to family members. Noncitizens are often detained in particularly remote locations such as Oakdale, Louisiana or Florence, Arizona. Many private attorneys can be discouraged from taking cases where clients are detained in remote locations. Onerous distances, inflexible visitation schedules and advance notice scheduling requirements by facilities are all obstacles that impede a detainees' ability to secure legal assistance.

Detention severely impairs the right of a respondent in removal proceedings to present evidence in her or his own defense. Extensive documentation is often required to highlight an individuals' equities including family ties, employment history, property or business ties, rehabilitation or good moral character. Obtaining originals or copies of documents from family members, administrative agencies, schools, and hospitals, can be burdensome for anyone, but often impossible for detained Respondents. Access to mail and property is often limited and can also create significant obstacles for detainees.

Mandatory Detention results in the abandonment of meritorious claims

Faced with the prospect of mandatory and prolonged detention, detainees often abandon claims to legal relief from removal. Mandatory detention operates as a coercive mechanism, pressuring those detained to abandon meritorious claims for relief in order to avoid continued or prolonged detention and the onerous conditions and consequences it imposes.

Mandatory detention leads to detention that is often neither brief nor determinate, and claim adjudication can be complicated and lengthy. An appeal to the Board of Immigration Appeals by either party extends the period of mandatory detention for many additional months. A petition for review to the U.S. Court of Appeals also extends mandatory detention, often for a period of years. A noncitizen is subject to mandatory detention even after being granted relief by the immigration judge, simply upon the filing of a notice of intent to appeal by Government counsel.

⁴⁶ "The Needless Detention of Immigrants in the United States", page 7.

⁴⁷ CIEJ Amicus Brief, page 20, *citing* Elizabeth Amon, *INS Fails to See the Light*, National L.J., March 5, 2001 at A1.

In fact, it is often the most meritorious cases that take the longest to adjudicate. Often the cases subject to the continuing appeals are cases where individuals may have the strongest ties to the U.S. and risk the severest consequences if removed.

Mandatory Detention devastates families and affects the broader community as well

In addition to the devastating effect that mandatory detention has on detained individuals, the policy has an overwhelmingly negative impact on the families of detainees, many of whom are often citizens of the United States.

Those who will eventually be removed are prevented from tying up their affairs and making preparations with their families for departure, to the detriment of the wider community.⁴⁸ Mandatory detention keeps them from fulfilling responsibilities they have to family members, to employers, and to a wider community that may rely on them for various reasons. Children who rely on parents for basic needs can suffer trauma and severe loss and injury from the sudden, prolonged, and sometimes permanent absence of that parent. The absence of a family member can result in irreparable economic and other injury to an entire family structure. Additionally, there may be health conditions and medical situations specific to certain families, none of which can be considered, if a detainee is subject to mandatory detention.

Mandatory detention, therefore has significant effects on US Citizen or Permanent Resident children, spouses, mothers, fathers, brothers, sisters, grandparents, and other family. Families consistently bear the psychological, geographic, economic, and emotional costs of detention.

Mandatory Detention Applies to Individuals who are not Deportable

Immigration laws are known for being particularly complex. A determination of whether or not mandatory detention applies turns on an analysis of the immigration classification and consequence of certain criminal offenses. These classifications depend on careful legal analysis of not only immigration laws but state and federal criminal statutes.

The definition of “aggravated felony”, a classification triggering mandatory detention, is one of many classifications that is not statutorily defined, and is therefore constantly changing, and constantly being challenged in U.S. Courts. It may take a non-citizen subject to mandatory detention months and sometimes years to ultimately prove that he or she was not even deportable.

Mr. F, a native and citizen and Mexico, a lawful permanent resident of the U.S., was detained for approximately three and a half years, subject to mandatory detention, for offenses that the Ninth Circuit ultimately found not to constitute deportable offenses. Three and a half-years after being placed into the custody of DHS and charged as having been convicted of an aggravated felony, Mr. F was released by the Department, as it was clear that nothing in his case made him removable and that removal proceedings would ultimately be terminated.⁴⁹

⁴⁸CIEJ Amicus Brief, page 5.

⁴⁹ Mr. F detained in Florence, Arizona. Information provided by the Florence Immigrant and Refugee Rights Project, who represented Mr. F in a custody redetermination hearing.

Even minimal protections currently in place are under threat by recent or pending legislation in a political climate that is hostile towards immigrants

Despite efforts by activists, community members, lawyers, and other advocates to repair the significant damage resulting from legislation introduced in 1996, not only has the legislation or its effects not been reversed or mitigated, but the political climate in the United States has become increasingly anti-immigrant. For example, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007)⁵⁰ is just one example of recently proposed legislation that would further expand mandatory detention and indefinite immigration detention. The STRIVE Act would require that DHS significantly increase the number of facilities for the detention of non-citizens, adding a minimum of 20 detention facilities with the capacity to detain an additional 20,000 non-citizens.

In addition, STRIVE would essentially overrules the limitations on indefinite detention outlined by the U.S. Supreme in *Zadvydas v. Davis* by specifically authorizing DHS to indefinitely detain certain non-citizens who have been ordered removed, even when their removal is not reasonably foreseeable. STRIVE would also increase the number of people subject to mandatory detention by further expanding the kinds of crimes that constitute an “aggravated felony” and provide the basis for such detention.

Moreover, even at the state level, the anti-immigrant climate has resulted in legislation that results in increased mandatory detention of non-citizens even before they are in DHS custody. For example, in November 2006, Arizona voters approved Proposition 100, which became effective on December 7, 2006 upon its codification in Arizona Revised Statutes §13-3961. That section now provides that a person who is in criminal custody, shall be denied bail “if the proof is evident or presumption great” that the person is guilty of a serious felony offense and the person “has entered or remained in the United States illegally.” In addition to the serious due process and equal protection issues this provision raises – by mandating different treatment for non-citizens in criminal proceedings than for citizens – it also virtually insures the eventual transfer of these individuals to DHS custody (even if they are never convicted), further increasing the number of people potentially subject to mandatory, prolonged, and indefinite detention⁵¹

III. Indefinite Detention

⁵⁰ H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007, introduced March 22, 2007 by Representative Luis Gutierrez (D-Ill.) and Jeff Flake (R-Ariz.) Legislative Summaries made available online by the American Immigration Lawyer’s Association (AILA). See: <http://www.aila.org/content/default.aspx?bc=1019%7C6712%7C8844%7C21943>

⁵¹ While this proposition may have been intended to deny bail to persons who are not in lawful status, it is egregiously worded to also deny persons who may have *entered* illegally, but who subsequently gained lawful status, including citizenship.

A 26-year-old Palestinian, Mr. Y was born in Gaza and lived there until the age of 10, when his family moved to Libya. Mr. Y lived in a refugee camp in Libya for 14 years before fleeing to the United States to seek asylum. Upon reaching the United States, he was placed in the Elizabeth Detention Center in New Jersey. He appeared without a lawyer before an Immigration Judge, who denied him asylum in January 2001. Mr. Y had been in INS detention for 1 year following his final order of removal when a pro bono lawyer determined that removal would likely be impossible in his case, since he was a Palestinian lacking documents. Mr. Y sought his release on an Order of Supervision, and in the spring of 2002, when that avenue failed, pro bono counsel filed a habeas corpus petition on his behalf. More than two years later – at which point he had been imprisoned more than four years – the Court of Appeals for the Third Circuit ordered him released under conditions of supervision, until such time as a government is located that is willing to accept him.⁵²

As of March 2005, when the most recent DHS statistics were available, DHS was holding approximately 1,200 individuals in detention after they had been ordered deported. Like Mr. Y, many of these individuals cannot be easily repatriated, for reasons that include lack of proper documentation.⁵³

Indefinite detention is unconstitutional under the laws of the United States, except in the most limited circumstances

In its landmark decision, *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court held that indefinite immigration detention of noncitizens who have been ordered deported but whose removal is not reasonably foreseeable would raise serious constitutional problems. Emphasizing that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent," and that "freedom from imprisonment-from government custody, detention or other forms of physical restraint-lies at the heart of the liberty that [the Fifth Amendment's Due Process] Clause protects," the Court held that even noncitizens who have been ordered removed have a due process interest in being free from indefinite detention.⁵⁴ In light of the serious constitutional problems that would be caused by subjecting noncitizens who cannot be removed to indefinite, potentially permanent, detention, the Supreme Court construed the immigration statute as authorizing detention only for the period of time reasonably necessary to effectuate removal, presumptively six months.⁵⁵

Prior to *Zadvydas*, the government had a policy of detaining individuals from countries such as Laos, Vietnam, Iraq, Cuba, Iran, and the former Soviet Union. even when there was virtually no chance they would actually be removed. The government often referred to these individuals as "lifers," in recognition that their detention was indefinite and potentially permanent. In the aftermath of *Zadvydas*, new regulations were promulgated in order to comply with the Supreme Court's decision. Under these regulations, If DHS cannot remove an immigrant within the 90-day removal period, the government is supposed to provide a post-order custody review to determine

⁵² *Yassir v. Ashcroft*, (3d Cir. August 2004); *see also* Catholic Legal Immigration Network, Inc., http://www.cliniclegal.org/content_pind.shtml

⁵³ Catholic Legal Immigration Network, Inc., http://www.cliniclegal.org/content_pind.shtml

⁵⁴ *Zadvydas v. Davis*

⁵⁵ *Id*

if the individual can be released. If the individual remains in detention six months after the removal order became final, another custody review is to be conducted. Moreover, once, it is determined that removal is not reasonably foreseeable, the individual is supposed to be released under conditions of supervision.

Unfortunately, many problems plague the post-order custody review process. For example, some detainees never receive notice of their 90-day or six-month custody reviews, and therefore do not have the opportunity to submit documentation in support of their release. Others never receive timely custody reviews at either the 90-day or six-month mark. In addition, decisions to continue detention are often based on faulty reasoning and erroneous facts, ignore the law outlined by the Supreme Court in *Zadvydas v. Davis*, or are essentially "rubber stamp" decisions that fail to cite any specific evidence in support of their conclusion. Frequently, the decisions ignore documentation (including letters from the detained individual's consulate) that prove that there is no significant likelihood of removal in the reasonably foreseeable future. In other cases, the DHS has failed to present evidence of the likelihood of removal and instead it inappropriately blames detainees for failing to facilitate their own removal.

Indefinite detention creates a 'legal limbo' for hundreds of immigrant detainees and their families.

Immigrants indefinitely detained are left uncertain of their status, their rights and their futures. Indefinite detention also subjects the families of detained immigrants to the agony of not knowing when their loved one will be released or removed. Detention, without a release date in one's future, further exacerbates existing mental health problems and re-traumatizes individuals who have been subjected to torture in their home countries.

Immigrants who cannot be repatriated to their home countries because ICE cannot remove them are unjustly punished because the U.S. does not have good relations with those countries.

DHS is non-compliant with current regulations

Recent government reports reveal that ICE is non-compliant with regulations governing the review of post-order cases. In March 2007, the Department of Homeland Security's Office of Inspector General (OIG) released its report reviewing the Immigration and Customs Enforcement's (ICE) compliance with the two U.S. Supreme Court rulings on indefinite detention.⁵⁶

ICE's own rules require "custody reviews" to take place at the 90- and 180-day mark, and for detainees to be released under ICE supervision if prompt deportation is not possible. The OIG study, "ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States," found that the "required custody decisions were not made in over 6 percent of cases [it reviewed], and were not timely in over 19 percent of cases."

Furthermore, the OIG study found that ICE failed to provide detainees with prior notice of custody reviews, information about how they can cooperate in removal efforts, or decisions that clearly explain why supervised release has been denied. OIG attributed many of these failures to inadequate staffing at local ICE Field Office levels, and at the ICE Headquarters level, which leads to insufficient oversight of local custody decisions.

⁵⁶ http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf

These non-compliance issues are of special concern given recent legislative proposals in the US House of Representatives that would expand the category of individuals subject to indefinite detention, eliminate the safeguards put in place by the Supreme Court of the U.S. and limit judicial review of indefinite detention cases⁵⁷. Without the ability to comply uniformly to the current regulations on post-order review and release there can be no reasonable expectation that ICE has the capacity to handle the cases of individuals subject to any expansion. As stated in the OIG report, "There are weaknesses and potential vulnerabilities in the POCR process that cannot be easily addressed with ICE's current oversight efforts. These deficiencies will directly affect ICE's ability to manage the projected growth in its caseload caused by DHS' planned enhancements to secure the border."⁵⁸

III. International Law and Standards⁵⁹

The U.S. has signed and ratified the International Covenant on Civil and Political Rights (ICCPR). Article 9 of the ICCPR states that "everyone has the right to liberty and security of person," and that "no one shall be subject to arbitrary arrest or detention." Article 9 further states that "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." It would appear then that international law that is binding on the U.S. explicitly prohibits mandatory detention laws that do not permit a judicial determination of danger or flight risk. As such, current U.S. practices violate international law.

The right to liberty is also recognized and protected in the Universal Declaration of Human Rights.⁶⁰ The Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment states that a person who is detained shall be brought before a judicial or other authority provided by law promptly after his arrest and that such authority "shall decide without delay upon the lawfulness and necessity of detention."⁶¹ The freedom from arbitrary arrest or imprisonment is recognized by several international human rights documents including the American Convention on Human Rights⁶², and is violated by a policy of both mandatory detention and indefinite detention.

⁵⁷ H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act of 2007) introduced March 22, 2007 by Representative Luis Gutierrez (D-Ill.) and Jeff Flake (R-Ariz.)

⁵⁸ OIG Report at p. 9.

⁵⁹ This section includes a brief discussion of applicable international legal standards and is by no means an exhaustive discussion.

⁶⁰ Universal Declaration of Human Rights, Art. 3, December 10, 1948, U.N.G.A. res. 217 A(III).

⁶¹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 37, U.N.G.A. res. 43/173 of December 9, 1988.

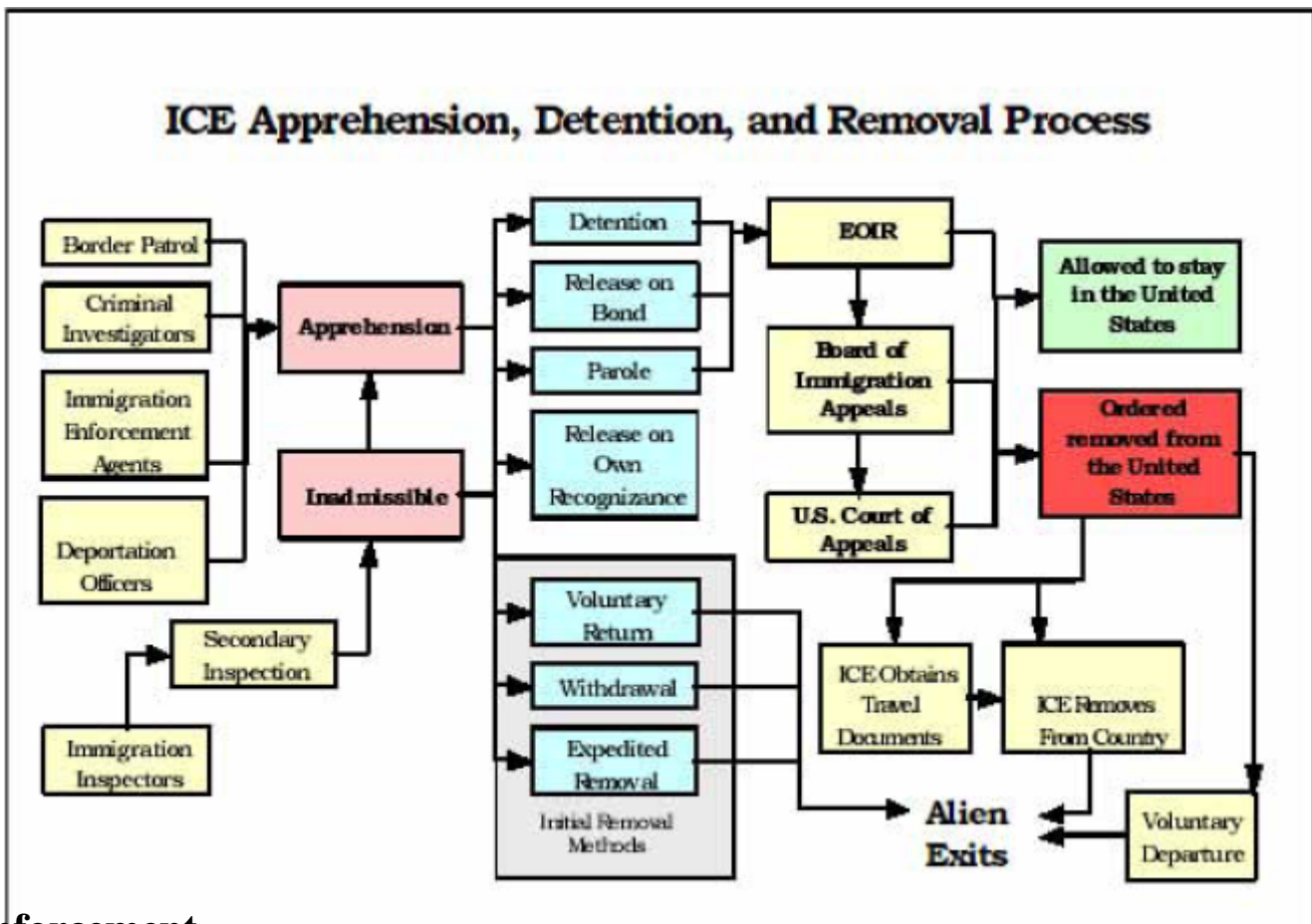
⁶² American Convention on Human Rights, Art. 7(3), adopted at the Inter-American Specialized Human Rights conference, November 22, 1969.

Tracking ICE's Enforcement Agenda

Tracking ICE's Enforcement Agenda

Detention Watch Network is deeply concerned about the exploding enforcement in our communities that leads to the ever-increasing detention and deportation of our friends and families. This report was originally created to document immigration raids, but has expanded to include data on the detention and deportation of immigrants. Some of the language used throughout the document is that of the government, specifically the Bureau of **Immigration and Customs Enforcement (ICE)**. Much of the data was compiled from the **ICE** website, though it has been supplemented with data from the media, congressional reports and various other sources. As the raids continue daily and **ICE** operations expand, it is difficult to document this information completely, and thus, this remains a working document. Its purpose is to assist advocates and organizers in exposing the links between operations like the highly publicized Swift meat-packing raids and the hidden world of detention where immigrants are then held and processed for deportation. Please feel free to use it in your own advocacy, education, and organizing work, and share it with others who may find it useful.

The Connection



Enforcement

Source: INS Detention and Removal Program, Critical Influences on INS Detention, May 2001, page 4, and DHS-OIG Analysis

The mission for the **Department of Homeland Security (DHS)** is to “lead the unified national effort to secure America” by preventing and deterring terrorist attacks, threats and hazards to the nation, and securing US borders.⁶³ The **Immigration and Customs Enforcement Agency (ICE)**, as the largest investigative branch of DHS, seeks to effectively enforce immigration and customs laws and protect the US against terrorist attacks by targeting undocumented immigrants, who they consider to be “the people, money and materials that support terrorism and other criminal activities.”⁶⁴ The **Office of Detention and Removal (DRO)** the primary enforcement arm of ICE, seeks to remove all removable immigrants from the US, as outlined in their June of 2003 strategic plan called, “**Endgame.**” This plan lays the framework for “removing all removable aliens” by 2012 by through the development of enforcement and detention infrastructure and strategies. To date, Congress has appropriated a total of \$204,842,510 to fund these efforts, starting with \$9,333,519 in FY 2003 to \$110,638,837 in FY 2006.⁶⁵

On November 2, 2005 the **DHS** announced to the public their multi-year plan called the **Secure Border Initiative** to increase enforcement along the US borders and to reduce illegal migration.⁶⁶ The **SBI** is divided into two phases:⁶⁷

- The first phase includes a re-structuring of the detention and removal system through the expansion of **Expedited Removal**⁶⁸ and the creation of the “**Catch and Return**”⁶⁹ initiative, in addition to greatly strengthening border security through additional personnel and technology.⁷⁰
- The second phase, the **Interior Enforcement Strategy**, was unveiled to the public on April 20, 2006. It is through this initiative that Immigration and Customs Enforcement (**ICE**) has expanded operations that target undocumented workers and individuals who are in violation of immigration law. The three primary goals of the **IES** are to:⁷¹

1. “Identify and remove criminal aliens, immigration fugitives and other immigration violators.”
 - A “criminal alien” is someone who is a non-citizen who has been convicted of a crime while in the US, either legally or illegally. This includes charges from shoplifting, to work document fraud, to murder. After having served their sentence, these individuals face a separate administrative procedure to see whether they should be removed from the US.
 - An “immigration fugitive” is someone who has been ordered deported by an immigration judge but has not complied with the order. In actuality, a number of these deportation orders were issued *in absentia* and mailed, many times to incorrect

⁶³ <http://www.dhs.gov/xabout/strategicplan/>

⁶⁴ <http://www.ice.gov/about/index.htm>

⁶⁵ **DHS**, Office of the Inspector General. *An Assessment of United States Immigration and Customs Enforcement’s Fugitive Operations Teams*. March 2007, p. 1-6.

⁶⁶ http://www.dhs.gov/xnews/releases/press_release_0795.shtm

⁶⁷ http://www.dhs.gov/xnews/speeches/speech_0261.shtm

⁶⁸ Expedited Removal is a process that authorizes ICE to expeditiously deport undocumented immigrants who are apprehended within 14 days of entry to the US and within 100 miles of the border with some safe guards for asylum seekers. DHS officers, instead of trained immigration judges, have the power to determine if someone should be deported. During the process immigrants in expedited removal are subject to mandatory detention with limited parole options.

⁶⁹ The “catch and return” policy refers to the end of the old “catch and release” ICE policy along the southern border. Essentially, this provision is asking for the expansion of expedited removal and mandatory detention, which affects all non-Mexican immigrants that have either been detained or arrested on immigration related charges.

⁷⁰ http://www.dhs.gov/xnews/speeches/speech_0261.shtm

⁷¹ http://www.dhs.gov/xnews/releases/press_release_0890.shtm

mailing addresses. As of **August of 2006 623,292**⁷² **immigrants were identified as “fugitives.”**

- Other “immigration violators” or “non-fugitive violators” are people who are in some way in violation of current immigration law, but have not been issued a final order of deportation. This includes people who are undocumented, have over-stayed their visas, or are in violation of a current immigration law that might not have existed at the time of their original entry.
2. **“Build strong worksite enforcement and compliance programs to deter illegal employment.”**
 - **ICE** has shifted its approach to worksite enforcement by bringing criminal charges against employers, seizing their assets, and charging more employers with money laundering violations. This initiative also seeks authorization from Congress to allow **ICE** investigators access to Social Security data to track down undocumented workers.
 3. **“Uproot the criminal infrastructures at home and abroad that support illegal immigration.”**
 - This includes immigration-related document and benefit fraud and has led to the creation of numerous task forces across the country. Such document fraud includes fraudulent green cards, work visas and social security numbers that many undocumented immigrants use to obtain work.

In response to both the **Secure Border Initiative** and the **Interior Enforcement Strategy**, **ICE** has expanded existing programs aimed at apprehending undocumented workers and others that are in violation of immigration laws

National Fugitive Operations Program

The **Office of Detention and Removal (DRO)** within **ICE** has consistently prioritized the apprehension and removal of immigrants identified as fugitives or absconders. In 2002, the former **INS** launched the **National Fugitive Operations Program (NFOP)** under the control of the **DRO**.

The **NFOP** targets immigrant “fugitives” or “absconders” who have an outstanding deportation order. In January of 2006, **ICE** set a goal of 1,000 arrests per team each year, a much higher number than the original goal of 125 arrests per year set in FY 2003. The reasons behind this increase include: more officers per team, the creation of the **Fugitive Operations Support Center**, and less emphasis on the apprehension of fugitives with criminal convictions, which are far more time-consuming workloads than the apprehension of fugitives with no criminal convictions.⁷³

- On April 20 2006 there were 35 teams nationwide; in the beginning of September 2006 there were 45; by the end of September 2006 there were 50. Currently there are 52 teams nationwide, and the goal for the end of FY 2007 is 75 teams operating.⁷⁴
- By December 20, 2006, **NFOP** teams had conducted more than **77,623 total cumulative enforcement activities since 2003**. Roughly 27,600 had been previously charged with a crime. **More than 61,437 of those arrested were considered to be fugitives.**⁷⁵

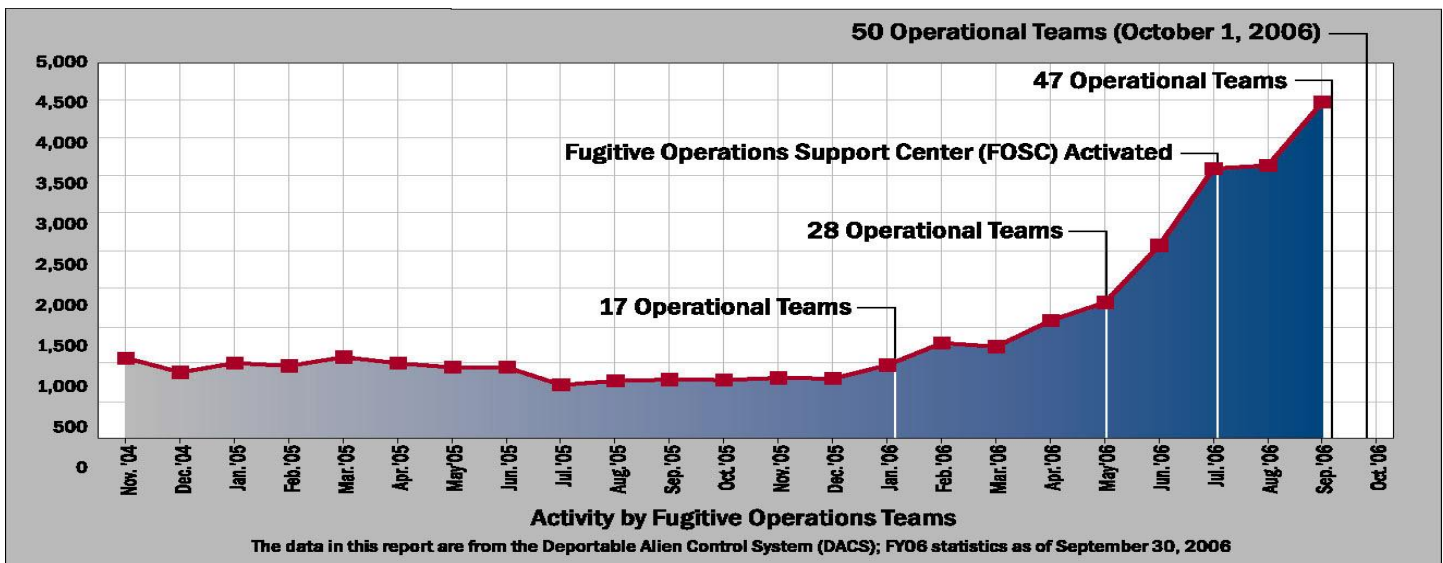
⁷² DHS, Office of the Inspector General. *An Assessment of United States Immigration and Customs Enforcement’s Fugitive Operations Teams*. March 2007, p 1

⁷³ Ibid, p. 8-9

⁷⁴ <http://www.ice.gov/pi/news/newsreleases/articles/070323yakima.htm>

⁷⁵ <http://www.ice.gov/pi/newsreleases/articles/061220delraybeach.htm>

In April 2006, the NFOP created a new program called “**Operation Return To Sender**” in response to the **Interior Enforcement Strategy**. This ongoing ICE project works with numerous state and local law enforcement agencies to track down and arrest immigrants in violation of immigration laws. One of the largest operations carried out during the FY 2006 was from May 26-June 13, which resulted in the arrests of 2,179 immigrants in more than 30 states. From May 26-September 30 of that same year ICE arrested a total of 14,356 immigrants, soon afterward deporting 4,716 of those arrested.⁷⁶ **Between May 2006 and April 2007, this operation has arrested almost 19,000 immigrants.**⁷⁷

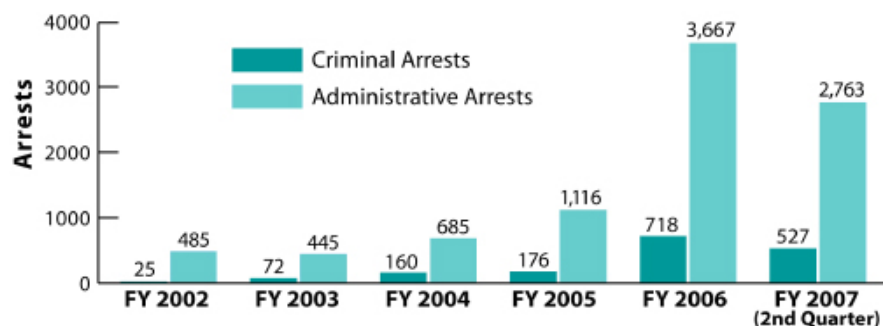


Other NFOP programs include:

- **Operation Secure Streets**—This operation begun in April 2006 targets immigrants with DUI-related charges.⁷⁸
- **Operation Cross Check**—This operation works closely with local law enforcement by sharing information in order to target, locate, and apprehend immigrants with past criminal convictions.⁷⁹

Worksite Enforcement Operations

The graph to the right from ICE⁸⁰ highlights the number of worksite enforcement related arrests that have occurred since FY 2002. There is a substantial increase in arrests from FY 2002 and into the second quarter of FY 2007. The graph also shows the number of people arrested on criminal charges, which include the number of



⁷⁶ <http://www.ice.gov/pi/news/newsreleases/articles/070323yakima.htm>

⁷⁷ <http://www.ice.gov/pi/news/newsreleases/articles/070402newark.htm>

⁷⁸ <http://www.ice.gov/pi/news/newsreleases/articles/070223raleigh.htm>

⁷⁹ <http://www.ice.gov/pi/news/newsreleases/articles/070406raleigh.htm>

⁸⁰ <http://www.ice.gov/pi/news/factsheets/worksite.htm>

employers, managers and contractors who might be criminally charged, immigrants using fraudulent paperwork in order to obtain employment, and immigrants charged with identity theft. The graph also measures the total number of administrative arrests, which refers to the number of undocumented workers arrested that will not be charged with criminal violations.

- The number of worksite investigations conducted is another method of measuring **ICE's** expansion of worksite enforcement. In FY 2004 **ICE** conducted 460 investigations; in FY 2005 the number rose to 502 investigations. As of **August 22 2006, ICE had conducted 1,097 investigations.**⁸¹
- Recently, **ICE** developed the **ICE Mutual Agreement between Government and Employers (IMAGE) program, which targets the employment of undocumented immigrant.** **ICE** examines the hiring practices of each employer in the program and determines if there are vulnerabilities. **ICE** also helps businesses integrate technical tools, which screen for Social Security information.⁸² Other requirements for the program can be found on the **ICE** website.

Document and Benefit Fraud Task Forces

In April 2006 **ICE** partnered with the **Department of Justice** and other federal agencies to launch 11 **Document and Benefit Fraud Task Forces** throughout major US cities: Washington, DC/Northern VA, Atlanta, Boston, Dallas, Denver, Detroit, Los Angeles, New York, Newark, Philadelphia, and St. Paul.⁸³ By the end of FY 2006, these teams launched 235 investigations resulting in 189 arrests and 80 convictions.⁸⁴

Local Enforcement Operations

ICE is actively seeking the assistance of state and local law enforcement in enforcing immigration law. Under current federal law, **ICE** can enter into agreements with state and local enforcement agencies **through 287(g) voluntary programs** which allow designated officers to carry out immigration law enforcement functions. These state and local law enforcement agencies enter into a **Memorandum of Understanding (MOU) (or a Memorandum of Agreement (MOA))** that outlines the scope and limitation of their authority. According to **ICE**, over 214⁸⁵ officers nationwide are participating in this program, and more than 40 municipal, county, and state agencies have applied. For the FY06, this program resulted in 6,043 arrests and so far in FY07, 3,327 more.⁸⁶

- **Local Enforcement Agencies that have signed MOU's:**
 - **Florida Department of Law Enforcement (FDLE)** was the first to enter into the agreement. 63 officers stationed throughout the state have been trained to date.⁸⁷
 - **Alabama Department of Public Safety (ALDPS).** 60 Alabama State Troopers have been trained.⁸⁸
 - **Arizona Department of Corrections:** Twelve officers trained.
 - **Los Angeles, CA, Sheriff's Office:** 8 people trained.
 - **San Bernardino County, CA, Sheriff's Office:** 11 people trained.

⁸¹ <http://www.ice.gov/pi/news/factsheets/ICEAccomplishments060911.htm>

⁸² <http://www.ice.gov/partners/opaimage/index.htm>

⁸³ <http://www.ice.gov/pi/news/factsheets/070301dbfi.htm>

⁸⁴ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

⁸⁵ <http://www.ice.gov/pi/news/factsheets/070323dc287gfactsheet.htm>

⁸⁶ <http://www.ice.gov/pi/news/newsreleases/articles/070123charlotte.htm>

⁸⁷ <http://www.ice.gov/pi/news/factsheets/060916dc287gfactsheet.htm>

⁸⁸ <http://www.ice.gov/pi/news/newsreleases/articles/060901dc.htm>

- **Riverside County, CA, Sheriff's Office:** 10 people trained.
- **Orange County, CA, Sheriff's Office:** 14 people trained.⁸⁹
- **Local Enforcement Agencies that Have Begun the MOU Process:**
 - **Gaston and Alamance counties in North Carolina:** These agreements will give the deputies the power to interview inmates in county jails to determine if the inmates are potentially deportable.
 - **Maricopa County Sheriff's Office:** 160 officers have signed up to receive training.⁹⁰
 - **Davidson County, Tennessee:** 10 officers will receive training. The agreement will allow these deputies to interview inmates in county jails and determine probable cause for violation of immigration laws.⁹¹
 - Other agreements include agencies in North Carolina and California bringing the total of signed agreements between **ICE** and local enforcement agencies to more than 8.⁹²

More recently, **ICE** decided to expand its collaboration with local law enforcement through the **287(g) initiative** to include review of inmates' records in local and county correctional facilities that are not housed under **ICE's** jurisdiction under the **Criminal Alien Program (CAP)**. The following are examples of its impact and use:

- **Mecklenburg County Sheriff's office in Charlotte, NC:** The Sheriff's office announced on November 7th that since their partnership with **ICE** under the **287(g) program, they have charged 1,600 people with immigration violations since March 23rd, 2007.**⁹³ Part of their program includes going to County jails and interviewing immigrants in hopes to find possible immigration violations.⁹⁴
- **Costa Mesa City Council:** The Costa Mesa Police Department is under **ICE's 287(g) program**. The city council also agreed to place two permanent **ICE** personnel in the town's city jail so that **ICE** can identify those who may be deportable.⁹⁵
- **BEST taskforce in El Paso, TX:** BEST is an initiative that patrols the borders through cooperation between **ICE**, Border Patrol, El Paso County Sherri's Office, and the US Attorney's office in the Western district. Since its start in October of 2006, this operation has resulted in 52 arrests.⁹⁶ In January of 2007 officers surveyed truck stops and arrested an additional 15 individuals.

Other Local Enforcement Efforts:

- **"Operation Driver's License Check Lane,"** Topeka, Kansas: Topeka PD and Kansas Highway Patrol stop vehicles to check for valid driver's licenses and they have asked for the participation of **ICE** agents to conduct this operation. Any driver who does not show a valid license is handed over to **ICE** agents waiting nearby who interview them to determine their immigration status.⁹⁷
- **"Operation Linebacker,"** Texas: Governor Rick Perry of Texas gave out more than \$10 million for border sheriffs to work with local and state enforcement officials. According to the governor, these sheriffs were not meant to enforce immigration law. However a November 2006 El Paso Times report found that the border sheriffs were reporting on undocumented immigrants seven times more than they arrested criminals. Among the various border sheriffs, Leo Samaniego is the most

⁸⁹ <http://www.ice.gov/pi/news/factsheets/070323dc287gfactsheet.htm>

⁹⁰ <http://www.ice.gov/pi/news/newsreleases/articles/070226phoenix.htm>

⁹¹ <http://www.ice.gov/pi/news/newsreleases/articles/070227nashville.htm>

⁹² <http://www.ice.gov/pi/news/factsheets/060916dc287gfactsheet.htm>

⁹³ <http://www.ice.gov/pi/news/factsheets/070323dc287gfactsheet.htm>

⁹⁴ <http://www.ice.gov/pi/news/newsreleases/articles/061127charlotte.htm>

⁹⁵ <http://www.ice.gov/pi/news/newsreleases/articles/061128costamesa.htm>

⁹⁶ <http://www.ice.gov/pi/news/newsreleases/articles/070130elpaso.htm>

⁹⁷ <http://www.ice.gov/pi/news/newsreleases/articles/060925topeka.htm>

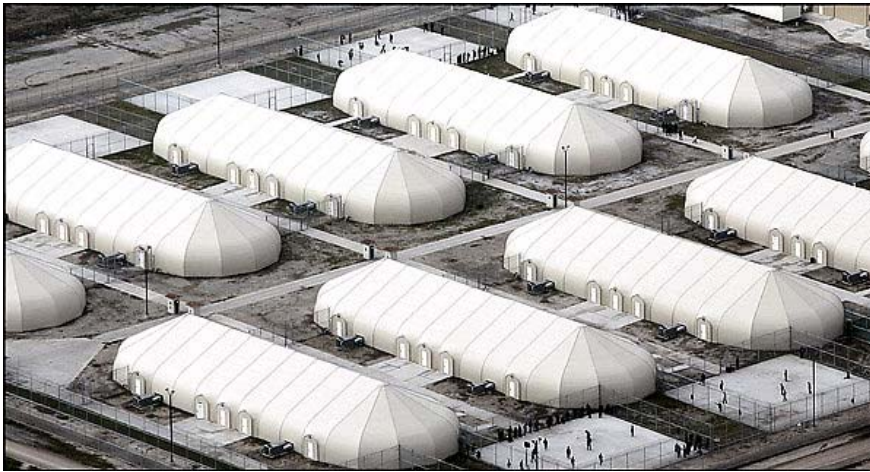
controversial. According to the El Paso Times, Samaniego has been reportedly using traffic checkpoints for immigration enforcement purposes. **Following these reports, Texas Senator Eliot Shapleigh filed a bill that would prevent local law enforcement agencies from participating in immigration enforcement.**⁹⁸

Detention Operations and Expansion:

Immigrants are being jailed in detention centers in record numbers while the government decides whether or not to deport them. There are currently 27,500 people in immigration detention on any given day. This is a three-fold increase in beds since 1996. A total of 283,000 immigrants were detained in 2006 in a network of over four hundred federal and contract facilities, county and local jails. As part of the 2004 Intelligence Reform Bill, Congress authorized the creation of 40,000 additional detention beds. As a result, the number of detention beds is expected to triple in the next several years even before any new legislative proposals to increase beds is considered by Congress. As detention bed space expands, enforcement operations will also expand.⁹⁹

According to one Washington Post article, “With roughly 1.6 million illegal immigrants in some stage of immigration proceedings, ICE holds more inmates a night than Clarion hotels have guests, operates nearly as many vehicles as Greyhound has buses and flies more people each day than do many small U.S. airlines.”¹⁰⁰ As enforcement operations increase, detention bed space becomes limited and ICE pushes to further expand

into facilities like the 2,000 bed facility in Laredo, Texas (shown on the left). **For this reason, detention expansion has been and continues to be one of ICE’s top priorities.**



By Kirsten Luce for the Washington Post

Facts

- **Since July 2006 the daily population of immigrants in detention rose from 19,000 to 27,521. ICE increased detention capacity by 6,300 in the Southwest border area alone, which brought the**

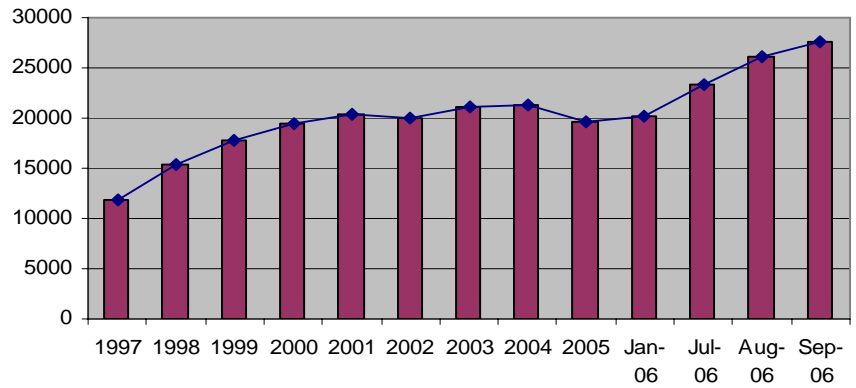
⁹⁸ http://www.elpasotimes.com/news/ci_4842250

⁹⁹ DHS, Office of the Inspector General. *ICE’s Compliance with Detention Limits for Aliens with Final Order of Removal from the United States*. February 2007, p. 13-14.

¹⁰⁰ <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/01/AR2007020102238.html>

total of funded bed space to 27,500.¹⁰¹ **For FY 2008, ICE is requesting funding for 950 additional beds, bringing the total number of beds to 28,450.**¹⁰²

Average Daily Detention Population



Prepared by DWN with data from the 04/06 CRS Report, DRO and CIE/DHS

- Since implementation of the **SBI**, the numbers of people subject to **Expedited Removal** has increased and **ICE** reports that the average length of stay in detention is roughly 19 days, a significant drop from the average of 90 days before the **SBI**.¹⁰³
- **DHS** and **ICE** also expanded **Expedited Removal** to include families.¹⁰⁴ **ICE** opened a new family facility, the **T. Don Hutto Family Residential Facility**, with a 512-bed capacity in Taylor, Texas in May to house whole families waiting to be removed. Since August there has been a **97 percent decline of family releases** along the southern border.¹⁰⁵
- In July **ICE** established the **Detention Operations Coordination Center (DOCC)** or “**Operation Reservation Guaranteed**”, which allows **ICE** to relocate immigrants throughout the detention system, anywhere around the country at any given time. This program is meant to maximize detention space; however, it also tears immigrants away from their families and legal counsel.¹⁰⁶

Family Detention

- The Women’s Commission for Refugee Women and Children and the Lutheran Immigration and Refugee Service published a report in February 2007 that focused on family detention at both the **T. Don Hutto Residential Center in Texas** and the **Berks Family Shelter Care Facility in Pennsylvania**. The following is an excerpt from their report:
 - “Hutto is a former criminal facility that still looks and feels like a prison, complete with razor wire and prison cells.
 - Some families with young children have been detained in these facilities for up to two years.
 - The majority of children detained in these facilities appeared to be under the age of 12.
 - At night, children as young as six were separated from their parents.
 - Separation and threats of separation were used as disciplinary tools.
 - People in detention displayed widespread and obvious psychological trauma. Every woman we spoke with in a private setting cried.

¹⁰¹ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

¹⁰² <http://www.ice.gov/doclib/pi/news/factsheets/FactSheet2008Budget020507b.pdf> Refer to Appendix B for the budgets of FY 2007 and FY 2008.

¹⁰³ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

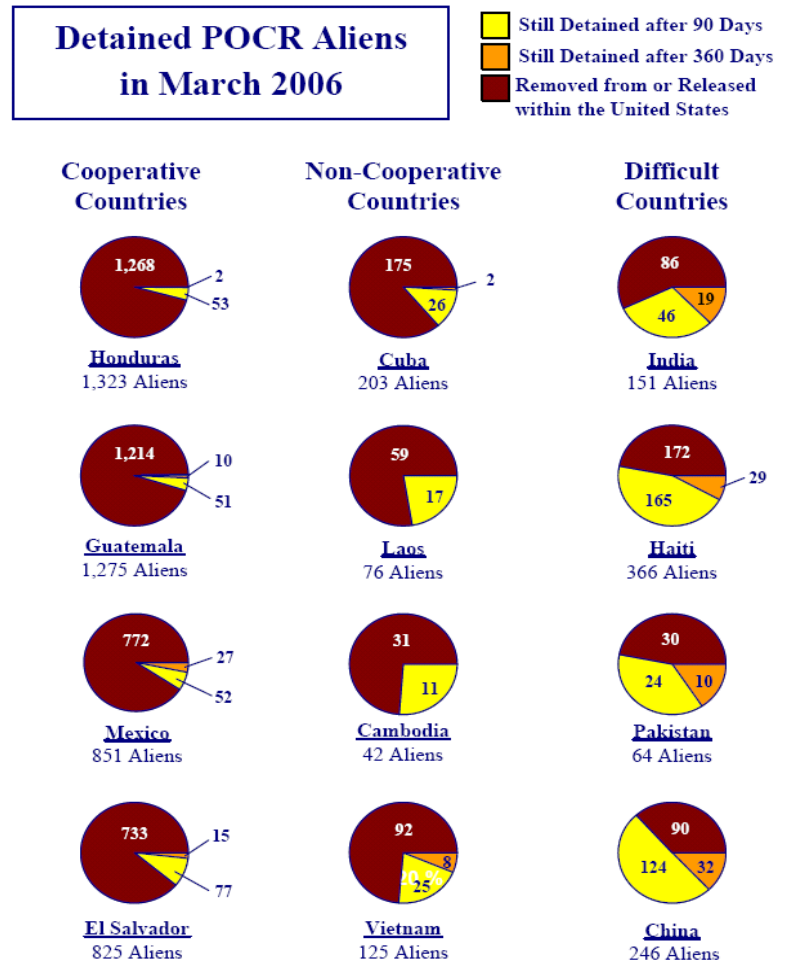
¹⁰⁴ <http://www.ice.gov/pi/news/newsreleases/articles/060516dc.htm>

¹⁰⁵ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

¹⁰⁶ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

- At Hutto pregnant women received inadequate prenatal care.
- Children detained at Hutto received one hour of schooling per day.
- Families at Hutto received no more than twenty minutes to go through the cafeteria line and feed their children and themselves. Children were frequently sick from the food and losing weight.
- Families in Hutto received extremely limited indoor and outdoor recreation time and children did not have any soft toys.”¹⁰⁷

Chart 1: Detention Rates By Country Of Origin



source: DACS, OIG Analysis

Mandatory Detention

Although many immigrants are eligible to be released through a bond, on their own recognizance, or through an order of supervision, between FY 2001-FY 2004, with a total of 998,481 detentions, **only 8% of those apprehended were released through these means.**¹⁰⁸

Indefinite and Prolonged Detention¹⁰⁹

In June 2001 the U.S. Supreme Court overturned the ICE practice of indefinitely detaining immigrants who they found difficult to remove and ruled that an immigrant with a final order of deportation should generally not be detained longer than six months unless special circumstances exist. However, a recent OIG report found that ICE has failed to fully comply with the Supreme Court decision.

- October 2006 **DRO** data shows that out of the 10,875 immigrants with final orders of deportation **8,810 remained in detention for up to 3 months, 1,074 remained in detention between 3 and 6 months, and 991 have spent over 6 months in detention.**¹¹⁰
- **According to a recent audit by the Office of the Inspector General** released in February 2007, required custody decisions were not made on 6% of cases and 19% of cases were not reviewed in a

¹⁰⁷ Lutheran Immigration and Refugee Service and the Women’s Commission for Refugee Women and Children. *Locking Up Family Values: The Detention of Immigrant Families*. Women’s Commission for Refugee Women and Children, 2007, pg. 2.

¹⁰⁸ **DHS**, Office of the Inspector General. *Detention and Removal of Illegal Aliens, Immigration and Customs Enforcement*. April 2006, p 31.

¹⁰⁹ See **DHS**, Office of the Inspector General. *ICE’s Compliance with Detention Limits for Aliens with a Final Order of Removal from the United State*. February, 2007, pg. 3-4.

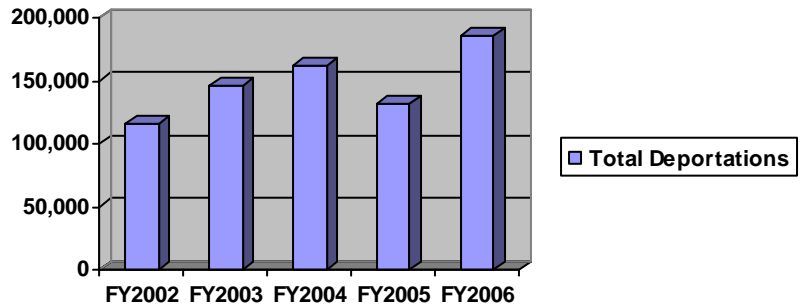
¹¹⁰ Unpublished data received from DRO, **ICE/DHS**

timely manner. In some cases, detained immigrants have had their cases suspended from receiving a **post-order custody review (POCR)**¹¹¹ due to non-compliance allegations from officials without sufficient documented evidence to support their claims. The audit also found that in some cases, officials had not applied the standard of review appropriately because **ICE** does not systematically track the receiving country's removal rates.¹¹²

- The chart above shows the various groups of immigrants that have been held past 90 days and past 360 days for the month of March 2006.¹¹³

Overall Deportations:

- In FY2006 ICE deported **186,000** immigrants from the US.¹¹⁴
- In FY2005 ICE deported **131,579**
- In FY2004 ICE deported **162,014**
- In FY2003 ICE deported **145,935**
- In FY2002 ICE deported **116,154**¹¹⁵



¹¹¹ See DHS, Office of the Inspector General. *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United State*. February, 2007, pg. 4-5.

¹¹² DHS, Office of the Inspector General. *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United State*. February, 2007, pg. 1.

¹¹³ *Ibid.*, pg. 12.

¹¹⁴ <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>

¹¹⁵ ICE. *Immigration Enforcement Strategy and Highlights*. August 2006, p. 8.

Raids List

The following is a list of arrests/raids conducted by ICE under its various operations since the announcement of the **Interior Enforcement Strategy** on April 20, 2006.

*Note that the following list is comprised of data gathered from **ICE** press releases and local newspaper reports. Unfortunately, it is difficult to verify the raids completely; therefore, this should be viewed solely as a partial list.

Unless otherwise cited, all raids information comes from the ICE website: www.ice.gov.

- *April 2006*
 - **65 in New Orleans** – Operation targeted “fugitives” and immigration law violators living in New Orleans neighborhoods.
 - **183 in Florida (Miami, Tampa, Jacksonville, Orlando)** – Part of the fugitive operations.
 - **125 in Midwest Region** – Part of the fugitive operations.
- *May 2006*
 - **3 in Panama City, FL** – Worksite Enforcement targeting immigrants working at Tyndall Air Force Base doing scaffolding work at the base.
 - **76 in KY** – Worksite Enforcement at Fisher Homes Construction Workers.
 - **21 in St. Joseph, Montana** – Worksite Enforcement at Julio’s Mexican Restaurants.
 - **8 Radcliff, KY** – Worksite Enforcement at Golden China Buffet Restaurant.
 - **8 Los Angeles, CA** – Worksite Enforcement at L.A. Department of Water and Power.
 - **34 in Springfield, NY** – Worksite Enforcement at Schichtel’s Nursery.
 - **29 in San Diego, CA** – Worksite Enforcement at Standard Drywall.
 - **35 in Edison, NJ** – Fugitive Operation.
 - **179 in Las Vegas** – Fugitive Operation.
 - **5 in Wichita, KS** – Worksite Enforcement at Cessna Plant.
- *June 2006*
 - **25 in Memphis, TN** – Worksite Enforcement at Lucite and Arkema Chemical Plants.
 - **11 Wichita, KS** – Worksite Enforcement at local scrap metal business.
 - **55 in Washington, DC** – Worksite Enforcement at Dulles International Airport.
 - **14 in Indian Head, Maryland** – Worksite Enforcement at Naval Surface Warfare Center.
 - **2,100 Nationwide** – Fugitive Operations.
 - **116 in Newark, NJ** – Fugitive Operations.
 - **39 in El Paso, TX** – Operation Return To Sender.
 - **110 in Detroit, MI** – Fugitive Operations.
- *July 2006*
 - **127 in Oklahoma** – Fugitive Operations.
 - **154 in Ohio (Columbus, Cincinnati, Cleveland)** – Fugitive Operations.
 - **61 in Miami, FL** – Fugitive Operations.
 - **37 in Kansas City** – Fugitive Operations.
 - **17 in Chicago, IL** – Fugitive Operations.
 - **12 Louisville, KY** – Fugitive Operations.
 - **3 Gulfport, MS** – Worksite Enforcement at Gulfport-Biloxi Regional Airport.
- *August 2006*
 - **51 in Sulphur, Oklahoma** – Worksite Enforcement at Billy Cook’s Harness and Saddle.

- **41 in Hamburg, NY** – Worksite Enforcement at America’s Fair. The investigation resulted from a tip from a community member .
- **58 in Florida** – Fugitive Operations.
- **326 in Houston, TX** – Operation Return to Sender implemented statewide.
- **15 in Roswell, NM** –Worksite Enforcement Targeting workers for a local company painting a U.S. military aircraft.
- **More than 100, Las Vegas** – Fugitive Operations.
- **34 in North Tonawanda, NY** – At Foristar Hydroponic Tomato Greenfarm. Immigrants arrested face criminal charges for using fraudulent green cards and false social security numbers.¹¹⁶
- **55 in Tallahassee, FL** – Worksite Enforcement targeting workers for a Janitorial contractor.
- **25 in Whitewater, Wisconsin** – Worksite Enforcement targeting undocumented Mexican workers at the Star Packaging plant.¹¹⁷
- **6 in Apopka, CA** – During a “Community Shield” Operation, which targets gang members and associates. ICE also detained 6 non-gang related immigrants in violation of administrative immigration laws.
- **14-15 in Little Rock, Ark** – Worksite Enforcement targeting workers at the local Country Club, many of whom were arrested for social security fraud.¹¹⁸
- *September 2006*
 - **More than 120 in Stillmore, GA** – Operation dealt with document fraud.¹¹⁹ An estimated number of 300 people disappeared from the town after the raid.¹²⁰
 - **26 in Bellingham, WA** – At Northwest Health Care Linen.
 - **38 in Caguas, PR** – Worksite Enforcement at Los Prados construction site that will feature home, apartments and a shopping center.
 - **82 in Florida** – Fugitive Operation. Only three of the 82 arrested were considered “fugitives.”
 - **90 in Bloomington, MN** – Operation Return To Sender.
 - **19 in Alexandria, VA** – the investigation involved alleged marriage fraud at local court house.
 - **More than 100 in San Francisco, CA** – Fugitive Operations.
 - **33 in El Paso, TX** – immigrants were found in a smuggler’s house.
 - **115 in PA** – Philadelphia based fugitive operation which led to the arrest of 115 immigrants throughout the state.
 - **122 in Aurora, CO** – Part of the Work Enforcement initiative which targeted immigrants working at the Buckley Air Force Base building military family housing.¹²¹
 - **163 in Naples, FL to Fort Myers, FL** – During weeklong “Operation Return to Sender.” Only 25 of those arrested had criminal convictions. The others had overstayed their visas, had fraudulent paperwork and were undocumented.¹²²
 - **49 in Topeka, Kansas** – As part of “Operation Driver’s License Check Lane” Which is headed by the Topeka PD, which requested the participation of ICE agents. 36 immigrants were deported the same day.

¹¹⁶ <http://www.newsday.com>

¹¹⁷ http://www.gazetteextra.com/immigrants_wwpolice111206.asp

¹¹⁸ http://www.arktimes.com/blogs/arkansasblog/2006/08/raid_at_the_club.aspx

¹¹⁹ http://www.boston.com/news/nation/articles/2006/09/16/immigration_raid_devastates_ga_town/

¹²⁰ <http://www.csmonitor.com/2006/1003/p01s01-ussc.html>

¹²¹ <http://www.ice.gov/pi/news/newsreleases/articles/060920Aurora.htm>

¹²² <http://www.news-press.com/apps/pbcs.dll/article?AID=/20061017/NEWS01/61016054/1075>

- **11 in Danbury, CN**—Worksite Enforcement Operation with local police and the mayor’s office. The 11 immigrants were day laborers gathered at the Kennedy Park. According to the report, **ICE** agents posed as employers and promised them jobs.¹²³
- **34 in Roaring Fork Valley, CO** – Operation Return To Sender.¹²⁴
- **30 in Gainesville, GA** – Worksite Enforcement at Forsyth County Construction Company.¹²⁵
- *October 2006*
 - **28 in Barker, NY** –Worksite Enforcement Operation at Torrey Farms. The workers had fraudulent social security numbers and green cards.
 - **111 in Newark, NJ**–Operation Return To Sender. 65 of those arrested were classified under the fugitive status. The other 46 were undocumented.
 - **49 in Boise, ID**–Operation Return To Sender. **ICE** received assistance from the following local law enforcement agencies: Boise Police Department, Nampa Police Department, Caldwell Police Department, Canyon County Sheriff’s Office, and Ada County Sheriff’s Office. Ages of those arrested ranged from 17-66.
 - **16 in Chicago, IL** –Operation Return To Sender.
 - **33 in Union, MO**—Worksite Enforcement targeting immigrants at the business and apartments owned by Happy Apples and Lochirco Fruit and Produce.
 - **44 in Austin, TX**—Operation Return to Sender.¹²⁶
- *November 2006*
 - **21 in Dallas, TX**—Operation Return To Sender. Those arrested ranged in age from 5 to 55 years old. The children arrested are staying with other family members, or are being housed with at least one parent at the **Hutto family detention facility in Taylor, Texas**. All of the other immigrants arrested are/were being detained at the Rolling Plains Detention Facility in Haskell, Texas.
 - **48 in Puerto Rico and USVI**—All are being detained and processed at the Aguadilla detention center in Puerto Rico.
 - **39 Throughout the Northeast** – Document Task Force. Six of the people apprehended were identified during the investigations.
 - **17 in the Great Lakes Region** –Fugitive Task Force operation.
 - **40 in Palm Coast, FL**—Worksite Enforcement Operation targeting immigrants working at the Ocean Towers construction site. All were transferred to Florida detention centers. Three of the workers arrested have re-entered the country after deportation, a felony offense with a possible 25 year sentence.
 - **70 in New York, NY**—Operation Return To Sender. 43 of those arrested were undocumented. All are being held in New Jersey detention facilities.
 - **7 in Wilmington, DE**—Operation Community Shield. **ICE** worked with local New Castle County Delaware Police Department. All were undocumented, and 4 of those arrested were suspected of some gang affiliation.
 - **137 in Newark, NJ**—Operation Return To Sender. 83 of those arrested were undocumented immigrants not initially targeted by **ICE**.
 - **10 Albertville, AL**—10 undocumented people were found asleep in a van during a trip from Arizona to Florida for work. Alabama State Trooper Darrell Zuchelli, who is certified under **ICE’s** 287(g) program, assisted in their arrest.

¹²³ <http://www.themilitant.com/2006/7039/703904.html>

¹²⁴ http://www.ruidosonews.com/columnists/ci_4634724

¹²⁵ <http://www.gainesvilletimes.com/news/stories/20060915/localnews/124515.shtml>

¹²⁶ http://keyetv.com/topstories/local_story_289181339.html

- **25 in Nebraska**—Operation Return To Sender. 5 of those arrested were not part of the initial investigation.
- **20 in Sioux City, IA**—Operation Return To Sender.¹²⁷
- **6 in Atlanta, GA**—Those arrested were working for the T.C. Drywall, Inc installing drywall in the Hartsfield-Jackson Atlanta International Airport.
- **32 in Cincinnati/Northern, KY areas**—Worksite Enforcement Operation targeting immigrants working for a dry wall company in the area. 19 of those arrested were picked up at a Home Depot parking lot, and the other 13 were arrested at a parking lot adjacent to a construction site.
- **81 in New York, NY**—Through ICE’s New York office initiative, Operation Retract. Those detained were transported to various detention facilities around the country.
- **More than 100 in Rico Rico, AZ**—Border Patrol agents stopped a car and questioned the driver. This led them to a house where other undocumented immigrants were residing.¹²⁸
- *December 2006*
 - **35 in Boston, MA**—Through ICE’s Operation Secure Streets, a national initiative targeting immigrants with prior DUI convictions. This operation is part of the Fugitive Task Force program. Nine of those arrested were undocumented people not initially targeted for investigation. They are being held at various state and county jails throughout MA.
 - **45 in Albert Lea and Austin, MN**—Operation Return To Sender. The operation targeted 9 fugitives, but ICE arrested 36 other people as well.
 - **Approximately 1,282 in six states**—“**The Swift**” Raids, part of ICE’s Worksite Enforcement Operation/Benefit Fraud. These raids took place in the following cities: Greeley, Colorado; Grand Island, Nebraska; Cactus, Texas; Hyrum, Utah; Marshalltown, Iowa; and Worthington, Minnesota. **Over a thousand federal officers were called in to participate in the raids.** According to officials, the raids were targeted against immigrants using false social security numbers. 65 have been charged with identity theft or other violations, such as re-entry after deportation.¹²⁹
 - The following link provides an interactive map of the Swift Raids which It includes data on the towns affected by the raids, their population numbers and their workforce numbers.
http://pserver.mii.instacontent.net/swiftcom/greeleytribune/national_raid_map.swf
 - YouTube.com has the following video on the Swift Raid on their website titled, “A Day To Remember”: <http://www.youtube.com/watch?v=QvRhAQorPw>
 - ABC Channel 7 News in Denver, Colorado has done a lot of coverage on the raids, including looking at the impact of the raids and the aftermath.
<http://www.thedenverchannel.com/news/10523648/detail.html?subid=22100484&q=1;bp=t>
 - The following is a chart from ICE’s website that breaks down the arrests made during the Swift Raids:¹³⁰

¹²⁷ <http://www.ktiv.com/News/index.php?ID=7062>

¹²⁸ <http://kvoa.com/Global/story.asp?S=5720995&nav=HMO6>

¹²⁹ <http://www.ice.gov/pi/news/newsreleases/articles/061213dc.htm>

¹³⁰ http://www.ice.gov/pi/news/factsheets/wse_ou_070301.htm

Plant location	Alien administrative arrests	Alien criminal arrests
Cactus, TX	297	53
Greeley, CO	252	21
Grand Island, NE	252	26
Worthington, MN	239	20
Marshalltown, IA	99	30
Hyrum, UT	158	124
TOTALS*	1297	274

- **62 in Miami, FL**—Fugitive Operations Team. 50 of those arrested had orders of removal and the remaining 12 were charged as being undocumented.
- *January 2007*
 - **60 in Charlotte, NC**—Operation Secure Streets targeting immigrants with DUI records. This is a pilot program based in Charlotte, NC that started in April of 2006 which to date has conducted three operations and deported more than 200 people.
 - **133 in Grand Rapids, MI**—Operation Return To Sender.
 - **28 in Alexandria, VA**—Worksite Enforcement targeting immigrants working or planning to work at Quantico Marine Base.
 - **12 in Boston, MA**—Operation Avalanche II targeting immigrants with past criminal convictions. There are currently 11 cities participating, including Boston. Of the 12 arrested, 10 were permanent residents and 2 were undocumented.
 - **757 in 5 Southland counties in CA**—Operation Return to Sender. This was the largest such operation ICE has conducted. In LA county they arrested 111; in Orange county, 111; in Riverside, 26; in San Bernardino, 22; and in Venture, 10. 150 of those arrested were considered fugitives, 24 had re-entered after having been deported, and 423 were from county jails. 450 of the 757 were expeditiously deported after their arrest. During this time, ICE also put nearly 3,000 detainers on immigrants with criminal convictions in state and county jails across the country.
 - **11 in Chicago, IL**—Worksite Enforcement which arrested eleven women working for the cleaning service agency, CleanPol. All had entered through visitor visas and had over stayed.
 - **13 in Key West, FL**—Worksite Enforcement targeting immigrants at the Naval Air Station in Key West.
 - **16 in San Diego, CA**—Worksite Enforcement at the Golden State Fence Company.
 - **10 in Chicago, IL**—Worksite Enforcement at the Pegasus Restaurant.
 - **53 in Houston, TX**—Worksite Enforcement at a suburban Houston waste management company.
- *February 2007*
 - **178 in South Florida**—Operation Return To Sender.
 - **43 in Raleigh, NC**—Operation Secure Streets. This was Raleigh’s first such operation.
 - **17 in Arlington Heights, IL**—Worksite Enforcement targeting workers at the Cano Packaging Corporation. In October of 2006 ICE began investigations into the plant after receiving information that a large number of undocumented workers employed there.

- **195 at 63 locations in 17 states and Washington, D.C.**—Worksite Enforcement. This operation, termed “Operation Clean Up,” targeted the cleaning and grounds-maintenance service, Rosenbaum-Cunningham International, Inc (RCI) that contracted with various restaurants and hospitality venues across the country. Some of the businesses that contracted with RCI include: House of Blues, Planet Hollywood, Hard Rock Café, Dave and Busters, Yardhouse, ESPN Zone, and China Grill. The three executives of RCI were indicted for “harboring illegal aliens and evading taxes.” 195 immigrants were arrested and charged with administrative immigration violations during this operation that lasted a day and half.
- **51 in Auburn, WA**—Worksite Enforcement at two UPS warehouses.¹³¹
- **Unknown in Coalinga, CA**—Fugitive Operation. ICE officers did a sweep of an apartment complex while looking for one individual.¹³²
- *March 2007*
 - **363 in New Jersey**—Operation Return To Sender. In the month of January ICE arrested 89 “fugitives” and 131 undocumented immigrants. In February, officers arrested 67 fugitives and 76 undocumented immigrants.
 - **A total of 18,149 immigrants have been arrested under the Operation Return To Sender since May 26, 2006.**
 - **36 in Mishawaka, IN**—Worksite Enforcement at Janco Composites Inc, a plastics manufacturer.
 - **8 in Tucson, AZ**—Worksite Enforcement at eight Sun Drywall job sites. All of the immigrants arrested were charged with administrative violations.
 - **30 in Eastern Washington**—Operation Return To Sender. 14 of the immigrants arrested were considered to be “fugitives,” and the remaining 16 were undocumented immigrants ICE encountered during the operation.
 - **69 in Baltimore, MD**—Worksite Enforcement at five businesses that contracted with the Jones Industrial Network.
 - **77 in Greenville, MS**—Worksite Enforcement at the Tarrasco Steel plant.
 - **362 in New Bedford, MA**—Worksite Enforcement. Named “Operation United Front,” the target of this operation was Michael Bianco, Inc. (MBI). This raid received much public attention because of ICE’s treatment of immigrants and their children during the raid, and the subsequent detainment and transfer. ICE first approached the state secretaries of public safety for the state of Massachusetts in December 2006. According to ICE, they requested that state detention facilities be made available to them so that they could process individuals at a nearby location. In late February of 2007, they began planning with Under Secretary for Public Safety Schwartz, the New Bedford police chief and others on public safety assistance on the issue of children. ICE officials speculated that child welfare issues would develop throughout the raid, as many women worked in this particular garment manufacturer. ICE and state government officials began preparing a “child welfare triage team” to handle child welfare situation that would arise. ICE stated that those arrested who said they would suffer immediate child welfare issues would be conditionally released. When the Department of Social Services (DSS) was notified of the raid, they immediately asked ICE for information of all those arrested as the operation was carried out. ICE stated that they would only give out the information for those arrestees who were identified to have a child welfare issue. On March 6 the raid was conducted and those arrested were taken to Fort Devens for processing. DSS was allowed to interview those arrested the following day, except for 90 people who had

¹³¹ http://seattletimes.nwsources.com/html/localnews/2003572722_ups15m0.html

¹³² <http://www.indybay.org/newsitems/2007/02/13/18362587.php> <http://www.indybay.org/newsitems/2007/02/13/18362587.php>

been transferred down to Texas after 8 hours.¹³³ The transfer was due to a shortage of detention space in Massachusetts. As a result several children were left behind, some requiring hospitalization because their nursing mothers were detained. One 7 year old girl called ICE's hotline looking for her mother. DSS officials noted that, the lack of communication between ICE and DSS during the operation delayed the process of finding all of the immigrants who are sole-caregivers, putting their children at great risk. As Governor Patrick stated, "What we have never understood about this process is why it turned into a race to the airport. We understand about the importance of processing; we get that. But there are families affected. There are children affected."¹³⁴

▪ *April 2007*

- **128 in New Jersey**—Operation Return To Sender. ICE has three fugitive teams in New Jersey, which arrested 55 "fugitives" and 73 immigrants with other immigration violations.
- **359 in San Diego**—Operation Return To Sender. Officers mainly targeted individual's homes. Only 62 of those arrested were the original targets for the raid, the rest were nearby when the arrests took place and were considered by officials as being "collateral arrests."¹³⁵
- **20 in San Juan, PR**—Worksite Enforcement at 26 Metal Recycling & Company. All of the people arrested were charged on administrative immigration violations and were taken to the Metropolitan Detention Center in Guaynabo, Puerto Rico.
- **62 in Beardstown, IL**—Worksite Enforcement targeting Quality Service Integrity, Inc, a cleaning service which operated with the Cargill Meat Solutions Plant in Beardstown, IL. Those arrested were charged with administrative immigration violations and were sent to a detention facility in Broadview, IL for processing, after which they were transferred to various county jails in the Chicago area. ICE released 11 people on humanitarian grounds.
- **2 in Allentown, PA**—Fugitive Operation. This operation was the first conducted by the newly formed Fugitive Operation Team in Allentown.
- **40 in Raleigh, NC**—Operation Cross Check. This was the first such operation in North Carolina. ICE began this initiative nationwide in January of 2007, working with local law enforcement to target immigrants with past criminal convictions. Those arrested that had past deportation orders were placed under expedited removal proceedings and the rest were placed in detention.
- **76 in Western Michigan**—Operation Cross Check. ICE worked with police departments in Detroit, the Grand Rapids, and Holland. Of the 76 arrested, 55 had past criminal convictions and 12 were "fugitives."
- **20-30 in Columbia County, NY**—Unknown. Knowledge of this raid comes from Susan Davies, a community member.¹³⁶
- **49 in Bloomington, MN**—Operation Cross Check. Of those arrested, 18 had past criminal convictions and six were considered to be fugitives.¹³⁷

¹³³ <http://www.ice.gov/pi/news/factsheets/070316operationunitedfront.htm>

¹³⁴ http://www.boston.com/news/local/articles/2007/03/09/dss_to_check_on_detainees_sent_to_texas/

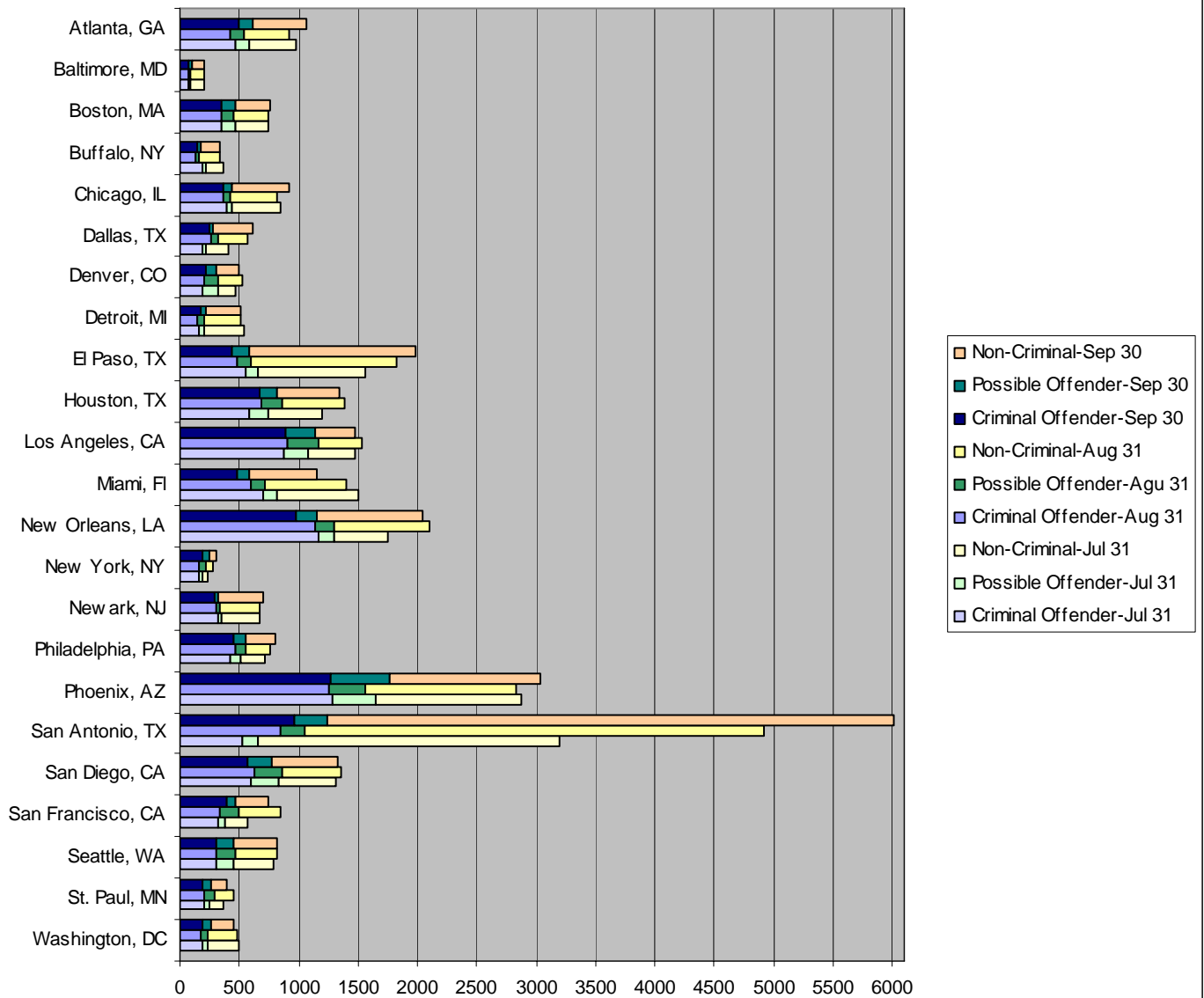
¹³⁵ <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/03/AR2007040301957.html>

¹³⁶ Post on the Detention Watch Network list serve, April 9th, 2007, from Aarti Shahani. "Legal support: Columbia County round up (NY)."

¹³⁷ <http://www.ice.gov/pi/news/newsreleases/articles/070416bloomington.htm>

Appendix A

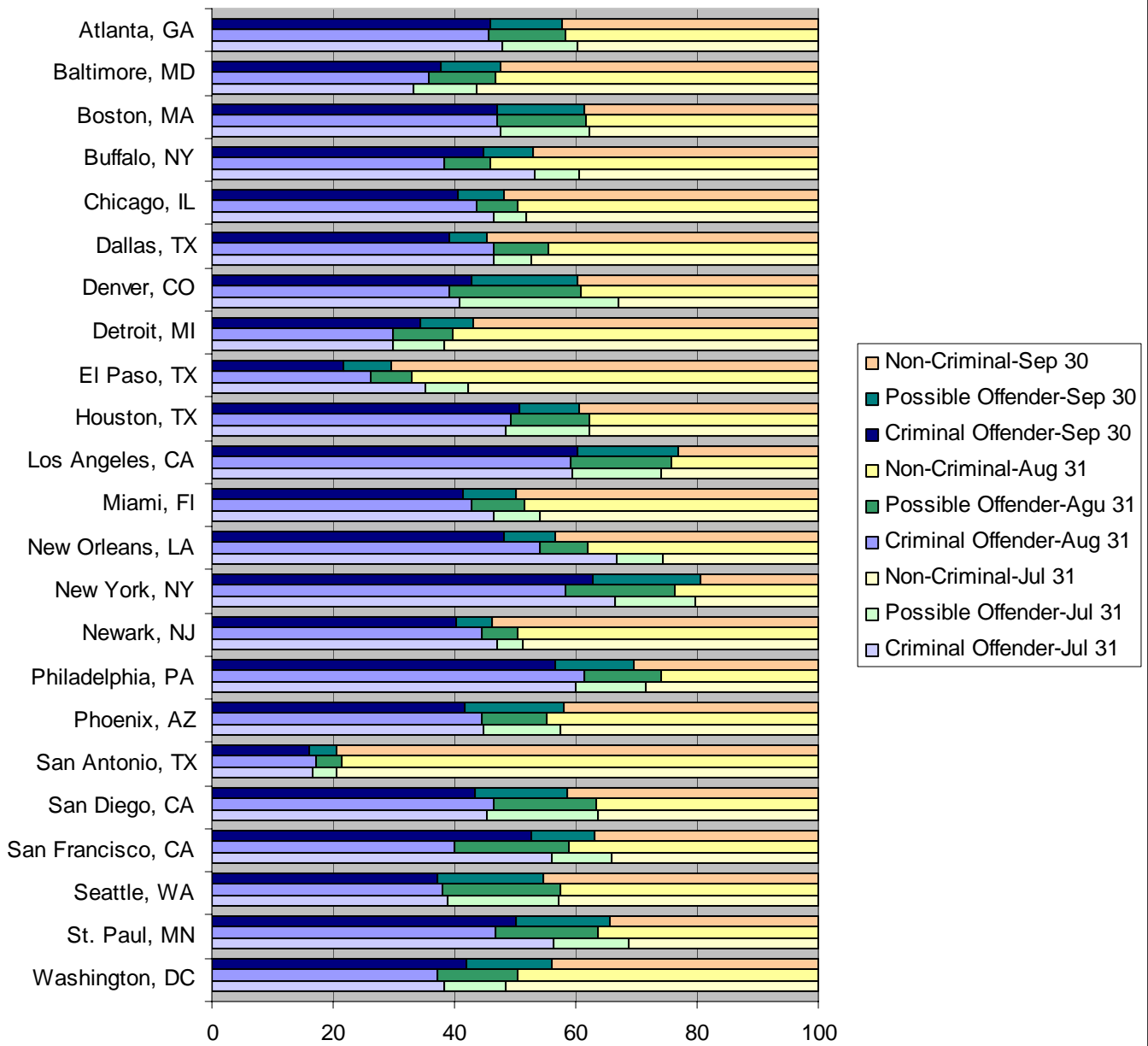
Number of Detainees in Field Office broken down by Criminal/Possible Criminal and Non-Criminal



Prepared by: DWN with data from DRO, ICE/DHS

*Note that field offices are split between different geographical centers. One field office can administer several detention facilities.

Percentage of Criminals vs Non-Criminals held at ICE's Field Offices



Prepared by the office of DWN with data received from DRO, ICE/DHS

*Note that field offices are split between different geographical centers. One field office can administer several detention facilities.

Information on Raids in Massachusetts

MEMO

FROM: Laura Rótolo, ACLU of Massachusetts

TO: Briefing Coordinators, Special Rapporteur on Migration visit to U.S.

DATE: April 17, 2007

RE: IMMIGRATION RAIDS IN MASSACHUSETTS

Advocates and community members have grown increasingly concerned about ICE's stepped-up strategy of arresting deportable immigrants through massive workplace and early morning actions at homes of immigrants.

ICE has recently stepped up its efforts to find and deport all deportable aliens. In a strategic planning document for an operation called "Operation Endgame," ICE has said that its goal is to deport all illegal aliens by the year 2012 – this means tracking down and expelling an estimated 12 million people. The document is no longer available on the ICE website, but is available at http://www.aclum.org/issues/ice_doc_gallery.html.

These "raids" or "sweeps" are carried out as coordinated efforts with massive law enforcement presence. In both instances, ICE arrests persons without warrants and based on the most insubstantial of evidence about illegal status. Many times, this evidence is nothing more than the result of racial profiling, where ICE will arrest anybody who "looks" like an illegal immigrant. There are substantial due process concerns in both, in addition to concerns about the lack of consideration for the affected families and communities.

ICE carries out these raids in a forceful fashion, and uses them not only as an enforcement mechanism, but to deter others from working or being in the United States illegally. ICE prides itself on this impact. A recent ICE newsletter touted that immigrants are now living in fear of these raids. "As immigration raids are becoming more common throughout the United States, immigrants are taking greater notice. When in public, illegal immigrants are sometimes on the lookout for federal agents. About the only place the immigrants feel safe these days are their homes and sometimes not even there as they may receive an unexpected knock on their door by a federal agent."

Workplace Raids

On the morning of March 6, 2007, Immigration and Customs Enforcement (ICE) raided the Michael Bianco, Inc., plant in New Bedford, Massachusetts, in one of the largest raids in recent U.S. history. ICE arrested 361 workers, mostly women, who were employed stitching armored vests and backpacks for the U.S. military. After being held and interviewed at the factory for hours, the workers were taken to a converted military base nearly 100 miles away from their home town, and within 48 hours were shipped to remote detention centers thousands of miles away, as far as Texas and Florida

Many of the workers had small children who were in daycare or school when the raids took place and found themselves without parents that evening, and ever since. Advocates know of at least 70 detained parents of minor children and estimate that at least 210 children were impacted by the raid.

Lawyers and state social service agency officials worked around the clock for the 48 hours following the raid to gain access to the detained immigrants while they were still held in Massachusetts, but were denied any

meaningful access. Lawyers were granted access to the facility, but were only allowed to see a small number of the detained persons they wished to see. Social service workers have stated that they were actually denied access into the facility to determine if any of the detained persons were sole caretakers of small children who may have been left behind.

The ACLU of Massachusetts along with other groups filed a class action lawsuit on March 9 in federal court alleging constitutional and statutory violations. The suit alleged that ICE transferred the detainees out of state in bad faith with the purpose of evading jurisdiction in Massachusetts and preventing the detainees from speaking with Massachusetts lawyers. It also alleged that ICE violated the workers' rights when it took parents away from their children without adequate arrangements.

The detention centers to which most of the workers were sent are in remote areas close to the US-Mexico border and far from lawyers and other services. Days after they were transferred, advocates began to hear stories about people being coerced into signing voluntary deportation papers. Through the lawsuit, the judge allowed Massachusetts lawyers to visit the detained immigrants in Texas to ascertain whether they had indeed been coerced. This work is still ongoing.

Since this raid took place, ICE has carried out approximately one large raid per week across the country.

In-home enforcement

Another strategy of concern is the early-morning operations at immigrant homes. ICE enters a home with a warrant to arrest one or a few immigrants and then proceeds to sweep through the entire building, knocking on other doors and demanding to see immigration papers from all the inhabitants.

Recently, on Cape Cod, ICE arrested 15 immigrants in a recent raid. In one case, ICE agents showed complete disregard for the impact of the raid when they picked up the mother and father of three young boys, ages 3, 4, and 7. The children were awakened at six in the morning to find that their parents were being taken away by immigration officers.

In addition, there have been reports that ICE officials use deception to enter homes without a warrant, deny access to lawyers or a phone to call family members, and use coercion and misinformation to convince immigrants to sign "voluntary departure" agreements.

*The Immigrant Gold Rush: The Profit Motive
Behind Immigrant Detention*

The Immigrant Gold Rush: The Profit Motive Behind Immigrant Detention

**Submitted to the U.N. Special Rapporteur on the Rights of Migrants by
Judy Greene, Justice Strategies
Sunita Patel, Soros Justice Fellow**

I. Introduction

Over the past year a moral panic over immigration has triggered a massive crackdown on immigrants in the United States. The Department of Homeland Security (DHS) has greatly stepped up enforcement, launching a series of special “operations” geared to reduce illegal migration and remove immigration fugitives, so-called “criminal aliens,” and other immigration violators.

A restructuring of the Immigration and Customs Enforcement (ICE) detention and removal system has entailed termination of the “catch and release” policy, under which non-Mexicans apprehended crossing the southwest border without required documentation were released and instructed to return to immigration court at some future date. The number of ICE fugitive operation teams has tripled since January 2006, and by September 30, 2006, the number of “immigrant fugitives” arrested had grown by 260 percent.¹³⁸ A rapid increase in worksite enforcement investigations has resulted in arrests of thousands of individuals, both employers and immigrant employees. A six-state dragnet of meatpacking plants owned and operated by *Swift & Company* on December 12, 2006 involved more than 1,000 federal enforcement officers and, resulted in 1,282 arrests of immigrants.¹³⁹

Immigrants now comprise the fastest growing population in federal custody. The immigrant crackdown is fueling explosive growth in the ICE detention system. The Intelligence Reform and Terrorism Prevention Act of 2004 contained authorization for 40,000 new immigrant detention beds by 2010 – a measure that would triple the number of beds available to ICE. In June 2006, DHS officials said they needed 35,000 new detention beds to hold immigrants awaiting detention. By the end of September, the daily detention population had swelled to 27,521, from an average of 19,000 before July.

The ICE detention system is comprised of an unwieldy patchwork of detention beds, located in hundreds of facilities nationwide. Just a handful of these facilities are operated by DHS. Most are actually state and county lock-ups and private prisons where immigrants are detained under federal contracts. This fragmented immigrant detention system has long been a troubled operation, rife with human rights abuses. The recent crack-down campaigns have added strain to this poorly-managed crazy-quilt of detention beds. Immigrant rights advocates have criticized the lack of accountability of this system for many years. The

¹³⁸ ICE Office of Detention and Removal “Fact Sheet,” online at <http://www.ice.gov/pi/news/factsheets/dro110206.htm>

¹³⁹ ICE Office of Detention and Removal press release, December 12, 2006

Department of Homeland Security has introduced detention standards, developed with advocates – yet complaints of sub-standard conditions and abusive treatment continue.

II. Cashing in on the detention boom

Both private prison executives and local jailers have eagerly joined the “immigrant gold rush,” raking in cash payments at an average *per diem* rate of \$95 for each immigrant held under contract for ICE. Private prison companies employ some of the best lobbyists money can buy to hook lucrative contracts, and it is clear that they command the “top dollar” for lease of their detention beds. ICE *per diem* payments for jail beds in New Jersey currently average in the neighborhood of \$80 per detainee. But private prison companies with contracts in the same region appear to be able to reach far more deeply into the public purse. Federal authorities recently converted the GEO Group’s contract with ICE to detain immigrants in their Queens, N.Y. facility into a contract to hold detainees for the U.S. Marshals. Local news reports revealed that ICE had been paying \$225 per day for each detainee they placed in the GEO jail.

Private prison executives have long relied on immigrant detention to grow their business. Both of the industry giants, the Corrections Corporation of America and Wackenhut Corrections (which recently changed its name to the GEO Group), obtained their very first private prison contracts back in the mid-1980s from the former INS.

Within weeks of the attack on the World Trade Towers in 2001 the chairman of Cornell Companies – a mid-sized private prison company based in Houston, Texas – excitedly told stock analysts that the massive terrorist strike was going to boost his business. “It is clear that since September 11 there’s a heightened focus on detention. More people are gonna get caught. So I would say that’s positive. The federal business is the best business for us, and September 11 is increasing that business.”

III. The crackdown on immigrants has spawned a “hot market” for detention beds

Correctional authorities in states that have long relied on private prison companies are feeling hard pressed by the flood of new immigrant detainees into the tight prison bed market. A correctional spokeswoman in Arizona complains that prison managers find themselves at “the whim and fancy” of their contractors.¹⁴⁰ Available beds are now a hot commodity and private prison executives are demanding price hikes as high as 30 percent.

Correctional managers in Oklahoma were notified last October that Cornell Companies was requesting removal of 814 prisoners housed under contract at the Great Plains Correctional Facility in Hinton, Oklahoma. Oklahoma’s corrections director, Justin Jones, said that Cornell was in contract negotiations with officials at ICE who were offering a better rate than the \$48 *per diem* Oklahoma had been

¹⁴⁰ Saunders, Diane, “Safford Complex, other Arizona prisons, ‘overflowing.’” *Eastern Arizona Courier*

paying. While state prison authorities scrambled to find space to absorb the evicted prisoners, U.S. Representative John Sullivan (R-Tulsa) welcomed the move, arguing that an increased ICE presence in the state would be a positive step toward serving Oklahoma’s immigration enforcement needs.¹⁴¹

During 2006, ICE detention capacity at the southwest border was expanded by 6,300 beds, including the T. Don Hutto Residential Center, a 512-bed “family facility” operated by the Corrections Corporation of America (CCA). Hutto was built by CCA and had been operated as a prison for men for many years. Some 200 children are now held there with family members who face immigration hearings.

Last month the American Civil Liberties Union (ACLU) filed a law suit charging that DHS had contracted with CCA in violation of *Flores v. Meese*, a 1997 court settlement that stipulated that children should not be detained by immigration authorities unless no other alternatives were available and set minimum standards for their detention.¹⁴² *Flores* requires that if detained, children must be kept in the least restrictive environment possible, and be released to care in the community by family members at the earliest possible time. While in custody, children must receive proper health care and appropriate educational and social services.

Attorneys for ten young plaintiffs who range in age from 3 to 10 years of age charge that Hutto is operated as a prison. Children are housed in prison cells and dressed in prison “scrubs” similar to those worn by adult prisoners. Until protests by immigrant rights advocates drew media attention to the facility, CCA offered just an hour a day of recreation and no more than two hours of educational services. Lawyers say the food is inadequate and the guards are psychologically abusive, threatening to separate children from their parents if they misbehave. Children who have been released from Hutto are said to exhibit signs of stress – weight loss, bed-wetting and nightmares.

A second ACLU lawsuit filed earlier this year challenges conditions at a CCA detention facility in San Diego, California.¹⁴³ Attorneys charge that adult immigrants held under ICE custody at the San Diego Correctional Facility endure severe overcrowding, with many detainees sleeping on plastic slabs on the floor in small prison cells designed for two people. Others are bunked in dayrooms. Triple-celling has led to the spread of infectious diseases and severe psychological suffering, while medical and mental health services are insufficient for the extra load of detainees, resulting in delays. A recent report of the DHS inspector general cited allegations of serious physical and sexual abuse by correctional officers at the San Diego facility.

¹⁴¹ Rabe, Josh, “State’s prison contract is in doubt.” *The Oklahoman*, October 6, 2006. Cornell Companies has not yet received a contract from ICE. According to Justin Jones, when federal officials inspected the prison in Hinton they determined that it did not yet meet ICE detention standards. The prison remains empty for the time being.

¹⁴² Press Release, *ACLU Challenges Prison-Like Conditions at Hutto Detention Center*, available online at <http://www.aclu.org/immigrants/detention/hutto.html>

¹⁴³ ACLU “Proposed Second Amended Complaint for Class-wide Declaratory and Injunctive Relief.” Online at http://www.aclu.org/images/asset_upload_file904_28128.pdf

The immigrant detention boom has been highly profitable for CCA. The company is reported to receive \$2.8 million each month under the Hutto contract.¹⁴⁴ CCA executives say that their company received contracts for about half of the new detention beds secured by ICE in 2006. CCA's earnings per share are running 130 percent over last year and the company is planning an expansion of more than 10,000 beds over the next 18 months.

CCA is not the only private company benefiting in the detention boom. 2,000 immigrants are being held in a huge complex of windowless Kevlar tents surrounded with barbed wire at Raymondville, Texas.¹⁴⁵ The \$63 million Willacy County Processing center was built in 90 days by Management and Training Corporation (MTC). The tent complex holds both men and women in prison-like conditions. At \$78 per-prisoner per-day, the costs to ICE for housing immigrants at the tent city appears to be a bargain, but the huge size of the complex likely assures MTC that operations will produce a considerable profit.

IV. County Governments Cash-In

Profits are not only recognized in the private sector; a growing number of county governments rent jail beds to the United States government to warehouse immigration detainees. By jailing largely non-violent individuals in removal proceedings under lucrative Intergovernmental Service Agreements (“IGAs”) with ICE, counties are able to finance jail construction, defray the cost of jail operations, and fill county coffers with “profits” – money received from ICE in excess of actual expenditures for housing ICE detainees. The expected profits from agreements with ICE has fueled county jail expansion since 1996, when Congress passed a series of draconian changes in immigration law. The changes expanded the categories of non-citizens subject to mandatory detention and deportation following certain criminal convictions.

Information on the revenue county governments rake in from these contracts is not publicly available, but revenue figures occasionally appear in news reports and audits that result from public scandal. A review of recent newspaper articles provides limited and patchy information. For example, in New Jersey, the Passaic County Jail received \$17.7 million from ICE in 2004, the year before the county stopped housing immigration detainees following national news reports and public pressure surrounding abusive treatment and mis-use of dogs to threaten and harass detainees. This figure represented 74 percent of the sheriff department's total revenue.¹⁴⁶

¹⁴⁴ Women's Commission for Refugee Women and Children. “Crossing the Border: Immigrants in Detention and Victims of Trafficking” <http://www.womenscommission.org/pdf/Detention%20test%20DHS.pdf>

¹⁴⁵ Hsu, Spencer S. and Sylvia Moreno. “Border Policy's Success Strains Resources.” *The Washington Post*, February 2, 2007

¹⁴⁶ *Opinion: Arrogant or not, let the Feds inside the Jail; Probe will Settle Issue of Inmate Mistreatment*, Herald News, September 6, 2005, at B7.

Immigrants are fast becoming the modern day cash crop in the prison industry. Last fall a local newspaper in Shawnee County, Kansas, reported that the county was in negotiations to house children in ICE custody. “It’s a huge need,” said the Betsy Gillespie, Director of the Shawnee County jail, “Like adults, if we can offset costs and provide that service we will do that.” Gillespie hoped to increase the \$2 million in revenue the county obtained from 2001 to 2005 by tapping into the new growing immigration detention market—detention of children.¹⁴⁷

The detention of immigrants is viewed as a booming industry that counties can cash in on. With a state prison, death row facility, privately run contract immigration prison, ICE detention facility, and county jail, Florence Arizona has become a modern-day penal colony. The county, undoubtedly realized it was missing out. In November 2005, local officials in Pinal County, Arizona, completed construction of a 1000-bed facility. The \$42 million facility was constructed with the expectation of receiving \$15 or \$16 million dollars in annual revenue from a contract with ICE.¹⁴⁸

Government audits also provide revenue-related information that illustrates how IGA revenue can produce “profit” for local county budgets. A series of Department of Justice audits conducted with various county jails in 2001 and 2002 illustrate the vast amount of unaccounted dollars moving from the federal government to county coffers. An audit of the DeKalb County Jail, in Atlanta, Georgia, found that county officials had over-billed the former INS \$5.6 million dollars in fiscal year 2000.¹⁴⁹ In August 2001, following a report of severely substandard medical care at the jail, the INS transferred detainees from the jail to a variety of jails across the southeast.¹⁵⁰ County officials reported losing revenue of more than \$13 million a year. In Manatee County, Florida, a similar audit found the county had over-billed INS \$1 million in fiscal year 2001.¹⁵¹

The history of federal immigration authorities’ involvement with York County, Pennsylvania clearly illustrates how county officials work to get a piece of the immigrant pie. The York County jail was opened for INS business when the Golden Venture ship ran aground on Rockaway Beach in 1993 and 300 undocumented Chinese swam ashore. After taking in 100 of the immigrants, the county realized their own “golden venture” by building a \$20 million expansion on the jail replete with offices for INS officials and courtrooms for INS judges.

¹⁴⁷ Tim Carpenter, Shawnee County Jail a Station on the Deportation Line, *The Capital-Journal*, October 22, 2006, at 1A.

¹⁴⁸ Preston McConkie, Pinal County Wants You, *Casa Grande Valley Newspaper*, November 22, 2005.

¹⁴⁹ Office of the Inspector General, Department of Justice, US INS Intergovernmental Service Agreement for Detention Facilities with the DeKalb County, Georgia, Sheriff’s Office, November 2001, available at www.usdoj.gov/oig/grants/g4002002.htm.

¹⁵⁰ Will Anderson and Mark Bixler, *INS Moving 400 Detainees from DeKalb*, *Atlanta-Journal Constitution*, August 9, 2001, at 8E.

¹⁵¹ Office of the Inspector General, Department of Justice, US INS Intergovernmental Service Agreement for Detention Facilities with the Manatee County, Florida Board of County Commissioners and the Sheriff of Manatee County, Florida, March 2002, executive summary available at www.usdoj.gov/oig/grants/g4002006.htm.

York County officials publicly boasted about raking in \$60 a day per detainee until the Inspector General of the Department of Justice audited the books and determined that the actual *cost* of housing the detainees in the York jail was just \$37 per day. The auditors found that in 2000, York officials had overcharged the Department of Justice by more than \$6 million for housing detainees. Auditors estimated that overcharges had totaled \$20 million. Federal authorities demanded repayment of \$20 million, plus \$40 million in punitive damages and they reduced York County's *per diem* rate to \$47.

In April 2006, York County settled with the federal government, agreeing to pay back \$16 million, plus interest, for a total of \$18.5 million, over the next 6 years. In addition, county officials negotiated a higher *per diem* rate in order to avoid using local tax revenue to pay back the federal government. The *per diem* rate was increased to \$60 dollars in December 2006.

In Bergen County, New Jersey local officials have also used an IGA to derive “profit” to augment slumping county finances. But in contrast to the situation in York County, it appears that federal authorities have made no efforts to stem the practice.

In 2000 New Jersey's state correctional managers moved to reduce the level of contracting for local county jails beds to house state prisoners. That year, the Bergen County Sheriff's Department received approximately \$1.2 million less in revenue from contracts for jail beds.¹⁵² The budget shortfall came amidst construction of a controversial county jail expansion. At each stage of construction, the jail increased its capacity without new contract prisoners to fill the beds. Once construction was fully complete the county's jail capacity would total 1,128. County officials were anxious that without new contracts to house prisoners from other jurisdictions, they would not be able to pay off the construction bonds.¹⁵³

In May 2001 the county began accepting immigration detainees and housing them in a new 64-bed housing unit located in the jail's south side. The IGA with the former Immigration and Naturalization Service (INS) provided \$65 a day per detainee. The IGA was expected to generate a little over \$1.5 million a year in revenue if the housing unit was kept at maximum capacity year round.¹⁵⁴ Once that agreement was in place, Sheriff Gordon Johnson urged county officials to re-negotiate with INS for more detainees, and – based on figures he obtained from other New Jersey sheriffs – he press for a higher *per diem* rate.

After September 11, the Sheriff began negotiations anew to increase the number of detainees and *per diem* from the federal government. Local newspaper articles from September 2001 indicate that the Sheriff and other county officials were hoping to increase the number of detainees from 64 to 150, or even 300 per

¹⁵² Hugh R. Morley, “Bergen Jail May Soon House Deportees Sheriff Hammering out Deal with INS,” *The Record*, March 5, 2001.

¹⁵³ *Id.*

¹⁵⁴ Shannon D. Harrington, *Bergen Jail Housing Aliens in U.S. Deportation Program Stays are Short While Travel Arrangements are Completed*, *The Record*, May 12, 2001, at A15.

day, and to negotiate a higher *per diem* of somewhere between \$70 and \$82. The issue became politicized when a Republican TV and print campaign ad featured Democrats opposing the proposed increase as “refusing to put those who threaten America and Bergen County into our jail.” That November, Joel Trella – a Republican – was elected Sheriff.

When the long-awaited agreement was finally signed in May 2003, the federal government agreed to provide \$3.75 million dollars to help offset the \$67.2 million dollars in construction costs for the expansion. In July 2004, Sheriff Trella announced he had secured another new deal with the federal government. The county would receive \$85 dollars a day, retroactive to May 2003, with a guaranteed 150 immigration detainees every day.¹⁵⁵ Despite the windfall that Sheriff Trella claimed the county would receive from the newly negotiated agreement, the issue remained politicized.

In May 2004 the Bergen County Executive – a Democrat – hired an accounting firm to conduct an audit he said was needed to verify whether the county was actually profiting from the ICE agreement. Sheriff Trella called the move a “political witch hunt.” He reported that the county obtained a profit of more than \$40 per inmate every day, based on actual costs he estimated would range from \$12 to \$24 dollars a day to house the detainees, depending on the salaries of the officers on duty. He said that revenues would reach \$6.5 million in the first year, and \$71 million over the life of the contract.¹⁵⁶ Trella charged that Democratic candidate Leo McGuire’s attempt to unseat him as Sheriff was the real reason county officials had paid the accounting firm, a Democratic contributor, \$20,000 to dig up information to use against him in the upcoming election.

After McGuire defeated Trella in the 2004 election, the study’s results were released. The audit confirmed Trella’s claims of enormous profit to the county, verifying that the county could expect \$4.6 million from the federal authorities in annual revenue, resulting in a net profit of \$2.1 million even after subtracting overtime payments. The Bergen County Jail continues to house at least 150 detainees each day, and the county continues to reap the financial benefits.

V. Conclusion

The current zeal for immigrant detention has roots in social, economic, and political forces which are driven by dynamics that run to the very core of our social system. The expansion of immigrant detention capacity comes on the heels of an astonishing upward shift in the overall U.S. incarceration rate which has swept this country into the uncharted territory of mass incarceration. The sharp increase in recent months

¹⁵⁵ Shannon D. Harrington, *Bergen gets \$1 Million More to House Detainees, \$4.6 million Projected from New Jail Deal*, The Record, July 20, 2004.

¹⁵⁶ Office of Joel G. Trella, Press Release: Immigration Incarceration Program a Success Political Interference Undermining the Department, May 4, 2004.

raises fundamental issues about the nature of our governmental system and the prospects for remaining an open, democratic society.

Opponents of prison privatization have long argued that turning the operation of prisons over to organizations that are chartered for the purpose of generating profits inevitably produces pressure for increased incarceration. It seems likely that the prison contract tail is wagging the policy dog. Private prison companies represent just one sector of the special interests that are profiting greatly from the rise of mass incarceration in the U.S., however.

The developments described above in locations as diverse as Bergen County, New Jersey and Pinal County, Arizona illustrate how – once created – a national “market” for prison bed contracts has penetrated the public sector with notions that expanding capacity of local lockups will generate “profit” for the public purse. And, in rural areas hard-hit by decades of economic decline, the immigrant detention boom is now being heralded as economic development – “jobs for our community.”

We must never forget, however, that this “market” results in commodification of immigrant bodies. Detention-for-dollars puts perverse financial incentives in play. Public jailers are increasingly heard to boast about cutting expenditures for custody and care of detainees well below the *per diem* price they’ve negotiated with federal authorities. This insidious incentive cuts directly across concerns about compliance with detention standards that were created to foster a decent, humane custodial environment for the rapidly-growing number of people who are subjected to detention.

Under international human rights norms, detention may be justified only when it is necessary and proportional; thus its use should always be appropriate to achieve a specific function. According to the principle of proportionality, any restrictive measure must be the least intrusive option available to achieve the desired result, and must be both permissible and necessary for protection.¹⁵⁷ Therefore, the United States must fully implement alternatives to detention programs in all parts of the country.

Moreover, the United States government should end the policy of mandatory detention and should re-examine whether use of detention is necessary and proportional. As long as the laws provide for the mandatory detention of immigrants without the right bond or bail, the country will continue to see the massive expansion of jails, prisons, and private contract facilities, increasingly fueled by the profit-making motives of both the private and public sectors, as much as by anti-immigrant hysteria.

¹⁵⁷ HRC General Comment No. 27 on freedom of movement, 2 November 1999 (adopted at 1783rd meeting on 18 October 1999), CCPR/C/21/Rev.1/Add.9, para 14.

CONDITIONS OF DETENTION

- *Conditions of Confinement for Immigrant Detainees*
- *Concerns Regarding Detention Conditions for Immigrants in Massachusetts*

*Conditions of Confinement for Immigrant
Detainees*

CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES¹⁵⁸

I. Introduction

The United States government, through the Department of Homeland Security and Immigration and Customs Enforcement (“ICE”), has increased its use of civil detention for non-citizens at an alarming rate since the 1996 immigration reforms.¹⁵⁹ The growth in detention has resulted in often horrible conditions of confinement, such as grossly inadequate health care, physical and sexual abuse, overcrowding, discrimination,¹⁶⁰ and racism. NGOs frequently receive widespread complaints from detainees and their loved ones regarding problems such as lack of access to necessary medications for persons with chronic illnesses; shackling; use of segregation or tasers for disciplinary purposes; inability to visit with family members and problems with access to telephones.

This briefing paper explains the domestic standards for detention conditions and demonstrates the pervasive problems with conditions of confinement immigration detainees face in jails and detention facilities across the country. The paper aims to illustrate the widespread human rights violations that migrants face while in the custody of the United States and offers recommendations for improved conditions and effective oversight of detention conditions.¹⁶¹

II. Applicable Domestic Standards

A. The United States Legal Standard

The constitutional standards that apply to convicted prisoners in the United States are well developed. Convicted prisoners are protected by the Eighth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, which prohibits the infliction of “cruel and unusual punishments” on convicted prisoners. To establish a violation of the Eighth Amendment, a prisoner must show *both* (1) a deprivation of a basic human need, *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993), and (2) deliberate indifference, *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). In the context of medical or mental health care, a prisoner must demonstrate “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Eighth Amendment is also violated when prison officials “maliciously and sadistically use force to cause harm,” even where no serious injury results. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

Immigration detainees, however, are not convicted prisoners. Rather, they are civil detainees held pursuant to civil immigration laws. Their protections are thus derived from the Fifth Amendment, which protects any person in the custody of the United States from conditions that amount to punishment without due process of law. See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Few courts have explored the precise contours of this protection. However, the U.S. Court of Appeals for the Ninth Circuit has held that conditions of confinement for civil detainees must be superior not only to convicted prisoners, but also to pre-trial criminal detainees. *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), cert. denied, 126 S.Ct. 351 (2005). If a civil detainee is confined in conditions that are identical to, similar to, or more

¹⁵⁸ This briefing was prepared by Sunita Patel, Soros Justice Fellow, supatel@legal-aid.org and Tom Jawetz, Staff Attorney, ACLU National Prison Project, tjawetz@npp-aclu.org.

¹⁵⁹ See Tab I “Overview of U.S. Immigration Detention and International Human Rights Law on the use of Detention in the US,” Lutheran Refugee Immigration Services, in partnership with Detention Watch Network, Briefing Materials for the U.N. Special Rapporteur on the Rights of Migrants.

¹⁶⁰ *Summary of Detainee Correspondence with the American Bar Association*, Oklahoma County City Jail, Oklahoma City, Oklahoma, dated July 20, 2006, Port Isabel Detention Center, Los Fresnos, Texas (on file with author).

¹⁶¹ The information provided here is not comprehensive nor does it reflect every problem with detention conditions. However, the examples and issues raised are indicative of routine complaints raised by NGOs and detainees around the country for years. Moreover, the authors cannot attest to the validity and accuracy of each account; the sources are primarily human rights reports, emails from legal service providers, letters from detainees, and newspaper articles.

restrictive than those under which pre-trial detainees or convicted prisoners are held, then those conditions are presumptively punitive and unconstitutional. *Id.* at 934. By definition, immigration detainees are thus entitled to, at minimum, the higher standard of protection articulated in *Jones*.

B. Non-Binding Department of Homeland Security Detention Standards

In November 2000, the former Immigration and Naturalization Service (“INS”) and the U.S. Attorney General released the Detention Operations Manual (“DOM”), which contained thirty-six Detention Standards.¹⁶² There are currently 38 detention standards in the DOM. The Detention Standards apply to Service Processing Centers (“SPCs”), Contract Detention Facilities (“CDFs”), and Intergovernmental Service Agreement (“IGSA”) facilities holding detainees for more than 72 hours. Whereas the standards are theoretically mandatory for all SPCs and CDFs, the standards are merely guidelines for the hundreds of county jails and prisons operating around the U.S. pursuant to IGSA’s;¹⁶³ IGSA facilities hold 80 percent of non-citizens in ICE custody.¹⁶⁴ The detention standards are not binding under United States law or regulations, however, and are thus practically unenforceable.¹⁶⁵

III. Applicable Human Rights Principles

International human rights law requires humane treatment of all persons in custody, regardless of alienage¹⁶⁶ or the reason for their detention. The prohibition against torture, including cruel and inhuman degrading treatment, is a fundamental human rights principle codified in the Universal Declaration of Human Rights (“UDHR”).¹⁶⁷ The United States government has ratified the International Covenant on Civil and Political Rights (“ICCPR”), Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)¹⁶⁸ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”),¹⁶⁹ which contain provisions applicable to the treatment of immigration detainees. Article 10 of the ICCPR acknowledges that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁷⁰ Moreover, the American Declaration not only sets forth human rights obligations but it creates a State obligation to protect such rights.

The United Nations has provided further guidelines for implementing the general prohibitions discussed above in the U.N. Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”)¹⁷¹ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹⁷² (“Body of Principles”). The Standard Minimum Rules and Body of Principles reflect agreed-upon norms of treatment for detainees, regardless of their legal status or alienage. The principles within

¹⁶² *INS News Release-INS to Adopt New Detention Standards*, (November 13, 2000), available at <http://www.uscis.gov/text/publicaffairs/newsrels/detainee.htm>.

¹⁶³ “IGSA facilities may find such procedures useful as guidelines. IGSA’s may adopt, adapt or establish alternatives to, the procedures specified for SPCs/CDFs, provided they meet or exceed the objective represented by each standard.” Detention Operations Manual, “INS Detention Standard: Hold Rooms in Detention Facilities,” (2000).

¹⁶⁴ Spenser S. Hsu & Sylvia Moreno, *Border Policy’s Success Strains Resources: Tent City in Texas Among Immigrant Holding Sites Drawing Criticism*, *The Washington Post*, February 2, 2007.

¹⁶⁵ See Petition for Rule-Making to Promulgate Regulations Governing Detention Standards for Immigration Detainees, (January 25, 2007), available at http://www.nationalimmigrationproject.org/detention_petition_final.pdf.

¹⁶⁶ *Wilson v. The Philippines*, UN Human Rights Committee, Case No. 1069/2002 (2003), (finding pre-trial detention of non-citizen with convicted prisoners and maltreatment while in detention was found to violate the ICCPR provisions governing freedom from torture and prisoners’ right to adequate treatment (Arts. 7 & 10, respectively)).

¹⁶⁷ Universal Declaration of Human Rights art. 5, December 10, 1948, U.N.G.A. res. 217 A(III).

¹⁶⁸ Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965 G.A. Res. 2106 (XX) of

¹⁶⁹ Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2 and 16, December 10, 1984, 1465 U.N.T.S. 85.

¹⁷⁰ International Covenant on Civil and Political Rights art. 10, December 19, 1966, 99 U.N.T.S. 171.

¹⁷¹ United Nations Standard Minimum Rules for the Treatment of Prisoners, May 13, 1977, Economic and Social Council res. 2076 (LXII).

¹⁷² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

include non-discrimination while in custody, protection against ill-treatment or intimidation as a consequence of complaining, no more restriction than required for safe custody, prompt medical care and attention, access to hygiene and sanitary conditions, and health care which meets national and community standards. The accounts provided here are in violation of the United Nations CAT, CERD, ICCPR and contradict many Rules found within the Standard Minimum Rules.

IV. Medical Care

Among the most common complaint from detainees across the country is inadequate access to medical care. Detainees and NGOs have documented severe and widespread problems with access to chronic and emergency medical care, including long delays prior to medically necessary surgical procedures; unresponsiveness to requests for medical care (often termed “sick calls”); and dental extraction-only policies. Specific case studies are provided below.

- A detainee held at the Oakdale Federal Detention Center in Oakdale, Louisiana reported that he broke his nose following an altercation in May 2006. A facility doctor examined his nose from outside the cell and declared it was not broken. After several weeks of complaining and requesting further medical care, he was finally taken to a local hospital where a doctor promptly stated the detainee’s nose was badly broken and required surgery. He received surgery two months from the date his nose was broken.¹⁷³
- While detained at the CCA Central Arizona Detention Center from November 2005 to April 2006, a Liberian woman complained of nausea, severe abdominal pain, trouble sleeping, and pain during urination. The facility’s own records indicate medical staff believed she may have developed uterine fibroids, enlarged fibroids, and may have needed a hysterectomy. She was frequently given 800 mg of Ibuprofen and told to exercise. Once she fainted and consequently missed a court appearance. A few weeks before her release, she was taken to a public hospital where an ultrasound found a cyst which she reports doctors described as the size of a 5-month-old fetus. When the hospital determined she required immediate surgery, ICE released her from detention on medical parole in order to avoid having to pay for the procedure.¹⁷⁴
- An HIV positive Jamaican detainee spent five years in detention during which he was bounced around from Passaic County Jail, in New Jersey, Oakdale Detention Center in southwest Louisiana, Concordia Parish Correctional Facility, near the Mississippi border. He described delays in transfer of medical records, frequent lapses in his medication regimen, and what one HIV/AIDS specialist called substandard medical attention. Due to the improper medical attention, he contracted several conditions while in detention, including conjunctivitis, a throat infection, infection of the lymph nodes, two upper respiratory infections, five skin infections, three ear infections, and a tonsil infection.¹⁷⁵
- One detainee housed at San Diego Correctional Facility and San Pedro Service Processing Center spent eleven months in immigration custody suffering from extremely painful lesions on his penis that were increasing in size and were frequently infected. During his detention he regularly complained to correctional staff and medical staff about his problems and occasionally showed correctional officers blood and discharge in his underpants in order to get medical attention. During

¹⁷³ *Summary of Detainee Correspondence with the American Bar Association*, Oakdale FDC, Oakdale, Louisiana, dated September 21, 2006 (on file with the author).

¹⁷⁴ Emails from Raha Jorjani, Staff Attorney, Florence Project to Sunita Patel, Staff Attorney, The Legal Aid Society, March 30, 2007 & April 11, 2007 (on file with author).

¹⁷⁵ Aslyn Loder, *Ex-detainees Rip Treatment: AIDS-Infected men got Sicker in Jail*, Herald News, August 24, 2005, at A1.

his eleven months in custody he received authorization to meet with one oncologist and several urologists; all of these specialists concluded that he required a circumcision to alleviate his pain and a biopsy to determine whether he was suffering from penile cancer. He was repeatedly denied the necessary circumcision and biopsy by U.S. Public Health Service and the Division of Immigration Health Services on the grounds that these procedures were simply "elective" in nature. Due to significant advocacy efforts by the ACLU, this detainee was ultimately released from immigration custody and was able to go to the emergency room for diagnosis and treatment. Within approximately one week of his release from ICE custody he was diagnosed with penile cancer and was admitted to the hospital to have nearly his entire penis surgically removed. By the time he was able to get treatment the cancer had already metastasized to his lymph nodes. He is currently undergoing chemotherapy, but doctors believe the cancer may have spread to other parts of his body and that he may have less than one year to live.¹⁷⁶

- Another detainee who was housed at San Diego Correctional Facility injured his foot while in custody. After the wound became infected he sought medical attention, at which point he was diagnosed with uncontrolled diabetes. He received a course of antibiotics in the Short Stay Unit of the facility, but was returned to general population before his wound was completely healed. Over the next month the wound became even more infected and his diabetes remained out of control. He complained for weeks about increasing pain and a foul odor coming from the wound, which was increasing in size, turning black, and oozing. He was finally taken to the hospital where he was admitted through the emergency room and was found to have developed a gangrenous ulcer in his foot and ankle and a severe, potentially fatal bone infection (that is, chronic osteomyelitis). Although doctors initially believed that he would have to have his foot partially amputated, he ultimately spent over one month receiving antibiotics and underwent a complicated skin graft operation to help heal the wound.¹⁷⁷
- Benedictus Yarzue arrived in York County Prison in July 2004. He complained of severe pain in his penis, testicles and anus. Various treatments by the doctor were unsuccessful and Mr. Yarzue was referred to an outside urologist. The treatment prescribed by the urologist was similarly unsuccessful, and the urologist recommended that Mr. Yarzue receive a cystoscopy. York County Prison submitted a Treatment Authorization Request to the Division of Immigration Health Services, which denied authorization for the treatment. The decision by DIHS to deny authorization, and for York County Prison to thereby withhold a referral to a urologist to perform a cystoscopy, was ultimately reviewed by the county's Solicitor (who found that Mr. Yarzue had raised a valid constitutional claim to treatment) and the county's Complaint Review Board. The Board concluded at the end of its hearing in May 2005 that Mr. Yarzue would receive the necessary treatment, and "INS shall be billed for reimbursement." Within a few days of the decision, Mr. Yarzue was transferred to Berks County jail (that is, outside of the jurisdiction of York County's Complaint Review Board), and his renewed requests for treatment were denied anew. In response to a lawsuit by Mr. Yarzue against York County Prison, York County Prison filed a Third Party Complaint against the United States and ICE. See *Yarzue v. Division of Immigration Health Services*, No. 05-cv-1415 (M.D. Pa.). Perhaps the most important document produced during that case was a letter from Thomas Hogan, Deputy Warden of York County Prison, to Joe Sallemi of Immigration and Customs Enforcement, explaining the prison's very serious problems dealing with the Division of Immigration Health Service. According to Deputy Warden Hogan, the Division of Immigration Health Services is a "massive Washington D.C. Bureaucracy" that is "primarily interested in delaying and/or denying medical care to detainees."¹⁷⁸

¹⁷⁶ Email from Tom Jawetz, Staff Attorney, ACLU National Prison Project, to Sunita Patel, Staff Attorney, The Legal Aid Society, April 15, 2007 (on file with author).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

- A Haitian detainee at Wakulla County Jail, in Florida, had a swollen abscess on his neck. He reported that when medical staff at the jail observed his condition, the staff failed to explain his condition. At the jail's clinic, without explanation, he was instructed to lie down. A physician, nurse and jail sergeant (with a Taser gun on his belt) held him down. Then the doctor, without his consent "came at [him] with a knife" and sliced open the abscess. No anesthesia was administered. The detainee reported an excess of blood and pus following the "procedure." He was escorted back to his pod and given pain relievers. After multiple requests the following week due to continued pus elimination he gave up seeking further care. He told attorneys from FIAC, "I think this was abuse. They treated me like an animal."¹⁷⁹
- A Swiss woman was still recovering from a triple ankle fracture when detained in January 2007. She was handcuffed and shackled by jail officers in Bay County, Florida although she protested such movement may re-injure her ankle. She was instructed to board an ICE bus with a missing step while shackled. She tripped and fell. The ICE officer looked at her bleeding ankle and said, "I think I'm looking at a broken ankle." At Wakulla County Jail, where she was first detained, she only received ACE bandages and ibuprofen for the first month of detention, despite her apparent pain and requests for further treatment. She could hardly walk and experienced sharp, shooting pain in her ankle. An X-Ray was administered a month after detention, but she was transferred before learning of the results. Her ankle remains noticeably swollen and she has lost much mobility. As of the end of March, 2007, she still was not told X-Ray results nor received any further treatment.¹⁸⁰

The inadequate chronic and emergency health care is compounded by poor record keeping practices or irregular intake medical screenings. The DHS Office of Inspector General's January report on detention conditions found that only Krome complied with the detention standards for documenting initial health screenings, and only three of the five audited facilities complied with the physical examination requirement. Without proper initial medical screening, individuals with chronic medical conditions may have their health compromised and increase the risk of transmission of communicable or infectious diseases and ongoing nutritional deficiencies.

Even when such screenings are conducted, detainees report delays in receiving necessary medications, changes in medications, and failures to dispense all required medications. For individuals with diabetes or HIV, medical staff at many facilities neglect to check blood-sugar levels, T Cell counts and viral loads at the required intervals. When detainees file requests for medical attention as a result of some inadequacy, a nurse or doctor may respond days or weeks later,¹⁸¹ if the medical staff responds at all. Waiting a week for an appointment can cause serious health consequences in some instances. One jail determined that a detainee's request to continue physical therapy following a hand injury did not constitute a "serious" medical need.¹⁸²

Additionally, detainees often complain of sick call procedures. Common problems include the unavailability of sick call forms, failure to respond to requests for medical attention and the resulting delay in detection or treatment of medical conditions. The OIG's January report recognized the audited facilities' lack of compliance with the detention standard which requires jails to maintain sick calls at a minimum based on the number of detainees housed at the facility. Further, the report demonstrated the facilities' failures to comply with their own sick call procedures.¹⁸³

¹⁷⁹ Email from Charu al-Sahli, Staff Attorney, FIAC, to Sunita Patel, Staff Attorney, The Legal Aid Society, April 16, 2007 (on file with author).

¹⁸⁰ Email from Charu al-Sahli, Staff Attorney, FIAC, to Sunita Patel, Staff Attorney, The Legal Aid Society, April 16, 2007 (on file with author).

¹⁸¹ *Summary of Detainee Correspondence with the American Bar Association*, San Pedro Service Processing Center, San Pedro, California, dated March 22, 2006 (on file with author).

¹⁸² *Summary of Detainee Correspondence with the American Bar Association*, Perry County Correctional Center, Uniontown, Alabama, dated June 8, 2006 (on file with author).

¹⁸³ OIG Report, at 4-5.

On March 25, 2007, federal detainees at the 1400-bed **Stewart Detention Center**, located in Lumpkin, Georgia, refused to eat for two days in protest of mistreatment and inadequate diet. One detainee who suffers from Parkinson's disease, diabetes, and HIV/AIDS reported to the Spanish-language Atlanta Latino that it generally takes two to four days to receive medical attention. The Salvadoran consulate in Georgia interviewed 40 detainees and confirmed that detention center officials assaulted one man for refusing to eat and locked him in an isolation cell for 45 minutes.¹⁸⁴

V. Mental Health

Mental health care is sorely lacking in jails and detention facilities where ICE holds immigration detainees. Similar to the issues raised in the medical care discussion, failure to transfer records;¹⁸⁵ inadequate record keeping, intake health screening and medication verification; and medication dispensation effect conditions for mentally ill detainees. Due to cost or availability, detention facilities sometimes change prescription psychotropic medications, either to a generic form or a different medication altogether. In such instances, detainees sometimes complain that adverse consequences to changed medications are not monitored or appropriately adjusted. In other cases, facilities completely deny detainees mental health care, which can lead to acute mental instability, compromise the detainees' safety, and prevent effective legal representation.¹⁸⁶

In addition, detainees who are survivors of torture or trauma may be re-traumatized due to detention or the inability to obtain necessary mental health treatment. A consistent problem is the overuse or misuse of suicide prevention segregation. Detainees have stated that the seemingly arbitrary use of segregation led them to hide suicidal thoughts from facility staff for fear that confiding such thoughts or seeking mental health treatment would result in segregation. One detainee stated she needed mental health medications and "just wanted to talk to someone about her fears," but was unwilling to seek medical care for fear of being placed in segregation.¹⁸⁷ Some segregation rooms are dirty, subject to extreme temperatures, or malodorous.¹⁸⁸ One county jail in Virginia has a practice of placing mentally ill detainees facing anxiety attacks or nervous breakdowns in solitary confinement to "cool down."¹⁸⁹ Another facility, located in Florence, Arizona, told a detainee who attempted suicide to consider detention "an extended Bible retreat."¹⁹⁰ The OIG Report identified that four of the five audited facilities failed to comply with aspects of the Detention Standard governing suicide watch.

- A detainee originally held at Piedmont Regional Jail was transferred to Hampton Roads Regional Jail after a failed suicide attempt. He was transferred to Hampton Roads so he could stay in the "medical wing" of the jail. Far from being a real medical facility, the medical wing merely holds both the mentally ill criminal population and the mentally ill immigrant population together in one pod. This young 24-year-old man suffered from schizophrenia, diagnosed in

¹⁸⁴ Mario Guevara, "Presos de Inmigracion Organizan Huilga," Atlanta Latino, March 22, 2007, available at <http://www.atlantalatino.com/printpage.php?id=7284>.

¹⁸⁵ Email from Sarah Sherman-Stokes, CAIR Coalition, to Tom Jawetz, April 10, 2007 (on file with author) (summarizing a Virginia detainee's experience of being transferred without his medical records to three different jails, which resulted in the detainee never receiving medications for schizophrenia).

¹⁸⁶ Memo to Sunita Patel and Tom Jawetz, Benjamin Yerger, Staff Attorney, Pennsylvania Immigration Resource Center (on file with author).

¹⁸⁷ Summary of Interview with Detainee at the Bergen County Jail, Hackensack, New Jersey, November 28, 2006 (on file with author). See Memo to Sunita Patel and Tom Jawetz, Benjaim Yerger, Staff Attorney, Pennsylvania Immigration Resource Center (on file with author).

¹⁸⁸ See Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, From Persecution to Prison: The Health Consequences of Detention of Asylum Seekers [hereinafter The PHR Bellevue Report], at 75, 77, 115.

¹⁸⁹ Email from Sarah Sherman-Stokes, CAIR Coalition, to Tom Jawetz, April 10, 2007 (on file with author).

¹⁹⁰ Emails from Raha Jorjani, Staff Attorney, Florence Project to Sunita Patel, Staff Attorney, The Legal Aid Society, March 30, 2007 & April 11, 2007 (on file with author).

his childhood. While detained in Hampton Roads he was given a daily medication regiment, but his condition remained unstable. The detainee continued to have suicidal tendencies. At one point he exclaimed “I need to be in a hospital, not a jail!” This young man desperately needed ongoing treatment with a mental health care professional, but all he received was a three times daily dose of anti-psychotic medication administered by a prison guard.¹⁹¹

- The mental health of a young Liberian detainee with a diagnosis of paranoid schizophrenia deteriorated during his three months detainton in a rural Pennsylvania prison in July 2005. He eventually began to refuse medication and became psychotic, flipping himself off his bed on to his head over and over in an attempt to “train his body” to endure the hardships and persecution he would face upon return to Liberia. The detainee assaulted guards, also based on his perceived need to hone his fighting skills in the event of his deportation. He was placed in 24 hour lock down and strapped into a restraint chair when escorted to other parts of the facility. He was ordered involuntarily committed in a state court action and the government’s removal proceedings were administratively closed. He was transferred to a facility in South Carolina in March 2006 for inpatient treatment, and later transferred to Krome in Miami, Florida, where he remains detained today.¹⁹²

VI. Overcrowding

The U.S. Constitution and international human rights principles prohibit housing detainees in severely overcrowded conditions that deny basic human needs. In some overcrowded facilities, detainees report that three people are housed in cells designed for two,¹⁹³ while at other facilities detainees are housed in the gymnasium or other large rooms with mats on the floor.¹⁹⁴ Overcrowding can heighten tension between detainees and guards and among detainees, increasing the risk of altercations and abuse.¹⁹⁵ An overcrowded facility’s capacity to service detainee medical, sanitation, and hygiene needs is also severely compromised.

Etowah County Detention Center, Gadsden, Alabama: The ACLU of Alabama and several other NGOs have received numerous reports from detainees of overcrowding, improper medical care, and punitive and excessive force at the Etowah County Jail in Gadsden, Alabama. Until a very recent visit by ICE to the facility, female detainees reported that 175 women were housed in a unit designed for 75 people, with many detainees crowded into cells designed for far fewer people. Pregnant women report only receiving pre-natal attention every three months and diabetics complain that extra meals and medications are not provided to regulate blood-sugar levels. Detainees additionally complain that the amount of food they receive is insufficient, and that detainees routinely lose weight at the facility. Perhaps most severe, for many months preceding ICE’s recent visit to the facility, women and men reported being locked down in their cells for more than 20 hours each day. The facility provides no outdoor recreation at all. Retaliation for filing complaints is common, in the form of tasers, tear gas, mace, or degrading verbal abuse.

¹⁹¹ Samantha Dillon and Leslie Thompson, International Human Rights Law Clinic, Washington College of Law, *Remote Detention = Rights Denied: the Impact of Remote Detention on Immigrant Detainees* (fMay, 2007) (unpublished summary on file with author).

¹⁹² Memo to Sunita Patel, Staff Attorney, The Legal Aid Society, and Tom Jawetz, Staff Attorney, ACLU National Prison Project, from Benjamin Yerger, Staff Attorney, Pennsylvania Immigration Resource Center (on file with author).

¹⁹³ *Summaries of Detainee Correspondences with the American Bar Association*, Middlesex County Adult Correctional Center, New Brunswick, New Jersey, dated January 31, 2007, Oklahoma City County Jail, Oklahoma City, Oklahoma, dated January 25, 2007 (on file with author).

¹⁹⁴ *Summaries of Detainee Correspondences with the American Bar Association*, York County Prison, York, Pennsylvania, dated June 29, 2006. Perry County Correctional Facility, Uniontown, Alabama, dated August 18, 2006 (on file with author).

¹⁹⁵ See e.g., *Summaries of Detainee Correspondences with the American Bar Association*, Tri-County Detention Center, Ullin, Illinois, dated September 12, 2006; San Diego Correctional Facility, San Diego, California, dated October 17, 2006 (on file with author).

In January 2007, the American Civil Liberties Union filed a lawsuit on behalf of all of the detainees housed at the CCA-run San Diego Correctional Facility. For several years prior to the filing of the lawsuit, hundreds of detainees were routinely triple-celled, which meant that one person would be forced to sleep in a plastic boat-shaped container on the floor. Additional detainees were housed in the common dayroom areas of some pods, pushing such pods well over 50 percent beyond their design capacity. Over the years, detainees participated in hunger strikes to protest triple-celling, and in September 2006 a disturbance erupted in one of the housing units when CCA staff attempted to increase the use of triple-celling.

The Pennsylvania Institutional Law Project (PILP) has heard numerous recent reports that individuals have been held in the gym at York County Prison on a temporary basis, with more limited access to toilet and shower facilities and increase in medical issues. The ACLU has also received complaints that the privately-operated Regional Correctional Center in Albuquerque, New Mexico has been housing detainees in a dayroom and placing additional detainees in full cells.

Seneca County Jail, Ohio:

Advocates for Basic Legal Equality (ABLE), offers legal orientation programs and direct legal representation to immigrants detained at Seneca County Jail, located near Toledo, Ohio. ABLE has witnessed a number of human rights abuses at the Seneca County Jail, many of which have persisted over time, despite advocacy from ABLE and other advocates to both jail and federal officials. First and foremost, the Seneca County Jail is severely overcrowded, generally holding approximately 50 more detainees than it has beds. For example, at the time of this writing, Seneca is holding 187 detainees while authorized to hold only 125. As a result of the overcrowding, detainees are routinely forced to sleep on mats on the floor of the gymnasium. Lights are left on throughout the night. Warehousing detainees in this manner, and the resulting pressure on the jail's systems and infrastructure, leads to additional violations, chief among them the denial of access to telephones to contact legal aid providers, health and hygiene problems, lack of recreation opportunities, and the jail providing detainees with aspirin to treat all medical problems.¹⁹⁶

VII. Punitive Disciplinary Procedures

Detention centers and county jails and prisons use punitive disciplinary procedures, some of which are considered torture under CAT and the ICCPR. The use of disciplinary "segregation" is widely abused.¹⁹⁷ Segregation is often used disproportionately in response to minor offenses. For example, one detainee reported being placed in segregation for two days as punishment for arguing with another detainee.¹⁹⁸ Detainees at Etowah County Jail in Alabama report they are locked in their cells and charged with "making terroristic threats" for complaining about jail policies.¹⁹⁹ A detainee at York County Prison complained that an officer offered to put money on his commissary if he beat up another detainee.²⁰⁰ Multiple detainees at the San Diego Correctional Facility report that they received disciplinary segregation when they complained about overcrowding or refused to have a third detainee sleep on the floor of their two-person cell.²⁰¹

The OIG Report also identified problems with overall disciplinary processes at the audited facilities. Misuse of disciplinary policies included detainees being placed in disciplinary segregation and never written

¹⁹⁶ Summary of Emails from Mark Heller, Staff Attorney, Advocates for Basic Legal Equality, to Sunita Patel, Staff Attorney, The Legal Aid Society, April 5, 2007 (on file with author).

¹⁹⁷ See Department of Homeland Security, Office of Inspector General, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* (released Jan. 16, 2007) [hereinafter DHS OIG Report], available at

¹⁹⁸ Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention of Asylum Seekers* [hereinafter The PHR Bellevue Report], at 75, 77, 115.

¹⁹⁹ *Summary of Detainee Correspondence with the American Bar Association*, Etowah County Detention Center, Gadsden, Alabama, dated July 19, 2006 (on file with author).

²⁰⁰ *Summary of Detainee Correspondence with the American Bar Association*, York County Prison, York, Pennsylvania, October 23, 2006 (on file with author).

²⁰¹ Email from Tom Jawetz, Staff Attorney, ACLU National Prison Project, to Sunita Patel, The Legal Aid Society, April 16, 2007 (on file with author).

up or untimely disciplinary hearings which resulted in detainees being held in segregation for extended periods of time, only to be ultimately found not guilty of the alleged violation.²⁰²

VIII. Treatment by Guards and Correction Officers

Among the most serious complaints from detainees are instances of physical, sexual, and verbal abuse, which is often discriminatory in nature. In a June 2005 letter to The Legal Aid Society from 20 detainees at the New Jersey Hudson County Jail, detainees reported physical and racist verbal abuse, including being called “faggots,” motherf---ers”, “spicks,” “cockroaches,” and Black detainees were called “monkeys.”²⁰³ Verbal abuse and harassment has been reported at the Middlesex County Jail in New Jersey²⁰⁴ and detainees at Otero County Prison in New Mexico reported guards’ use of obscenities when addressing detainees.²⁰⁵ Guards who abuse, harass and intimidate detainees often go undisciplined.²⁰⁶ Last year, the ABA Commission on Immigration received a letter signed by 54 detainees at the Monmouth County Correctional Institute that stated officers responded to complaints by stating, “this is a white man’s country and white man’s law, you ain’t got no f---ing rights immigrants.” Other detainees, such as Sharon Nyantekyi, a student at Rutgers University detained at Middlesex County Correctional Institute, were reportedly subjected to verbal abuse by officers and sexual and physical threats by other prisoners.²⁰⁷ Moreover, the recent OIG Report provides four specific examples of physical and sexual abuse in the audited facilities, though it references numerous instances of alleged physical abuse.²⁰⁸

Passaic County Jail: Dogs were used for three years to intimidate and attack immigrant detainees. In at least two cases, dogs purportedly bit detainees. Ibrahim Turkman and other detainees reported that two or three times a week, sometimes at 3:00 a.m., the doors would open and ten to twenty officers rushed in with four to six unmuzzled barking dogs. The leashed dogs, mostly German Shepherds, would come within inches of the detainees’ faces. In July 2006, Bill Maer, the Sheriff Department’s spokesman, said guards pepper-sprayed detainees during an incident involving 20 detainees.²⁰⁹ In December 2005, fifteen detainees signed a statement stating that Passaic County Jail officers beat an immigration detainee. The statement stated that Osama Metwaly was subdued but then beaten while handcuffed.²¹⁰

Of particular concern to NGOs are reports of sexual abuse. The extent of the problem is unknown because of fear and threats by the abuser; emotional and physical isolation; and the lack of access to phones, independent complaint mechanisms, or attorneys. In December 2006, Mayra Soto, a transgendered detainee testified before the National Prison Rape Elimination Commission, a bipartisan

²⁰² OIG Report, at 14-15.

²⁰³ Letter to Bryan Lonagan, Staff Attorney, The Legal Aid Society, June 15, 2005 (on file with author).

²⁰⁴ Samantha Henry, *Shattered Dreams: Rutgers Senior Facing Deportation to Africa After being Jailed for 21 Days*, Herald News, April 20, 2006 at A1.

²⁰⁵ *Summary of Detainee Correspondence*, Otero County Prison, Chaparral, New Mexico, dated January 22, 2007 (on file with author).

²⁰⁶ See *Summaries of Detainee Correspondences with the American Bar Association*, Tri-County Detention Center, Ullin, Illinois, dated November 28, 2006, Otero County Prison, Chaparral New Mexico, dated January 22, 2007 (on file with author).

²⁰⁷ Samantha Henry, *Shattered Dreams: Rutgers senior facing deportation to Africa after being Jailed for 21 Days*, Herald News, April 20, 2006, at A1 (Middlesex County Correctional Institute houses women detainees with pre-trial prisoners in criminal custody).

²⁰⁸ OIG Report, at 28.

²⁰⁹ See David Zwerdling, *Immigrant Detainees tell of Attack Dogs and Abuse*, November 18, 2004, available at <http://www.npr.org/templates/story/story.php?storyId=4170152>; David Zwerdling, *Government Halts use of Dogs Around Detainees*, November 25, 2004, available at <http://www.npr.org/templates/story/story.php?storyId=4193030>; Samantha Henry, *Protesters Want Detainees Freed: Inside Jail, Guards put Down a 30-minute Incident*, Herald News, January 9, 2006, at B1.

²¹⁰ Please note that detainees are no longer held at the Passaic County Jail. However, the contract was not terminated, merely suspended and the problems at Passaic are indicative of an unruly and chaotic detention system.

federal commission established to study Federal, State, and local government policies and practices respecting the prevention, detection and punishment of prison sexual assaults. She testified that in December 2003, while waiting for her attorney, a guard entered the holding cell with his pants unzipped and ordered her to perform oral sex on him twice.²¹¹ Soto was able to tell her attorney and pressed charges against the officer. NGOs pointed out to the Commission that many other men and women are unable to come forward with similar complaints due to fear of retaliation, resulting trauma, or lack of access to attorneys or family.²¹² At least two lawsuits alleging sexual assault filed by detainees at the San Diego Correctional Facility have resulted in settlements.²¹³

Last June, Keston Phillip, a Trinidadian detainee was sexually molested by a detainee. A fight ensued. Upon an officer's command, he turned away from the detainee and was immediately tasered near his collarbone and in his abdomen by the officer (he was not wearing a shirt, having just woken up.) FIAC was in the facility the same day to conduct its regular "Know Your Rights" presentations and representatives were able to confirm Mr. Phillip's account from witnesses and sustained injuries. The officer's incident report indicates Mr. Phillip was engaged in a fight when tasered, failing to mention the allegation of sexual abuse or his compliance with the officer's commands. In response to FIAC's written questions, the county's sheriff defended the officer's actions as "following protocol." FIAC has documented numerous other accounts of use of excessive use, including tasing and inappropriate threats of tasing. The Sheriff of the Wakulla County Jail openly acknowledges the use of M-26 Taser guns constitutes extreme force, even though he defends the policy as appropriate jail policy.²¹⁴

Willacy County Detention Center, Raymondville, Texas ("Ritmo"/ "tent city")

The Willacy County Detention Facility is the largest immigration detention facility in the country. The facility is made up of ten large tents, each of which is designed to house 200 individuals. The tents are completely windowless and the lights are on around-the-clock, making it difficult for detainees to sleep. No partitions exist to separate the showers, toilets, sinks and eating areas, and detainees report that they are occasionally forced to eat with their hands because no utensils are provided. When detainees are permitted to go outside of the tents for recreation, they do not appear to be provided with warm weather clothing. Detainees who are sent to this remote facility near the southern border may have been transferred from places as far away as Boston, New York and Florida. As a result of the transfer, detainees are not only separated from their loved ones, but may also find it impossible to obtain legal representation.

IX. Grievance Procedures

Detainees repeatedly report inadequate access to meaningful grievance procedures and lack of review of detainee complaints. The recent investigation into detention conditions at ICE facilities conducted by the OIG found a lack of proper record keeping for detainee complaints. For example, there was no log of complaints or accessible complaint box for detainees to file anonymous grievances.²¹⁵ From a review of detainee complaints regarding grievance procedures made to the American Bar Association Immigration

²¹¹ Testimony of Mayra Soto, *Hearing: The Elimination of Prison Rape: Immigration Facilities and Personnel/Staffing/Labor Relations*, December 13, 2006, available at http://www.nprec.us/docs/sxvimmigrdet_d13_persaccts_MayraSoto.pdf.

²¹² Testimony of Christina DeConcini, *Hearing: The Elimination of Prison Rape: Immigration Facilities and Personnel/Staffing/Labor Relations*, December 13, 2006, available at http://www.nprec.us/docs/sxvimmigrdet_d13_strategies_ChristinaDeConcini.pdf, at page 152.

²¹³ See Leslie Berestein, *Woman in Detention Alleges Rape Contract Operator's Employee is Named*, *The San Diego Union-Tribune*, January 18, 2005, available at: <http://www.signonsandiego.com/news/metro/20050118-9999-1m18assault.html>

²¹⁴ See Email from Charu al-Sahli, Staff Attorney, FIAC, to Sunita Patel, Staff Attorney, The Legal Aid Society, April 16, 2007 (on file with author),

²¹⁵ OIG Report, at 20.

Commission since January 2006, detainees complain that written and oral grievances go unanswered,²¹⁶ grievance forms are sometimes unavailable,²¹⁷ jail officials are generally dismissive of complaints,²¹⁸ Additionally, detainees are deterred from filing grievances due to fear of retaliation²¹⁹ or the general belief that the jail will not respond or make changes.²²⁰ One detainee at the Buffalo Federal Detention Center in Batavia, New York, reported he was beaten and threatened with solitary confinement in the Special Housing Unit (“SHU”) when he asked for a grievance form. Language and cultural barriers, as well as literacy levels also create barriers to complaining to jail officials and ICE.²²¹ Inadequate access to telephones and the expense of phone calls prevent detainees from complaining to their consulates about human rights abuses faced while in custody.

X. Deaths in Detention²²²

There is little information available about deaths that occur in immigration custody. ICE has no legal obligation to publicly report such deaths and it is not always clear whether a proper investigation is taking place following such deaths.²²³ The DHS Office of Inspector General, which is responsible for conducting investigations relating to the Department, does not appear to receive automatic notification of each death that occurs in DHS custody, and the OIG’s semiannual reports to Congress contain sporadic and vague references to investigations into in-custody deaths.

Because few of these deaths ever receive media scrutiny, it is difficult to know how many people have died in ICE custody.²²⁴ Since 2004, it appears that *at least* 20 individuals have died in ICE custody, seven as a result of suicide.²²⁵ As ICE detains greater numbers of individuals, this issue will only grow in

²¹⁶ *Summaries of Detainee Correspondences with the American Bar Association*, Florence Service Processing Center, Florence, Arizona, dated February 26, 2007; San Pedro Service Processing Center, San Pedro California, dated June 29, 2006; York Correctional Institution, Niantic, Connecticut, dated October 13, 2006; McHenry County Jail, Woodstock, Illinois, dated February 24, 2006; Tensas Parish Detention Center, Newellton, Louisiana, dated August 7, 2006; Oklahoma City County Jail, Oklahoma City, Oklahoma, dated December 20, 2006; York County Prison, York, Pennsylvania, dated October 23, 2006; Port Isabel Detention Center, Los Fresnos, Texas, dated March 8, 2007; Willacy County Detention Center, Raymondville, Texas, dated September 21, 2006; Piedmont Regional Jail, Farmville, Virginia, dated October 5, 2006 (on file with author).

²¹⁷ *Summaries of Detainee Correspondences with the American Bar Association*, Park County Jail, Fairplay, Colorado, dated June 2, 2007; Clinton Country Correctional Facility, McElhattan, Pennsylvania, dated February 2, 2007 (on file with author).

²¹⁸ *Summaries of Detainee Correspondences with the American Bar Association*, Park County Jail, Fairplay, Colorado, dated January 2, 2007, Port Isabel Detention Center, Los Fresnos, Texas, dated March 8, 2007, Northwest Detention Center, Tacoma, Washington, dated February 6, 2007.

²¹⁹ *Summaries of Detainee Correspondences with the American Bar Association*, Monmouth County Correctional Institute, Freehold, New Jersey, dated June 27, 2006 and July 31, 2006 (on file with the author).

²²⁰ *Summaries of Detainee Correspondences with the American Bar Association*, Park County Jail, Fairplay, Colorado, dated January 2, 2007 (on file with author).

²²¹ *Summary of Detainee Correspondence*, Guadalupe County Adult Detention Center, Seguin, Texas, dated March 31, 2006 (on file with author).

²²² This section was contributed by Tom Jawetz, Staff Attorney, ACLU National Prison Project.

²²³ According to the ICE Detention Standards, when an immigration detainee dies in custody, the Assistant District Director for Detention and Removal Operations is supposed to notify the District Director, the Assistant Regional Director for DRO, and the Director of Field Operations at ICE Headquarters. A local representative of the U.S. Public Health Service is to receive medical reports within 48 hours of the death, and both family of the deceased and consulate officials are to be notified about the death.

²²⁴ The problems with medical care provided to ICE detainees is covered elsewhere in the briefing materials. However, it is worth mentioning here that detainees with serious, life-threatening medical conditions may be denied proper care throughout their detention, only to be deported or released suddenly on account of their serious medical condition. It is also not possible to determine how many of these individuals may die each year as a result of the failure to treat their medical conditions during their detention.

²²⁵ See Chart of Known Deaths in Detention from 2004-Present (on file with author). The names on this chart were identified reviewing public media reports and the OIG’s semiannual reports to Congress, talking to immigration advocates around the country, and consulting with the OIG.

importance. Since June 2006, at least five immigration detainees have died in custody: one in San Diego, CA, another in Albuquerque, NM, a third in Tacoma, WA, a fourth in Farmville, VA, and a fifth in Hackensack, NJ. Three of these deaths occurred in facilities operated by private prison companies. The following accounts detail the circumstances surrounding just a few of the 20 deaths:

1. Nery Romero, Bergen County Jail: Hackensack, NJ (February 12, 2007)

Within five days of entering Bergen County Jail, Nery Romero committed suicide. Prior to entering detention, Mr. Romero was taking strong prescription pain medications for a serious injury that he had experienced in a recent motorcycle accident. According to witnesses at the jail and a letter mailed by Mr. Romero to his family prior to his death, but delivered only afterwards, Mr. Romero was not receiving any pain medications at the jail and was crying out for painkillers every day.

2. Abdoullai Sall, Piedmont Regional Jail: Farmville, VA (December 2, 2006)

Abdoullai Sall suffered from kidney problems. When he was initially detained in late September, his immigration attorney wrote a letter to the Department of Homeland Security office where Mr. Sall had been taken into custody, explaining that he had a health problem related to his kidneys and required medication. Mr. Sall was soon transferred to Piedmont Regional Jail, where he notified jail staff that he needed to take specific medications at specific times. His immigration attorney spoke with an officer at Piedmont Regional Jail in mid-October about the fact that Mr. Sall was apparently not receiving the appropriate amount of medication and that his feet were beginning to swell. His attorney was informed that the Major who works in the Medical Unit was on a one-week trip, and that nothing could be done until the Major returned. One week later, Mr. Sall again complained to his immigration attorney about the lack of medical care, and the immigration attorney again advised the officer at the jail about Mr. Sall's problems. On the morning of December 2, Mr. Sall collapsed on the way to the bathroom. Detainees who were present report that it took a long time for officers on duty to respond to the emergency, and it was another detainee who used the phone to dial 911. By the time an officer began to attempt CPR, it was too late to save Mr. Sall's life.

3. Young Sook Kim, Regional Correctional Center (Cornell Corrections): Albuquerque, NM (September 2006)

On or about August 22, 2006, Young Sook Kim was transported to Regional Correctional Center from Virginia. During the van ride in Virginia to the airport, Ms. Kim vomited. Throughout her detention, which lasted approximately two weeks, she suffered serious stomach problems. Her condition deteriorated steadily, eventually getting to the point where she could not eat. Other women detainees pled with guards and nurses to examine Ms. Kim and also completed numerous sick call requests, at least one of which was marked "urgent." Ms. Kim never received proper care from a doctor. Only when her eyes finally turned yellow and she could no longer eat did the nurse agree to send her to the hospital. She was transported to the hospital on or about September 10, 2006 and died shortly thereafter.

4. Maria Filomena Inamagua Merchan, Ramsey County Jail: St. Paul, MN (April 13, 2006)

Maria Filomena Inamagua Merchan was detained on February 24, 2006. She was held at the Ramsey County Jail, where she regularly complained about headaches and dizziness. She reported to family members that she only received Tylenol and similar painkillers, and the Ramsey County Sheriff corroborated her account that she did not see any specialist until she collapsed. The collapse occurred on April 3, when she struck her head while getting down from her top bunk assignment. After the guards found her unconscious, medical staff

monitored her at the jail for four hours before finally transporting her to the nearby hospital. She was admitted in critical condition and was quickly diagnosed as having oxygen-depriving parasites attacking her brain. She died ten days after arriving at the hospital and falling into a coma. The Ecuadorian Civic Community in Minnesota has filed a formal complaint and request for investigation with the Department of Homeland Security, Office of Inspector General.

5. Ignacio Sarabia-Villasenor, San Diego Correctional Facility (Corrections Corporation of America): San Diego, CA (January 4, 2005)

Ignacio Sarabia-Villasenor collapsed in the shower. Other detainees dragged him out of the shower and yelled for the guards to come. Several officers were in the control booth at the time, but it took them a while to notice the commotion. When they finally arrived at the Pod, they first imposed a lockdown of all detainees. When all of the detainees were locked in their cells, one officer stood beside Mr. Sarabia waiting for medical personnel to arrive. It was approximately 15 minutes before nurses arrived with a wheelchair, not a stretcher. Mr. Sarabia's chest was still heaving and it was clear he could not breathe, but the nurses put a thermometer in his mouth and tried to take his temperature. No one performed CPR. When some detainees screamed that the guards and nurses should do something, one guard responded that the detainees would have to shut up or be placed in the hole. After 25 minutes, someone finally started CPR, but by then Mr. Sarabia was already dead.

XI. Religious Freedom

Detainees are also subject to religious discrimination or restricted in practicing their religion. Harpal Singh Cheema was detained at the Yuba County Jail since 2002, during which time he was denied permission to wear his religious head guard, the Sikh turban. In May 2005, the ACLU filed suit, alleging that "defendants have been unjustifiably and unlawfully subjecting Mr. Cheema to extraordinary restrictions on his use of a religious head-covering, prohibiting him from leaving his bed with his head covered."²²⁶ Muslim detainees at Northwest Detention Center in Washington report they are denied religious food and the ability to practice their religion.²²⁷

XII. Lack of Effective Oversight

The current scheme of detention oversight does not prevent or cure human rights abuses within detention facilities or jails. The U.S. Immigration and Customs Enforcement ("ICE"), an agency within the Department of Homeland Security ("DHS"), is charged with the custody and care of immigration detainees. The government's internal systems of oversight are (1) annual inspections for all ICE detention facilities, contract and intergovernmental service agreement jails and prisons and (2) the Office of Inspector General's occasional site or issue specific investigations. The American Bar Association's Commission on Immigration and the United Nations High Commissioner for Refugees ("UNHCR") conducts investigations into the treatment of detainees, including refugees and asylum seekers. Moreover, various NGOs, legal service providers, and immigrant and human rights groups use media and direct inquiry with the government to create an additional method of oversight.

The failure of this uncoordinated and piecemeal approach to prevent human rights abuses is acknowledged by the United States government, as well as NGOs and immigration detainees. In January 2007, the Inspector General of DHS published a report entitled "Treatment of Detainees Housed at Immigration and Customs Enforcement Facilities" following an investigation of five detention facilities. It

²²⁶ Ann M. Simmons, *Suit Targets Curbs on Turban Wearing in Jail: ACLU Sees a Violation of a Sikh's Rights*, Official says the Headgear Could Hide a Weapon, L.A. Times, May 22, 2005, at B3.

²²⁷ *Summary of Detainee Correspondence to the American Bar Association*, Northwest Detention Center, Tacoma, Washington, dated September 21, 2006.

questioned the ICE annual inspections process. Striking among the OIG's findings were numerous instances of non-compliance with the detention standards that were not reported in the most recent ICE annual inspections of the 5 detention facilities.²²⁸ NGOs have recently learned ICE fails to inspect each detention facility annually. Perhaps most troubling is that detainees often have no effective mechanism to raise grievances within a facility or directly to ICE. The January OIG report recognized untimely responses to detainee grievances, failure to respond, and problems with effective means to file grievances.²²⁹

Further, in former DHS Undersecretary Asa Hutchinson's testimony before the National Prison Rape Elimination Commission, he identified gaping holes in detention oversight and accountability. He observed that "continued oversight is essential to eliminating abuse and violence in the care of immigrant aliens."²³⁰ To achieve oversight, Undersecretary Hutchinson found the agency needed greater transparency in complaints of abuse, investigation, and the outcomes of such investigations. He criticized the current tracking of complaints and their disposition, noting that he was unable to acquire statistics on the instances of sexual abuse in preparation for the hearing. In addition, he believes complaints should be reviewed by the Inspector General, the DHS Office of Civil Rights, and outside groups.²³¹

The external oversight process is under-trained and incomplete. Although the ABA's visits are independent and much needed, they are limited in scope (primarily focusing on access to counsel), conducted by pro bono attorneys with little experience in conditions of confinement or human rights monitoring, and the results are not publicly available. Several regional or state-based immigrant organizations receive complaints regarding detention conditions and raise concerns to the facility, ICE, and the Department of Homeland Security using an administrative complaint process. However, the results are inconsistent, difficult to monitor, and difficult to maintain.

Non-governmental organizations have been actively seeking greater oversight and stronger enforcement mechanisms. Recently, several national immigration organizations and detainees filed a Petition for Rule-Making to the Department of Homeland Security, requesting the government begin a formal regulation promulgation process to create stronger enforceable standards for the custody of immigration detainees.²³² The recently introduced Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (the STRIVE Act)²³³ would create an Office of Detention Oversight within DHS, charged with investigating systemic complaints, conducting unannounced inspections of all detention centers, and reporting to DHS all findings of non-compliance.²³⁴

The United States continues to violate the human rights of immigration detainees in jails and detention centers across the country and greater oversight is essential to protect the rights of migrants facing removal. The United States should create strong on-going oversight of detention centers and jails where detainees are held. One expert encourages a "layered approach" where internal and external mechanisms of oversight support the goal of safety and maintaining the human rights of persons in custody. Without multiple systems of transparent oversight, jails and detention centers are literally walled off from public scrutiny, exposing detainees to greater risk of abusive treatment.

The components of effective oversight:

- The monitoring body should have authority to conduct unannounced visits of any part of the facilities at anytime;

²²⁸ Office of Inspector General, *Treatment of Detainees Housed at Immigration Customs Enforcement Facilities*, January 2007, p. 36-37, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf

²²⁹ OIG Report, 20-21.

²³⁰ Testimony of Asa Hutchinson, National Prison Rape Elimination Commission, *Hearing: The Elimination of Prison Rape: Immigration Facilities and Personnel/Staffing/Labor Relations*, December 13, 2006, available at http://www.nprec.us/docs/sxvimmigrdet_d13_persaccts_MayraSoto.pdf, at page 38.

²³¹ *Id.* at 38-39.

²³² See *Petition for Rule-Making to Promulgate Regulations Governing Detention Standards for Immigration Detainees*, (January 25, 2007), available at http://www.nationalimmigrationproject.org/detention_petition_final.pdf.

²³³ Security Through Regularized Immigration and a Vibrant Economy Act of 2007 ("Strive Act of 2007"), House Resolution 1645, Introduced March 22, 2007.

²³⁴ *Id.* at Sec. 175.

- The monitoring body should have a duty to conduct routine and regular inspections;
- The reports of monitors should be public and ICE should respond publicly to the report, either agreeing or disagreeing, and develop an action plan;
- The aim of monitoring should be preventative and forward-looking, rather than reactive and investigative;
- The monitoring should be conducted by a team of people with expertise relevant to the needs and concerns of the facilities;
- There must be adequate safeguards against retaliation for providing information to the monitoring body or monitors;
- Monitors must have the ability to review all records;
- The monitoring entity should have adequate funding, resources, and staff;
- The monitoring body should create procedures that enable staff, community members, detainees and their family or representatives to provide information confidentially;
- Any monitoring entity that currently monitors prisons and jails should not exclude the monitoring of detainee housing units or dormitories;
- Regulatory bodies that inspect buildings should not exclude jails or detention centers.

*Concerns Regarding Detention Conditions for
Immigrants in Massachusetts*

MEMO

FROM: Laura Rótolo, ACLU of Massachusetts
TO: Briefing Coordinators, Special Rapporteur on Migration visit to U.S.
DATE: April 17, 2007

RE: CONCERNS REGARDING DETENTION CONDITIONS FOR IMMIGRANTS IN MASSACHUSETTS

Background

The average number of immigrants being detained in the United States on any given day more than tripled between 1994 and 2001, primarily as a result of changes enacted by two 1996 laws, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. The 1996 changes in immigration law coupled with the changes in structure of the federal immigration agency and new anti-terrorism laws have led to a remarkable increase in the number of immigrants in detention. The new laws did several things: they mandated detention for anyone who is in deportation proceedings because of a criminal conviction; they greatly expanded the types of offenses for which lawful permanent residents (green card holders) could be deported; they eliminated much of the discretion of immigration judges to waive deportation under compelling circumstances; they mandated detention for asylum-seekers, and; under a process known as “expedited removal”, they gave low-level immigration inspectors wide authority to return asylum-seekers encountered at airports.

Every year the Department of Homeland Security arrests over 1.6 million aliens and detains over 200,000.²³⁵ In 2006, the average daily population of immigrant detainees rose from 19,000 in the previous year to 26,000.²³⁶

In 2004, ICE reported that it had detained so many immigrants that it had exceeded its available funded bed space they had available.²³⁷ Accordingly, the majority (about 60%) of immigration detainees are held in county jails and other correctional facilities throughout the country.²³⁸ While immigrants are held on “administrative detention” and not “criminal detention” they are put into jails with criminals and are treated like all the other inmates. Particularly troubling is the detention of persons who come to the United States fleeing persecution, apply for asylum and spend months in jail pending the outcome of their application. The UN High Commissioner for Refugees has described this policy as “inherently undesirable” especially for vulnerable groups such as single women, children, unaccompanied minors, and those with special needs.²³⁹

In Massachusetts, ICE has contracts with six county jails where ICE detainees are held.

²³⁵ U.S. Immigration and Customs Enforcement Fact Sheet: “DETENTION AND REMOVAL OPERATIONS: ALTERNATIVES TO DETENTION” July 14, 2004, <http://www.ice.gov/pi/news/factsheets/061704detFS2.htm> ; Mark Dow, American Gulag, “Today the immigration agency holds some 23,000 people in detention on any given day and detains about 200,000 annually.” At page 9.

²³⁶ U.S. Immigration and Customs Enforcement Fact Sheet: “Executive Summary ICE Accomplishments in Fiscal Year 2006”, October 30, 2006, available at <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>.

²³⁷ U.S. Immigration and Customs Enforcement Fact Sheet: “DETENTION AND REMOVAL OPERATIONS: ALTERNATIVES TO DETENTION” July 14, 2004, <http://www.ice.gov/pi/news/factsheets/061704detFS2.htm>

²³⁸ Serena Hoy, *The Other Detainees*, Legal Affairs, Sept/ Oct 2004

²³⁹ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Feb. 1999, available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>

ICE detainees are often held together with criminal detainees and are treated as criminal inmates, with all the daily hardships that this entails.

Concerns

Through meetings with detainees and those who advocate on their behalf, the ACLU of Massachusetts has identified several concerns that we would like to bring to the attention of the Special Rapporteur

1. **Mixed population.** In many jails, ICE detainees are not separated from the regular prison population, some of whom are violent offenders.
2. **Lack of medical attention.** Detainees at several facilities are denied access to proper medical attention. There is a severe lack of medical personnel available to assist the number of detainees housed in many jails. Detainee requests to see a doctor often are ignored. One detainee waited four months to see a doctor for a sprained ankle, and only saw the doctor after his lawyer called the facility on his behalf. . Another detainee, who had a pre-cancerous condition that needed careful monitoring, was not given an appointment to see a doctor until 5 months after he had requested one, and only after his lawyer complained to ICE. He was released before his appointment took place. Many detainees feel that the only way to see a doctor, short of a life-threatening emergency, is to have a lawyer call on one's behalf. In addition, for many medical procedures or treatments, the jail must ask for permission and funds from ICE, which adds an extra layer of difficulty and can slow down the process of getting the care needed.
3. **Lack of psychological care.** Immigrants often become depressed and anxious in detention. Most detained immigrants have never been in jail before, and find it difficult to deal with the harsh everyday realities of detention. In addition, the uncertainties of the system and the difficulty of maneuvering a legal case make it so that many detainees do not know how long they will be in detention. There is a lack of psychological care available to detainees. In one facility, the Massachusetts Department of Public Health conducted a study and found that for the size of the population, there needed to be 8 clinicians on duty. Instead, there is one psychiatrist who is there 8 hours per week and a social worker who works 35 hours per week.
4. **Lack of access to legal resources.** In some jails, legal materials are either outdated, unavailable or nonexistent. Because there is no right to free, court-appointed counsel in immigration proceedings, many immigrants must represent themselves, and cannot do so without adequate legal materials.
5. **Lack of proper grievance procedures.** In several jails, detainees are denied access to grievance procedures. While grievance forms exist, they are not readily available. Detainees must ask guards for these forms, and are often told that there are none available at the time. In addition, detainees are often too afraid to fill out grievance forms because they must file them by handing them to the guards against whom the grievances are made.
6. **Retaliation and abuse of power.** Guards are sometimes abusive both verbally and physically. Both prison guards and ICE officials use force against the detainees. There are reports of ICE officials physically forcing detainees to sign deportation papers. In addition, guards sometimes punish detainees harshly for small infractions, putting them in isolation or administrative segregation where they are inside a cell for 23 hours of the day and are not allowed visits. One detainee was put in isolation for urinating in a zip-lock bag after the guard would not allow him access to the bathroom.

7. **Lack of educational programs and jobs inside the jails.** In many jails, immigration detainees are not given access to educational programs or an opportunity to do work. Only inmates who have been sentenced in a criminal proceedings have access to these programs.
8. **Lack of proper recreation.** In one jail, detainees are allowed recreation time outdoors approximately *one hour per month*.
9. **Possibly unclean or unsafe water.** Detainees at one jail wash, drink and cook with water that may be unsafe for consumption. We have spoken to many detainees who complain about the water situation. If one holds a white cloth or towel up to the showerhead or faucet for a few seconds, the towel turns brown. One detainee was able to send us a piece of white towel that he ran under the water, and it is now a brown color.
10. **Widespread skin ailments.** Many detainees at one jail suffer from visible skin problems including sores, dryness, and acne and on their skin. One detainee talked about a unit-mate who has such severe sores on his head that he bleeds and his hair is falling out. This could be an effect of the unclean water or a common disease in jails called MRSA, or methicillin-resistant *Staphylococcus aureus*. Detainees have been unable to get medical treatment for their skin problems because of the lack of proper medical services (see above). They have been unable to change this situation because of their inability to make grievances (see above). The prison officials do not drink this water. Detainees describe the officials as always carrying around bottled water “as if it were a part of their uniform.”
11. **Lack of access to bathrooms and properly functioning sanitation system.** In one jail, the cells are equipped with a toilet but detainees complain that once or twice a month the toilets break, and it takes several days for the toilets to be fixed. In another jail, the cells do not have toilets. When the doors are closed during lockdown or at night, detainees must ask the guards to open the doors and give them access to the bathrooms. Guards are sometimes unresponsive to these requests.
12. **Low quality of food and lack of hot water.** While prison food is not known for its high quality, detainees in several prisons complain that the food is bland, tasteless, undercooked and lacking in nutritional value. The food is served at room temperature because it sits out for up to an hour from the time it is made to the time it is served. Of particular concern is the lack of Kosher, Halal, vegetarian or other special diets. One detainee who was diagnosed with severe diabetes while in detention was told that there is no special meal for diabetics. In one jail, the food is served on plastic trays that are not properly washed between uses. Detainees say they often see pieces of the previous meal on the tray they are given, and that on the day when the facility is being inspected, they are served on Styrofoam disposable trays instead. The detainees are forced to supplement the food they are given with food sold at commissary, which is pre-cooked highly processed food, such as instant noodles and junk food. Most requires the addition of hot water, but in one jail, the detainees do not have access to any.
13. **Visitors.** In one jail, immigration detainees are not allowed contact visits. They must speak to their visitors through a thick glass wall and a telephone. In addition, the visiting process is a burdensome one, in which the detainee must list ahead of time those persons allowed to visit him and wait several weeks before the person is cleared to see him.

In addition to the problems of conditions in detention, we have seen a problem that affects all immigration detainees: **transferring of detainees and forum-shopping**. Because ICE detainees are controlled by the federal agency and not the local prison system, they can be physically moved to any facility in the country where ICE holds detainees. ICE detainees may be moved without notice to counsel or to their families to a detention facility in a remote area far from their homes and access to lawyers. This makes it impossible for families and lawyers to visit the detainees. There is also concern that detainees are transferred purposefully to jurisdictions where there is unfavorable legal precedent.

Thank you for your attention to these issues.

**ACCESS TO COUNSEL AND DUE
PROCESS FOR DETAINED
IMMIGRANTS**



a HEARTLAND ALLIANCE partner

Briefing Paper

To: United Nations Special Rapporteur

From: National Immigrant Justice Center²⁴⁰

Date: April 16, 2007

RE: **Access to Counsel and Due Process for Detained Immigrants**

INTRODUCTION

Immigrants facing deportation are often unable to access counsel, placing them at great risk because immigration laws are among the most complex and confusing in the American legal system. Without representation, immigrants are subject to proceedings that are fundamentally unfair. Consequently, without counsel, they are deprived of due process. Although the Sixth Amendment to the Constitution guarantees that all individuals subject to criminal proceedings, regardless of their citizenship status, are entitled to the appointment of counsel, this mandate does not extend to immigrants facing deportation. Deportation proceedings are considered non-criminal in nature, despite the fact that individuals facing deportation may be deprived of their physical liberty, separated from their family and loved ones, and ultimately returned to countries where the threat of torture and even death remains a real possibility. The spirit of fundamental fairness is betrayed when such individuals are denied the right to appointed counsel and when their access to lawyers is unduly limited. Under the current system in the United States, most individuals facing removal lack legal representation.

Even if the Sixth Amendment of the Constitution does not apply, the Fifth Amendment of the Constitution does apply. Under the Fifth Amendment, immigrants should have access to appointed counsel. Lack of appointed counsel is particularly detrimental to detained individuals. As discussed below, detainees face significant hurdles in accessing and securing counsel.

²⁴⁰ The National Immigrant Justice Center provides direct legal services to and advocates for immigrants, refugees, and asylum seekers through policy reform, impact litigation, and public education. For questions regarding this briefing paper please contact Tara Tidwell Cullen at ttidwellcullen@heartlandalliance.org or (312) 660-1337.

Statistics from the Executive Office for Immigration Review (EOIR) reveal that most persons in removal proceedings appear without counsel, or *pro se*, and that the lack of counsel has a pronounced, negative impact on case outcomes.²⁴¹ This data demonstrates that individuals who are unable to secure representation often cannot obtain the relief available to them under existing domestic and international law. According to EOIR statistics, 65 percent of individuals facing removal from the United States in the year 2005 did so without representation. In the same year, 31 percent of appeals to the Board of Immigration Appeals were filed *pro se*.²⁴²

In light of the significant personal interests at stake and the complexity of the law, access to counsel is critical to ensure that individuals in removal proceedings are able to exercise their due process rights and seek relief for which they may be eligible. As discussed below, several specific issues relating to access to counsel and due process arise when an immigrant is placed in removal proceedings. The most egregious due process violations generally occur when an individual is detained. Therefore, this briefing paper will focus on access to counsel and due process protections in the context of immigration detention. The document provides an overview of the right to counsel for individuals in removal proceedings. It also includes a description of the circumstances faced by detained immigrants and the hurdles they must overcome in accessing legal counsel. Finally, the document contains recommendations to ensure that non-citizens are allowed to exercise their right to counsel.

RIGHT TO COUNSEL FOR IMMIGRANTS

I. United States Law

Pursuant to existing United States law, non-citizens have both a statutory and Fifth Amendment right to counsel in removal proceedings. In the Immigration and Naturalization Act (INA), Congress codified a statutory right to retain counsel and the right to be informed of that privilege by the Court. The INA states that, “in proceedings...the alien shall have the privilege of being represented, *at no expense to the Government*, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”²⁴³ (Emphasis added). The right to representation in removal proceedings extends only to those who have access to and can secure counsel. The statute indicates that the government cannot pay for representation in removal proceedings, but it does not imply that the Court does not have the *power* to appoint counsel.

The right to counsel in immigration proceedings is rooted in the Due Process Clause of the Fifth Amendment of the U.S. Constitution and codified in federal law.²⁴⁴ Deportation hearings can have very serious consequences, thereby requiring that individuals have the right to a fair hearing. To ensure these essential standards of fairness, the regulations require immigration judges to inform the respondent of his or her right to counsel and ascertain “then and there whether he or she desires representation.”²⁴⁵ The regulations further require the immigration judge to provide the respondent a full understanding of his or her rights. In particular, the immigration judge is required to advise the individual of the availability of free legal services

²⁴¹ “Revisiting the Need for Appointed Counsel,” Donald Kerwin, Migration Policy Institute, *Insight*, April 2005, available at www.migrationpolicy.org.

²⁴² See U.S. Department of Justice, FY2005 Statistical Year Book, available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

²⁴³ INA §240(b)(4)(A); 8 U.S.C. § 1229a(b)(4).

²⁴⁴ See 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A).

²⁴⁵ 8 C.F.R. § 1240.10(a)(1).

provided by local organizations and attorneys and to make sure that the respondent has received a list of such programs.²⁴⁶

II. International Law

International law, like the U.S. Constitution, guarantees a right to due process of law. Denial of the right to counsel, even where such denial is circumstantial rather than deliberate, is a denial to due process of law. Immigrants in detention have a right to counsel, even though that right does not extend to counsel paid for by the government. The International Covenant on Civil and Political Rights (ICCPR) states that due process requires that criminal defendants receive adequate time and facilities to prepare a defense and to communicate with counsel.²⁴⁷ That protection arguably extends to immigration detainees, who face deportation, a very serious consequence under the law. In addition, the Vienna Convention on Consular Relations²⁴⁸ requires that detained foreigners be afforded the opportunity to contact consular officers of their home country.

Detention of individuals in removal proceedings implicates international treaty obligations and other human rights norms and practices. Although the United States government typically views its roles and responsibilities through the lens of domestic law, including domestic statutes and the U.S. Constitution, it also bears a responsibility to adhere to international law. Protecting the human rights of immigrants is of particular concern in the post-September 11, 2001, environment, given the trend toward increasingly punitive laws and regulations for immigrants in general, regardless of an individual's lack of criminal history or links to terrorist activities.

International covenants that provide protection to detained individuals include the United Nations Declaration on Human Rights (UNDHR),²⁴⁹ the International Covenant on Civil and Political Rights (ICCPR),²⁵⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²⁵¹ The U.S. has adopted or ratified each of these treaties, with certain reservations. The protections for immigrants who are detained include the right to be informed of the charges against him, to have a court review such charges without delay, and to be treated humanely and without discrimination based upon race, national origin, religion, or other factors. Moreover, the ICCPR protects all persons against arbitrary arrest and detention.²⁵²

Both the U.S. Constitution and international human rights law protect individuals from arbitrary detention.²⁵³ In addition, international human rights law, norms, and practices require that all individuals be treated equally before the law and have the right to due process of law.²⁵⁴

²⁴⁶ 8 C.F.R. § 1240.10(a)(2), (3) (2006).

²⁴⁷ ICCPR, Art 14(3)(b).

²⁴⁸ Vienna Convention on Consular Relations, 596 U.N.T.S. 261, *entered into force* March 19, 1967, Art.36, "Communication and Contact with Nationals of the Sending State," ("Vienna Convention"), *available at* untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

²⁴⁹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), *available at* <http://www.un.org/Overview/rights.html>.

²⁵⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 2 ("ICCPR"), *available at* <http://www.ohchr.org/english/law/ccpr.htm>.

²⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, ("ICERD"), *available at* http://www.unhcr.ch/html/menu3/b/d_icerd.htm. ICERD was ratified by the U.S. in 1994.

²⁵² ICCPR, Art 9(1).

²⁵³ ICCPR Article 9, Section 4.

²⁵⁴ ICCPR Article 26.

DETAINED IMMIGRANTS' ACCESS TO COUNSEL AND DUE PROCESS PROTECTIONS

I. Overview of U.S. Immigration System

Over the last decade, an elaborate system of detention facilities has been developed by the U.S. immigration system, to accommodate more than 230,000 immigrants held in administrative detention each year. The average daily population of immigrant detainees in the custody of U.S. Immigration and Customs Enforcement (ICE) has risen from 19,000 to 26,000 since July 2006, and ICE has increased detention capacity in the Southwest border area by creating 6,300 new beds in 2006.²⁵⁵ These facilities, which are known as Service Processing Centers (SPC) and Contract Detention Facilities (CDF) and are dedicated solely to ICE detention, are located near major ports of entry on the Eastern Seaboard, the West Coast, and along the Mexican border. However, throughout the rest of the United States, ICE detains thousands of immigrants in rural county jails. These county jails are under contract to ICE to hold detainees for a set dollar amount per individual per night, and are known as Inter-Governmental Service Agreement (IGSA) facilities.

Nationwide, a majority of immigrant detainees are held in IGSA facilities.²⁵⁶ In terms of the lack of oversight, the number of people affected, and the cost to society, the IGSA system represents one of the greatest challenges to guaranteeing basic due process protections and international human rights norms in the United States. The detention of immigrants in IGSA facilities presents unique legal and social issues that differ significantly from concerns frequently raised with regard to the traditional prison system. ICE detainees are held on administrative rather than criminal charges. They have far fewer legal protections than criminal defendants and have no guaranteed right to counsel. Moreover, access to counsel is extremely limited, with severely inadequate phone and mail systems and no recognition of attorney-client privilege. IGSA facilities are ill-equipped to provide even minimal language interpretation. Jail officials and staff members frequently have little or no training in the unique cultural differences of the immigrant population.

Furthermore, IGSA facilities are typically located in rural counties far from major urban centers, impeding meaningful representation, especially for indigent immigrants who depend on *pro bono* attorneys. *Pro bono* attorneys already donate their time and cannot be expected to cover out-of-pocket expenses, which can add up quickly as attorneys travel to and from facilities. The Department of Homeland Security has become far more secretive regarding detainee numbers and locations. In addition, the rapid transfer of detainees between facilities creates a system in which attorneys frequently cannot locate their clients. The distance between jails and immigration courts has resulted in government reliance upon video teleconference technology for court hearings, which denies the detained immigrant an opportunity to see the judge and for an in-person hearing. The use of video teleconferencing violates basic standards of due process.

²⁵⁵ "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, April 2006, available at http://www.dhs.gov/xoig/assets/mgmtreports/OIG_06-33_Apr06.pdf; "Executive Summary ICE Accomplishments in Fiscal Year 2006, available at <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>.

²⁵⁶ Illinois is the only one of the five first-tier states for immigration in which immigrants are *exclusively* detained in contracted county jails. Detainees under the jurisdiction of the ICE Chicago District are held as far afield as Hastings, Nebraska and Tri-County Detention Facility in Ullin, Illinois, both of which are located hundreds of miles from major population centers, making access to families and legal services virtually impossible.

II. Failures to Provide Access to Counsel in Immigration Detention as Documented by the Department of Homeland Security, Office of the Inspector General

On January 16, 2007, the Office of Inspector General (OIG) of the Department of Homeland Security (DHS) released a report on the treatment of immigrants held in detention by U.S. Immigration and Customs Enforcement (ICE).²⁵⁷ Reviewing five detention facilities around the nation, investigators documented systemic failures to implement the ICE detention standards.

ICE's detention standards were developed in November 2000 by the then-Immigration and Naturalization Service to ensure the "safe, secure, and humane treatment of individuals."²⁵⁸ Each of the facilities visited by the OIG was noncompliant in one or more ways.

The OIG report detailed practices that prevented detainees from communicating with their attorneys. OIG described one example in which the jail facility "took at least 16 business days to grant a detainee's request to call an attorney as opposed to the 24 hour time limit required by the [detention] standard." According to the ICE standards, immigrant detainees are to be provided with private telephones and phone numbers to contact attorneys. When OIG investigators tested the phones and phone numbers provided by one of the ICE facilities, they were unable to get through to any of the *pro bono* legal representation phone numbers, and very few of the consulate numbers. Additionally, phones are routinely out of service, and privacy is frequently limited by the constant presence of facility guards, even during calls regarding confidential legal matters.

In addition, the ICE detention standards require that each detainee be allowed at least 5 hours per week of access to facilities' law libraries. However, the OIG audit found in several facilities that detainees were allowed as little as one and a half hours of library access, and that libraries had incomplete or obsolete material.

III. Denial of Access to Counsel and Due Process Violations faced by Non-Citizens In Immigration Proceedings

The following is a compilation of the issues regarding access to counsel and due process faced by non-citizens throughout the United States provided by legal service providers and advocates from around the country:

- *Remote locations*: Many immigrants are detained by ICE in isolated and remote facilities, far from legal service providers and/or individuals that provide low-cost or *pro bono* legal services to immigrants in detention. In addition, ICE often detains immigrants in facilities located far from family members who might be able to assist in securing legal counsel if the detainee were located in a more accessible facility.
- *Lack of phone access*: Since immigrants are not guaranteed court-appointed counsel, and are often detained in remote locations across the country, access to telephones is a critical means of

²⁵⁷ Department of Homeland Security, Office of Inspector General, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities, December 2006, *available at* http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf.

²⁵⁸ See Detention Operations Manual, *available at* <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

communicating with legal service providers or with family members. However, telephone access in the jails where immigrants are detained is unreliable. Not all jails allow immigrants to purchase calling cards. In these facilities, detained immigrants can only make collect calls. Many jails' phone systems are impossible for detainees to decipher, particularly those immigrants who do not speak English.²⁵⁹

- Denial of access to conduct legal rights presentations: Because jails are often located in remote locations and because phone service is unreliable in most jails, it is common for detained immigrant to rely solely upon legal orientation presentations, often called “Know Your Rights” presentations, for information on their rights and potential relief. Unfortunately, these presentations are not available nationwide to all immigration detainees. In Iowa, legal service providers have been repeatedly denied access into local county jails to offer such information, despite the fact that the presentations are essential for immigrants in detention. The orientations not only inform a detained immigrant of his or her rights under U.S. immigration law, but they typically provide an opportunity for the immigrant to discuss his or her case with a legal aid provider, often on a *pro bono* basis.
- Transfers and lack of notice to detainees and families: A frequent occurrence that directly impedes a detained non-citizen's right to access counsel is transfer of the immigrant without notice to counsel or family members. Such transfers are a significant concern for individuals in the Southeast United States. Individual accounts submitted for this briefing paper describe instances in which individuals who were represented by counsel were nonetheless transferred without notice to areas outside of counsel's ability to continue representation. Even when legal service providers were informed of the transfer, they were frequently provided with inaccurate information, causing delays in the counsel's ability to locate clients.
- Video-teleconferencing: The use of video-teleconference technology (VTC) is a growing concern of legal services providers in the Midwest and around the nation. Appearance by VTC means that the detained individual appears by video before an immigration judge. This practice serves to deprive an individual in detention of meaningful participation in his or her removal proceedings. When an individual is not present in the courtroom, it can create obstacles to that individual's ability to receive and confront evidence submitted by the government against the individual, a right recognized under U.S. law.²⁶⁰ Furthermore, practitioners are concerned that the use of VTC has a particularly negative impact on asylum-seekers. Credibility is a key component of an asylum claim. VTC may make an asylum seeker uncomfortable or nervous, in ways that serve to impact the judge's assessment of the asylum seeker's credibility. Finally, the reliance upon VTC detracts from the dignity of the court

²⁵⁹ According to the Florida Immigrant Advocacy Center, phones are often turned off as punishment, which makes it impossible for attorneys to communicate with detained clients. This was reported as recently as March of 2007 at Monroe County Detention Center in Key West, Florida. Reports stated that this same facility, Monroe County Detention Center, turned phones off for 5 days.

²⁶⁰ See INA §240(b)(4), 8 U.S.C. § 1229a(b)(4). In addition to the National Immigrant Justice Center, which is litigating over the use of VTC in immigration court, the American Immigration Law Foundation has argued that the use of a video hearing after a non-citizen has requested an in-person hearing “violates the respondent's statutory and constitutional right to present evidence on her own behalf, to cross-examine witnesses presented by the Government, to examine evidence used against her, and/or to be represented by counsel of her choice.” Practice Advisory, “Objecting to Video Merits Hearings,” American Immigration Law Foundation, December 2003, available at http://www.aifl.org/lac/lac_pa_121203.pdf.

proceeding itself. Detained individuals who appear via VTC have reported feeling confused during proceedings and left out of their own case.²⁶¹

- *Stipulated Orders of Removal:* ICE routinely pressures detainees to waive their rights by signing “stipulated orders of removal,” which are documents in which an immigrant admits to his or her own deportability. When an immigrant signs a stipulated order, he or she can be deported without seeing a judge, without consulting an immigration lawyer, without understanding their legal rights, and without hearing a basic presentation on how to navigate the legal system alone.
- *Expedited Removal:* Expedited removal is a procedure that allows an immigration officer to remove an undocumented non-citizen without a hearing or review before an immigration judge. Its purported purpose was to give U.S. Customs and Border Protection more flexibility in removing illegal immigrants while retaining protection in the law for genuine asylum seekers. However, the government all too often fails to extend this protection.

In 2005, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) issued a congressionally mandated study on expedited removal and its impact on asylum seekers. The USCIRF report found that Border Patrol and immigration officers frequently do not inform asylum seekers of their rights in the expedited removal process. DHS has twice in the past two years expanded expedited removal practices, but has still not responded to the problems brought forward by USCIRF in 2005. On the two-year anniversary of the release of the original report, USCIRF issued a scorecard on the government’s response. According to the scorecard, which excoriated the government’s performance, DHS made no effort to ensure that detained asylum seekers have access to legal service providers. This inaction occurred despite the USCIRF’s finding in 2005 that asylum seekers who were able to obtain counsel had significantly higher rates of winning asylum in the United States.²⁶²

CASE STUDY: WORKPLACE RAIDS

Nowhere are concerns regarding access to counsel and due process more acute than in the context of workplace raids. In the last few months, U.S. Immigration & Customs Enforcement has stepped-up enforcement in the workplace, resulting in the arrest, detention and removal of thousands of non-citizens.

On December 12, 2006, U.S. Immigration and Customs Enforcement (ICE) conducted a nationwide raid against employees of six meatpacking plants owned by Swift & Company. Many of the immigrants who were detained following these raids were denied the opportunity to receive basic information on their legal rights. Despite the fact that attorneys sought access to the detainees to offer them legal

²⁶¹ “Videoteleconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court,” Legal Assistance Foundation and Chicago Appleseed Fund for Justice, August 2, 2005, available at <http://www.lafchicago.org/immig%20case%20study.htm>.

²⁶² See the Commission’s website, www.uscirf.org, for the original report and scorecard.

*services, those requests were either ignored or denied by ICE. A large number of immigrants from the Swift plants in Grand Island, Nebraska, Marshalltown, Iowa, and Worthington, Minnesota were transferred to a National Guard facility, called Camp Dodge, in the Des Moines area. Despite repeated attempts by legal service providers to contact the detainees and provide legal orientation programs for them, ICE denied the attorneys access to the facility until many detainees had already been transferred again to detention facilities in other states. Such responses contravene the ICE Detention Standards, which require ICE to permit authorized persons to offer legal orientation programs.*²⁶³

On March 6, 2007, another large-scale raid occurred in the city of New Bedford, Massachusetts, resulting in the arrest and detention of hundreds of individuals, many of whom were rapidly transferred to detention facilities in Texas. The rapid transfer of detained immigrants hindered the individuals' access to legal counsel, prompting a lawsuit in District Court in Massachusetts.²⁶⁴ In addition to being deprived of an opportunity to access counsel, many of the individuals detained were separated from family members, including children.²⁶⁵

In addition to these large-scale raids, many cities around the United States are witnessing raids on a smaller scale on a daily basis. At present, it is impossible to ascertain how many individuals have been deported from the United States because they signed stipulated orders of removal without speaking to counsel and without knowledge of any relief for which they might be eligible.²⁶⁶

²⁶³ See Letter from Midwest Coalition for Human Rights to Senator Patrick Leahy regarding Swift raids and ICE's failure to provide detainees' access to counsel, January 11, 2007, *available at* http://www.immigrantjustice.org/documents/SwiftLettertoCongress2007.1.11_000.pdf.

²⁶⁴ Jesse Harlan Alderman, "Judge temporarily forbids deportation of New Bedford immigrants," Associated Press, April 6, 2007.

²⁶⁵ Yvonne Abraham, "As immigration raids rise, human toll decried: Arrests across US break up families," *Boston Globe*, March 20, 2007.

²⁶⁶ See generally Antonio Olivo, "U.S. Raid at Plant Nets 62 Arrests," *Chicago Tribune*, April 5, 2007; "Marin County Supervisors Sharply Critical of Immigration Raids," KCBS Television, March 13, 2007, *available at* <http://kcbs.com/pages/300146.php>.

ISSUES FACED BY VULNERABLE POPULATIONS

- *Detention/Deportation Issues Impacting Unaccompanied Children*
- *Situation of Immigrant Women Detained in the United States*
- *The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR*

*Detention/Deportation Issues Impacting
Unaccompanied Children*

To: United Nations Special Rapporteur on the Human Rights of Migrants

From: Lutheran Immigration and Refugee Service, Florence Immigrant and Refugee Rights Project, and Center for Social Justice, Seton Hall Law School

Re: Detention and Deportation of Unaccompanied Children in the United States

INTRODUCTION

Each year over 100,000 undocumented children come to the United States, and of those who remain, approximately 8,000 unaccompanied children are detained.²⁶⁷ These children arrive without parents or guardians, facing arrest, detention and adversarial removal proceedings by immigration officials. Mexican children are eventually, if not immediately, granted administrative voluntary departure and repatriated to Mexican authorities.²⁶⁸ Children who are not turned away at the border are usually detained in federal custody while their asylum eligibility is determined or while the government puts them through removal proceedings. These children come to the United States for a variety of compelling reasons. Some flee persecution in search of freedom and safety. Others are escaping abuse, abandonment, and neglect by their family members. Others are trafficked into the United States for illicit purposes. Additionally, others seek to reunify with immediate family members.

In 2002, with the passage of the Homeland Security Act of 2002,²⁶⁹ the U.S. Congress transferred the responsibility of unaccompanied children in immigration proceedings from the former immigration service (INS) to the Office of Refugee Resettlement (ORR), an agency within the US Department of Health and Human Services.²⁷⁰ The Division of Unaccompanied Children's Services (DUCS) was created within the Office of Refugee Resettlement in March 2003 with the following responsibilities: a) holding legal custody of unaccompanied children under the age of 18 years, referred by the Department of Homeland Security Bureau of Immigration, Customs & Enforcement (herein after ICE); b) providing basic necessities for child while in custody (food, medical and mental health services, education, etc.); c) locating placements within a network of ORR- funded providers; d) making all final decisions regarding care and placement arrangements

²⁶⁷ See DHS OIG-05-45, available at <http://trac.syr.edu/immigration/library/P963.pdf>; The numbers presented in this document are from Customs and Border Protection (CBP), just one of the 15 federal agencies involved in the apprehension and detention of unaccompanied children. As detailed in a recent study entitled "Seeking Asylum Alone," no agency collects data on whether juveniles are unaccompanied or accompanied upon apprehension. This precludes an exact number of unaccompanied children detained annually; see also ORR Program Overview, available at <http://www.acf.hhs.gov/programs/orr/programs/uac.htm>; "The Littlest Deportees," New America Media, News Feature, Camille Taiara. Posted March 9, 2007. Available at http://news.ncmonline.com/news/view_article.html?article_id=2d08b89f8d9448961b645becd8e9a669.

²⁶⁸ "Are the Kids Really All Right? Towards Plugging the Black Holes to Protect Unaccompanied Alien Children," National Prison Rape Elimination Commission, Testimony of Christopher Nugent, Senior Counsel, Community Services Team, Holland & Knight LLP and Pro Bono Counsel to the Women's Commission for Refugee Women and Children, Los Angeles, California (December 13, 2006) at 1.

²⁶⁹ Pub. L. No. 107-296 S. 49, 116 Stat. 2153 (2002).

²⁷⁰ This is the same agency responsible for social services to refugees, trafficked victims and other "refugee like" populations. A key consideration in the transfer of responsibilities was the experience of the ORR in serving unaccompanied refugee minors and the desire to separate the enforcement functions by the federal government by the newly formed US Department of Homeland Security from the care decisions for these unaccompanied children.

until child is released or removed; e) approving release decisions to relatives or other sponsors in the United States.

Of the 8,000 minors apprehended by ICE each year and turned over to DUCS custody, some have parents or other relatives in the United States to whom they may be released, but others are without family reunification options. Some may have avenues for legal relief, such as special immigrant juvenile status (SIJS), a T-visa for victims of human trafficking, or asylum. There is no form of relief available for unaccompanied children simply by virtue of their classification as an unaccompanied minor, even when return to the home country would not be a safe option for the child. All these children face administrative removal proceedings before the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice (DOJ). These proceedings are administrative and adversarial, and pit the lone child, carrying the same burden of proof and persuasion of evidence as an adult alien, against a trained DHS trial attorney before an immigration judge.

Unaccompanied children experience a myriad of human rights violations throughout their encounters with the immigration system, from the border to detention to deportation. Nevertheless, efforts at carving out a role for a “best interest of the child” consideration in U.S. immigration proceedings are on-going within the advocacy community.

Unaccompanied Children Encounter a Law Enforcement Model, Not a Child Welfare System That Places Emphasis on the Best Interests of the Child

Law Enforcement Model: The INS had a poor track record in caring for children prior to 2003, and faced a fundamental conflict of interest in acting as police officer, prosecutors, and guardians of the children simultaneously. The INS also prioritized law enforcement considerations over child welfare considerations, placing, for example, one third of unaccompanied children in secure detention juvenile jails for lack of bed space in shelter facilities.²⁷¹ ORR has made substantial progress; for example, it decreased the use of juvenile detention centers from 23 in 2003 to 3 in 2005, used exclusively for children who need a secure environment. However, unaccompanied children continue to be housed in geographically remote shelters out of range to advocates, the local community, and the public at large. The DHS and the ORR do not have clearly distinguished mandates and responsibilities in some key areas where blanket law enforcement considerations trump individualized child welfare considerations.

These areas include:

- Privacy and confidentiality – ICE misuses privileged and confidential ORR information for a litigation advantage against unaccompanied children in their immigration proceedings.
- Conditions of confinement – There are reports of unaccompanied children not being routinely transferred from DHS custody to the ORR within the 3-5 day timeframe stipulated in the *Flores* Settlement Agreement.
- Age determinations – DHS relies too heavily on dental and bone forensics to determine a child’s age, which are scientifically fallible given a margin of error of several years. DHS’ erroneous age determinations result in many children being wrongfully detained in adult facilities and commingled with general criminal populations.
- Classifying children – DHS sometimes labels certain children as accompanied or unaccompanied for law enforcement purposes and thereby acts as “gatekeeper.”

²⁷¹ Amnesty International USA, United States of America: Unaccompanied Children in Immigration Detention at 18 (2003), available at http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf.

- Separation of families – Sometimes DHS separates families and thereby “manufactures” a child as unaccompanied, presumably because of a lack of planning and a lack of family shelters.
- Repatriation

Best Interest Principle: The “Best Interests of the Child” principle is a basic child welfare concept that expresses the need to look at multiple factors, listen to multiple voices and consider multiple interests in determining the best course of action for a child. The best interest is based on the need to always keep the focus on the well-being of the child—physically, psychologically, in the present and over the long term (permanency). Some key concepts/beliefs that have been developed based on studies of children and child welfare services include: i) the parent has a unique role in the well-being of the child. Substitute caregivers may have important information about the child, but their wishes should not carry the same weight as a parent or legal guardian. The use of Guardians or Child Advocates is one way to insert the parental role into the decision-making process; ii) the child should be a participant in the process to the extent that they are able according to their developmental stage and ability to comprehend the process; iii) the well-being of the child includes their physical safety, physical, emotional and psychological health. Ensuring that their basic needs are met, they have nurturing relationships and providing opportunities for their continued development and healing from past harm; iv) children need stability in order to thrive. Reunification with parents should always be the first possibility considered for the long term care of the minor. When this is not possible, efforts to reunite with other close family members, including siblings is important. If neither of these options is available, then every effort should be made for a child to be placed in a long-term, stable, nurturing and loving family environment. Likewise, the need for permanency should impact other decisions that are being made on behalf of the child. While immigration officials and advocates alike may not be able to predict the ultimate consequences of a particular course of action, whenever possible decisions about immediate or short-term arrangements should not preclude the pursuit of permanency.

Best Interests of the Child considerations related to the detention or release of unaccompanied children in the U.S can be applied in various contexts, including i) detention, ii) release to family members or care-givers, and iii) evaluating immigration options to pursue. In each of these contexts, a “Best Interest of the Child” analysis regularly, when possible, ensures that the child is an active participant in the decision-making process. Each of these three areas of the application of the best interest standard to the immigration context is discussed below:

Detention: Children should be placed in the least restrictive setting. This means understanding the individual needs of the child and the safety concerns for the child and others. The ORR is mandated to ensure the “safety and well-being” of unaccompanied children in their care. One important “institutional” aspect of this approach is the role of the Field Coordinator. The field coordinator is an employee of a national NGO (LIRS is one of two such agencies). Each regionally-based field coordinator oversees the best interest of children in ORR custody regarding care and release decisions. In providing oversight, field coordinators act as liaisons among contracted care providers, ORR, immigration attorneys, DHS and immigration court; work with local providers to continuously assess the level of care necessary for each child; make placement/transfer recommendations; review applications for release to sponsors in the U.S. and make recommendations; and facilitate access to other services. This third-party oversight function is crucial to ensuring that the individual needs of the child are considered when making any decision on their behalf regarding their care arrangements.

Release to Family or other care givers: Decisions for release to sponsors is based primarily on child welfare concerns—relationship to potential sponsor, safety and well-being of the child. The Field Coordinator assesses the suitability of the potential sponsorship based on a number of risk factors and makes

a recommendation to the ORR. The ORR has the ultimate decision on whether or not to release the child. In a small percentage of cases, a home visit is conducted as part of a more intensive suitability assessment process to ensure the safety and well-being of the child. Children who are suspected of trafficking or smuggling, sponsors with prior history of domestic violence, substance abuse or other safety concerns are examples of reasons for this additional safeguard. In these cases, 90-days of follow-up services are also provided that enable a social worker to work directly with the child and sponsoring family to ensure appropriate services and transitional support.

Immigration -- Process: When considering the immigration process, it is important to separate out the forms of immigration relief from the decision-making process itself. A core principle for best interests is that children should be fully informed and a participant in the decision-making process. Too often adults make children into objects of the process. In the U.S. this is addressed through the use of “Know Your Rights Presentations” by NGO legal services projects. Such presentations include information on different types of immigration benefits (e.g. refugee status/asylum) as well the court process, role of the judge, government counsel, etc. In the US there are no attorneys provided for immigration matters. Therefore, NGOs, in conjunction with pro bono attorneys from private law firms, struggle to represent as many children as they can. Nevertheless, the majority of the separated children appear in immigration court without any legal representation.

The use of guardians *ad litem* or child advocates is another means to ensuring that the voice of the child is brought into the proceedings. The advocate is someone who is skilled at listening to the child and able to present these concerns to the decision-making authority. The advocate is serving as a surrogate parental role, accompanying the child and looking out for his or her best interests. The advocate, therefore, is not limited to simply repeating the child’s wishes, but is also able to assess the issues at stake from a best interests perspective and present a recommendation. Unlike the immigration attorney, the advocate is not focused on legal strategies and immigration relief, but rather how different immigration options would serve or not serve the best interests of the child. There is currently no child advocate assigned to children in immigration proceedings in the U.S. However, there is legislation that has been introduced to establish child advocates and allow for their involvement in immigration proceedings and related matters.

Time is an important consideration in any process involving a child. On the one hand, a child’s perception of time is much slower than for an adult. A few weeks can seem like forever. On the other hand, it may take a series of meetings and several hours for an unknown adult to establish sufficient rapport with a child for that child to talk freely and openly about their experiences. This is especially true for survivors of trauma. Too often judges have insisted on a case moving forward when insufficient information is available to determine whether or not a child is in need of international protection. Once such information has been made available, however, those in a decision-making position should act promptly to make a determination and communicate the decision to the child. Living for months or years in “immigration limbo” can be detrimental to the development and emotional health of the child. In the U.S. unaccompanied children’s cases are exempt from the case completion timelines set for adult cases. This allows judges the flexibility to grant continuances to allow attorneys the necessary time with the child to prepare the application for immigration relief.

Children respond differently to trauma and grief than adults. It is essential that immigration officials, attorneys and others receive adequate training so that they do not misinterpret a child’s acting out or other behavioral responses. LIRS has published *Working with Refugee and Immigrant Children: Issues of Culture, Law and Development* as a training tool (1998). This manual has been used by non-governmental agencies, law firms and the US Executive Office of Immigration Review for their training of professionals working with children in immigration proceedings.

Immigration –Relief: For separated children without immigration status in the U.S., the majority face either an Order of Removal (deportation) or Voluntary Departure (leave U.S. voluntarily). While an Order of Removal can bar the re-entry to the United States for several years, Voluntary Departure does not impact the ability to apply for a visa in the future. The majority of separated children who are granted the right to remain in the U.S. find such relief under one of three humanitarian-based statuses: i) Special Immigrant Juvenile Status, an immigration benefit providing to minors who have been adjudicated as dependent upon a family court because of abuse, abandonment, or neglect, are eligible for long-term foster care/placement; and it is in the child’s best interest to remain in the U.S.; ii) T-Visa, which is specifically for an individual in the U.S. who is a victim of "a severe form of trafficking in persons" as defined in §103 of the Trafficking Victims Protection Act (TVPA) of 2000²⁷²; iii) Asylum, which is based on the 1980 Refugee Act which consolidated U.S. law to reflect its obligations under the 1951 UN Convention Relating to the Status of Refugees and 1967 Refugee Protocol and provides for in-country refugee status determination. While some recent decisions have begun to look at grounds for refugee status from a child’s perspective, more could still be done. In recent years, for example, this has been true in cases which have recognized “street children” or “former gang member” as a particular social group. In general, however, the defining elements for “well-founded fear of persecution” are the same for a child as for an adult.

Current developments in each area are explored here:

Unaccompanied Children Lack the Right to Government-Funded Counsel

Under current U.S. law, unaccompanied immigrant children do not have the right to government-appointed counsel in their immigration proceedings.²⁷³ As a result, far too many children attend immigration court without an attorney. The National Center for Refugee and Immigrant Children strives to match unaccompanied children with *pro bono* counsel. Indeed, since 2005, it has already matched more than 545 children with *pro bono* counsel. But the need is vast and resources are scarce and relatively untapped in most parts of the country.²⁷⁴

For example, Harlingen Immigration Court has jurisdiction over the largest numbers of detained unaccompanied minors in the country, approximately 200 minors detained at any given time. This number is twice the number in any other region in the United States, and encompasses approximately one third of all the detained children in ORR custody.²⁷⁵ In a letter from the Director of the American Bar Association to the Chief Immigration Judge in May 2005, the ABA noted that ProBAR, the South Texas Pro Bono Asylum Representation Project, is the only agency in South Texas which is willing or able to serve the unaccompanied minor population. At that time, ProBAR had only one attorney and a part-time volunteer paralegal to serve this entire population.

²⁷² The TVPA defines trafficking as “Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” Additionally, the individual must demonstrate s/he would suffer extreme hardship if removed from the United States.

²⁷³ There is a right to counsel for indigent children charged in juvenile delinquency proceedings. See *In re Gault*, 367 U.S. 1 (1967).

²⁷⁴ Amanda Levinson, “Alone in America” (Aug. 23, 2005), available at <http://www.alternet.org/story/24309>.

²⁷⁵ Letter from Robert Evans, ABA, to Chief Immigration Judge Michael Creppy, dated May 19, 2005.

Unaccompanied Children Regularly Experience Border Patrol Abuses

In 2006, FIRRP worked with 1600 children who were detained in Arizona. The vast majority of these children were apprehended crossing the border, alone or with relatives other than their parents. Almost all children are held by Border Patrol (BP) before being transferred to ORR custody. (Some children are arrested in the interior of the U.S. and therefore are detained by ICE instead of BP stations along the border.) While the Flores Settlement Agreement (see US Law section) established minimum standards and conditions for the housing and release of juveniles in INS custody, BP does not uphold these standards for the custody of unaccompanied minors in Arizona. Minors do not receive adequate or sufficient food and water, are held in extremely restrictive conditions, do not receive information about their rights, are not allowed phone calls, and sometimes are held in adult or criminal facilities. Personal testimony that we have gathered from children shows that BP and (ICE) regularly violate the rights of children in their non-compliance with the Flores agreement and in their deliberate disregard for the human rights of children and migrants.

Unaccompanied minors apprehended crossing the border in Arizona, usually spend between 3 and 5 days in Border Patrol custody, before they are transferred to ORR shelters in Phoenix. Minors may spend up to 8 days in custody, as is the case with minors who are transferred from Texas. These minors are held in cells with no windows and sometimes may be held alone for days, without ever going outside. Almost all children report feeling sad and hopeless while in custody. They may be transferred between stations several times, often without any explanation that they are being transferred to a shelter for juveniles. Minors in BP custody rarely are able to make phone calls and often think that they are waiting to be deported.

They are seldom given the required three meals per day, two of which should be hot; instead they subsist only on crackers and juice and sometimes small hamburgers. After many have spent several days walking in the desert, this food is not sufficient and almost all children say that they remained hungry while in custody. In rare instances, children have had clean water to drink, but usually, they drink water from the tap in their holding cells. They either sleep on the floor or on cement benches and are not always given blankets. The toilet is located within their cell and is shared among whoever is detained there. Children do not have the chance to bathe. Some minors report that the air conditioning in the holding cells is kept very high so that the children suffer prolonged exposure to cold temperatures.

BP stations are meant to be temporary holding facilities where children can be held separately from adults. These facilities are not designed to hold children in the “least restrictive setting possible”, as prescribed by the Flores settlement. Instead, children are being held regularly far longer than prescribed by DHS policy and the Flores settlement, and under conditions which violate their rights. For children who can be as young as toddlers or already adolescents, spending 3-5 days locked in a room is extremely traumatic. Many children say that being held by BP custody was terrible because it was the first time in their lives that they had ever been locked up.

The treatment that children receive from BP agents seems to be completely arbitrary. While some agents seem to take their particularly vulnerable status into account, many yell at the children or taunt them. Recently one child recounted that he was held in a room with no toilet. When he asked if he could be taken to the bathroom, the agent on duty said that he should hold it like the coyote had made him do while coming here. He eventually let the child use the bathroom only after making him wait. Another child spent one night and two days, in handcuffs and shackles sitting on benches with adults, before going to the ORR shelter in Phoenix. Unaccompanied minors are threatened verbally and physically by BP agents.

There are serious concerns about the ability of children to contact family members and have access to legal counsel while in BP custody. Children are not regularly permitted to make phone calls to family while

they are detained. Children are sometimes given a sheet with information on legal service providers in Arizona, but the sheet is often in English, and BP agents do not inform children of their rights. Children sign papers without understanding what they mean. Children who are detained along with adult relatives other than parents, are immediately separated from their relatives and almost never have a chance to say goodbye before the relative is taken to an adult detention facility. Children never have the opportunity to communicate with their adult relatives in detention, even after the children have been transferred to ORR.

While the regular practices of BP constitute severe violations of the rights of unaccompanied children in custody, some children experience even worse: including physical harm during arrest and detention, detention with adults or in adult facilities, or detention in juvenile corrections facilities.

Moreover, unaccompanied minors are being placed in expedited removal proceedings by the Office of Border Patrol in Texas and Arizona. The ABA noted at least 4 incidents that occurred to detained minors at the Port Isabel Detention Center with expedited removal orders out of Laredo CBP. These individuals reported that after informing CBP officers that they were under eighteen, the officers insisted that they were older and insisted on placing them in expedited removal proceedings. In some cases, officers were physically abusive and otherwise intimidating, including telling the minors that they did not have any legal relief.²⁷⁶ OBP responded to a letter from the ABA, dated June 14, 2005, stating that expedited removal does not apply to unaccompanied minors. OBP further stated that Border Patrol agents are specifically trained to deal with unaccompanied minors. As of January 2006, however, allegations continued about a systemic, ongoing problem of the mistreatment of minors. In a letter dated January 26, 2006, the ABA notes that detained minors made allegations that they were forced to

- Sleep on the floor, in cold temperatures, with either no blankets or small blankets to share with others;
- Denied adequate food and/or water;
- Subjected to verbal harassment, threats, intimidation, and humiliation, including derogatory slurs;
- Subjected to physical abuse;
- Commingled with adults; and
- Made to sign papers with no explanation or translation

Declarations that we have collected from children show that detention by BP/ICE is a terrifying and isolating experience, where children are sometimes exposed to physical harm, and are regularly deprived their human and legal rights despite multiple national and international agreements which afford them protections.

Unaccompanied Children Cannot Obtain Temporary Protected Status and Reunite with their Families

TPS is a remedial scheme meant to provide a temporary safe haven to individuals who cannot safely return to their home country due to ongoing armed conflict, natural disasters, or other extraordinary conditions that prevent safe return.²⁷⁷ Congress established the TPS remedy to “allow nationals from war-torn or otherwise dangerous countries to remain in the United States temporarily until conditions in the home

²⁷⁶ Letter from Robert Evans, ABA, to David Aguilar, Chief, Office of Border Patrol, CBP, dated April 14, 2005.

²⁷⁷ See INA § 244 (b)(1), 8 U.S.C. § 1254 (b)(1).

country stabilize.”²⁷⁸ USCIS, however, interprets the TPS scheme in a restrictive manner that undermines this humanitarian purpose by denying children the opportunity to reunite with their families in the United States.

Despite its protective function, USCIS has interpreted the TPS scheme to not apply to unaccompanied children who travel to the United States after their parents and who seek either derivative or late TPS. USCIS maintains that there is no provision in the TPS statute allowing parents to petition for their immediate family members. This interpretation of the TPS scheme that keeps families apart does not effectively fulfill Congress’ mandate to protect individuals from harm in their countries of origin.

Our client, a 14 year old girl, lived in El Salvador with her 6 year old sister and aunt. Their parents had gone to the United States in order to make enough money to care for ailing relatives in El Salvador. Our client witnessed gangs attack two female acquaintances in her neighborhood. She became so frightened that something similar would happen to her that she and her sister undertook a 5-week trip crossing borders to get to the United States. Her father paid the smugglers close to \$10,000 to bring his daughters over. At the border, our client was apprehended by ICE and separated from her little sister, who was kidnapped by one of the smugglers and kept for ransom in Las Vegas. Her father incurred a debt of \$5000 to recover his younger daughter. Our client is now in removal proceedings and her younger sister has no status.

There is Inconsistent Guidance About Special Immigrant Juvenile Status

Congress created Special Immigrant Juvenile Status – commonly referred to as “SIJS” – specifically in response to the problem of undocumented youth who have been abused, abandoned, or neglected. SIJS allows young people who are either in foster care or otherwise under the Family Court’s jurisdiction due to abuse, neglect or abandonment to apply for lawful permanent residence in the United States. Young people are only eligible for SIJS until they turn 21. Under current policy, this means that they must not only file their applications before they turn 21, but that the application must be adjudicated by that time. Many young people who are eligible for SIJS will never be eligible for any other form of lawful immigration status in the United States. This is because SIJS beneficiaries are exempted from many statutory bars to becoming a lawful permanent resident, such as not having enough money or being in an unlawful immigration status. Young people placed in foster care, guardianships, or adoptions who miss their opportunity to obtain SIJS face a grim future. As undocumented immigrants, they are not eligible for most of the government programs that youth leaving foster care depend on for survival. In addition, they cannot work legally or obtain federal financial aid to go to college. And of course they face the constant threat of deportation.

Though SIJS is a federal immigration benefit, the federal statute and regulations leave determinations of abuse, neglect or abandonment to the state courts because they are more experienced with making such adjudications. This has caused some level of confusion as the terminology used in the federal statute and regulations does not always match that used by the state. Recently, this confusion has led to several state courts erroneously concluding that they are not able to make the specific findings of fact needed to apply for SIJS when children are in removal proceedings.

²⁷⁸ Extension of Application Deadline for Special Temporary Protected Status for Salvadorans, H.R. REP. 102-123, 102ND Cong., 1st Sess. 1991, to accompany H.R. 2332, legislative history available at P.L. 102-65.

Unaccompanied Children Are Held to an Adult Asylum Standard

Even though asylum cases are adjudicated on a case-by-case basis, DHS often applies a strict enforcement lens to children's asylum claims in their policies. Their fear of opening borders to other children seeking asylum limits the broadening of asylum social group law to include street children, gang resisters, and children facing domestic violence.²⁷⁹ Although the INS had established guidelines for children's asylum claims, they do not apply to or bind the EOIR and the DHS prosecutors in children's cases.²⁸⁰

Return to Country of Origin

For children who do not have any legal avenues for immigration relief in the US, most are "forced" to accept Voluntary Departure. In studies conducted on return practices for separated children, child experts agreed that the return of children to country of origin should be voluntary. This is not the practice in the U.S., where thousands of children have no option but to accept Voluntary Departure, regardless of whether or not it is in their best interest. In one case where LIRS was involved, the minor stated clearly to the judge that he was afraid to return to his country. Nevertheless, the judge signed a Voluntary Departure order anyway and the child was returned home to danger.

U.S. deportation policies for unaccompanied children do not reflect international laws or even national child welfare standards. In a recent analysis of unaccompanied children in the United States, researchers found that the principle of "best of interest of the child," routinely applied in family and juvenile law, is curiously absent in the immigration arena.²⁸¹ In many instances, the United States returns children to situations that pose great risk to their safety and well-being. In response to reports of the more egregious situations, Congress urged the DHS, the ORR, and the State Department to develop policies that protect the child throughout the repatriation process.²⁸² The likelihood of full compliance with this request, without funding or legislation, is in question.

Legal Framework

US Law

In 1996, a settlement agreement was reached in Flores v. Meese, No. 85-cv-8544 (C.D. Cal. Sept. 16, 1996), which "sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS." It applies to all minors in the custody of ICE and DHS, not just unaccompanied minors. Flores Settlement, para. 9. The parties to that Agreement established two fundamental principles: (1) children should be treated with dignity, respect, and special concern for their particular vulnerability as minors, and (2) children should be held in the least restrictive setting appropriate to the minor's age and special needs. ORR inherited the *Flores* Settlement Agreement when responsibility was transferred and is bound to comply

²⁷⁹ Christopher Nugent, *Article: Whose Children Are These? Towards Ensuring the Best Interests And Empowerment of Unaccompanied Alien Children*, 15 B.U. Pub. Int. L. J. 219, 226-27 (Spring 2006).

²⁸⁰ New Guidelines for Children's Asylum Claims, INS Memorandum from the Office of International Affairs (Dec. 10, 1998).

²⁸¹ Seeking Asylum Alone, Bhabha & Schmidt, 2006.

²⁸² House Report 109-699, 2006.

with the Agreement.²⁸³ The Settlement expresses a policy preference for the release of minors where possible, and sets out standards for the conditions of detention where release is not available. Under paragraph 14, if ICE or DHS determines the detention of a minor is not required to secure his or her appearance in immigration proceedings or for safety reasons, the minor “shall be released from custody without unnecessary delay” to a parent, a legal guardian, an adult relative, an adults designated by the child’s parent, a licensed program willing to accept legal custody, or an adult individual or entity seeking custody. Flores also requires minors to be separated from unrelated adults, and when this is not immediately possible, “an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.” (paragraphs 11 and 12A).

Flores was never intended to be the final word on the authority for the detention of minor children in immigration custody. Over ten years later, neither DHS nor Congress has yet promulgated binding rules regarding standards for the detention of minors. DHS has taken varying ideas of policy and procedure from its Detention Operations Manual and *Flores*, resulting in no uniform requirements for these centers. In its Detention Manual, DHS does list 36 standards that ICE and its facilities are to follow, including visitation procedures, grievance policies, medical care, and discipline, access to counsel, telephone access and food service. However, because these standards have never been incorporated into statutory regulations, the level to which each detention center follows them is varied.

International Law

The United States ratified the 1976 International Covenant on Civil and Political Rights (“ICCPR”) in 1992.²⁸⁴ As a party to the ICCPR, the United States is bound to uphold its international obligations as a party to the treaty. The ICCPR protects the rights of individuals to self-determination. Article 9 guarantees a person’s right to liberty and security of his or her person. Article 10(3) specifies that the penitentiary system shall comprise treatment of prisoners which shall include their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. Article 14 (3) of the ICCPR requires that an individual facing a criminal charge shall be entitled to be informed promptly and in detail in a language he understands of the nature and cause of the charge against him . . . to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him . . . without payment by him in any such case if he does not have sufficient means to pay for it.” Article 23 of the ICCPR further incorporates family unity provisions, and Article 17 of ICCPR cautions that “No one should be subjected to arbitrary or unlawful interference with his... family.”²⁸⁵

The Convention on the Rights of the Child (CRC) has been ratified by 193 countries.²⁸⁶ In 1995, the United States signed onto the CRC, evidencing its support for its provisions, although it has yet to ratify the treaty.²⁸⁷ Under Article 3(1), “all actions concerning children, whether undertaken by public or private social

²⁸³ Paragraph 41 of the Flores settlement indicates that it is binding on the parties’ successors, and it should therefore be binding on Customs and Border Patrol and ICE because custodial functions were transferred to these agencies from the former INS.

²⁸⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), entered into force 23 March 1976.

²⁸⁵ *Id.*, Article 17, Paragraph 1.

²⁸⁶ U.N. Convention on the Rights of the Child (1989), UN General Assembly Document A/RES/44/25, entered into force 2 September 1990, at Article 9.

²⁸⁷ Although the CRC was not ratified by the U.S., it shares similar fundamental principles with U.S. domestic law; *See, e.g., Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (in family law cases concerning abuse, “the child’s welfare predominates over other interests”); 59 Am. Jur. 2d Parent & Child §

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 8 of the CRC provides for the obligation of the States to respect the child’s right to preserve his family relations and Articles 9 and 10 provide protections of family unity and reunification.

Article 6(2) requires states to ensure the maximum extent possible the survival and development of the child. Article 19 mandates states to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” Article 37(b) provides that no child shall be subject to an unlawful or arbitrary deprivation of liberty. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 37(c) mandates that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. The provision further mandates the separation of children from adults unless it is considered in the child’s best interest not to do so. Article 37(d) guarantees the right to prompt access to legal and other appropriate assistance.

Article 40(1) calls on states to treat children accused of, or recognized as having infringed the penal law to be treated in a manner that promotes his or her sense of dignity and worth and which also takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. To do this, states should 40(1)(b)(ii) promptly inform the child of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (vi) provide the free assistance of an interpreter if the child cannot understand or speak the language used. Article 40(3)(b) also urges states to enact, whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. These measures could include (4) a variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care in a manner appropriate to the child’s well-being and proportionate both to their circumstances and the offence.

Comparative Practice

On October 12, 2006, the European Court of Human Rights ruled that Belgium had violated several aspects of the European Convention for the Protection of Human Rights and Fundamental Freedoms in its treatment and detention of a five-year-old Congolese girl who was going to live in the Netherlands with a relative before going on to Canada to join her mother. Specifically, the Court declared that the girl’s Article 3 right to be free from inhuman or degrading treatment was violated when she was detained for two months “in the same condition as adults” with no parents or anyone to look after her.²⁸⁸ The Court held that the state owes a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention. The Court also affirmed that the girl’s detention had caused “serious psychological effects.”

The Court is in no doubt that the second applicant’s detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to

10 (1987) (general tenets of family law includes best interests of the child); 2 Am. Jur. 2d Adoption § 136 (1994) (in adoption, “best interests of the child” is the paramount consideration).

²⁸⁸ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application No. 13178/03) ECHR 12 Oct. 2006, para. No. 50. Art. 3 of the European Convention provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.²⁸⁹

In 2005, the Council of Europe's Committee of Ministers adopted a set of guidelines that address the "forced return" process. The Guidelines state that member states should only detain immigrant children as a last resort, that detained children have a right to education and leisure, that detained families should have separate and private accommodation, and that the "best interest of the child shall be a primary consideration in the context of the detention of children pending removal."²⁹⁰

With respect to safe repatriation, in 2006, UNICEF published a reference guide evaluating the application of the best interest of the child standard as established by CRC to the safe return of minor victims of human trafficking.²⁹¹ The same principles ought to apply to the return of any unaccompanied migrant child. The UNICEF guide emphasizes that the return to the country of origin is not an option if it would lead to a "real [reasonable] risk" of certain factors occurring, stating that the fundamental human rights of the child should always be considered and return to the country of origin shall only be arranged if such return is in the best interests of the child.²⁹² According to UNICEF, in order to assess whether return to home country is in the best interest of the child, the following factors must be considered: i) safety, security and conditions, including socio-economic conditions awaiting the child upon return; ii) availability of care arrangements for that particular child; iii) views of the child expressed in exercise of his or her right to participation and those of the caretakers; and iv) child's level of integration in the host country and the duration of absence from the home country. In order to assess and uphold these factors, it is necessary to trace a child's parents or relatives and assess whether there would be unacceptable risks if the child returns to her or his country of origin and/or to the family.²⁹³

Policies regarding the detention of children in Australia have recently shifted as well. The Australian advocacy group Children Out of Detention found that a range of documents had shown "that detention itself is the cause of significant mental health problems in children, additional to the trauma and persecution already experienced by them in their home country and during their journey to 'freedom'."²⁹⁴ After this report's publication, Parliament adopted a new law that ends the practice of detaining children and families. This 2005 law gives the Minister for Immigration and Multicultural and Indigenous Affairs the "non-compellable power" to "specify alternative arrangements for a person's detention," so that the Minister can "allow families with children to reside in the community at a specified place in accordance with conditions

²⁸⁹ *Id.*, para. 58.

²⁹⁰ Committee of Ministers, Council of Europe. "Guidelines on all stages of the 'forced return' process." [CM (2005) 40]. Guidelines 10 and 11, quoted in Amnesty International. "Italy: Temporary Stay – Permanent Rights: The Treatment of Foreign Nationals Held in 'Temporary Stay and Assistance Centres.;" London: June 2005. AI Index: EUR 30/004/2005. PP. 61-62.

²⁹¹ "Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe," UNICEF, pg 135 – 138, found at: http://www.unicef.org/ceecis/protection_4440.html

²⁹² *Id.* at 138.

²⁹³ *Id.*

²⁹⁴ Children Out of Detention (2002). "The Heart of the Nation's Existence: A Review of Reports on the Treatment of Children in Australian Detention Centres." Pg. 2, available at : http://idcoalition.org/portal/component/option,com_remository/Itemid,105/func/fileinfo/id,16/.

that address their individual circumstances.”²⁹⁵ The new law also specifies that minors should only be detained as a last resort.²⁹⁶ In Sweden, someone under the age of eighteen can only be detained for three days or less and unaccompanied children who arrive in Sweden are taken to government-run group homes.²⁹⁷ With regard to minimum ages required for detention, countries in Western Europe have varied policies, but generally the minimum age for detention ranges between 14 and 18.²⁹⁸

²⁹⁵ House of Representatives, Parliament of the Commonwealth of Australia. “Migration Amendment (Detention Arrangements) Bill 2005: Explanatory Memorandum.” Pg. 1. Available at <http://www.ajustaustralia.com/resource.php?act=attache&id=78>.

²⁹⁶ Id.

²⁹⁷ Professional Alliance for the Health of Asylum Seekers and Their Children (May 2002). “Submission to Human Rights and Equal Opportunity Commission Inquiry into Children in Immigration Detention.” Pg. 51, available at http://www.racp.edu.au/hpu/policy/asylumseekers/alliance_inquiry.pdf.

²⁹⁸ The Austrian Penal Code is 16; Germans is 14; Denmark is 18; France is 15; Sweden is 18; and the United Kingdom requires Inspector authorization for under 18. Hughes, J. and Field, O. “Chapter 1: Recent Trends in the Detention of Asylum Seekers in Western Europe,” Detention of Asylum Seekers in Europe: Analysis and Perspectives. The Hague: Kluwer Law International. 1998. PP. 41-43.

*Situation of Immigrant Women Detained in the
United States*



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Briefing Paper

To: United Nations Special Rapporteur on the Rights of Migrants

From: National Immigrant Justice Center²⁹⁹

Date: April 16, 2007

Re: **The Situation of Immigrant Women Detained in the United States**

INTRODUCTION

The problems of isolation, inhumane conditions, and lack of reliable access to legal counsel and health care that characterize immigration detention in general are particularly problematic for women. Women account for approximately 10 percent of the immigrant detention population, a fact that may account for the government's apparent failure to recognize the particular concerns and needs of this vulnerable group. Anecdotal evidence suggests that the majority of immigrant women in detention are asylum seekers fleeing persecution or are victims of some other form of violence. Unfortunately, a dearth of hard data on the population of detained immigrant women prevents advocates from comprehensively understanding the makeup of this group and the potential relief available to individual detainees.

This briefing paper covers five major areas of concern among advocates of immigrant women who are detained by the Department of Homeland Security's Immigration and Customs Enforcement (ICE):

1. **Medical and Mental Health Conditions for Victims of Violence.** Many women who are detained are victims of violence or persecution, and have critical medical and mental health needs. Stories from women who have suffered in immigration detention show that the system does not properly address these needs. Cultural and language barriers, compounded by ICE practices that effectively deny women access to outside social services, make it difficult for detained women to obtain the medical and mental health care they need.
2. **Medical Conditions for Pregnant and Post-Natal Women.** Pregnant women and those who are nursing report problems with accessing proper health care and nutrition while they are detained.

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3. **Sexual assault.** Guards and detention facility staff members hold considerable power over detainees. Any lack of accountability over jail staff leaves women vulnerable to danger of sexual assault from jail staff or other inmates.
4. **Family separation.** Many women who immigrate to the United States come with their families and are their families' primary caregivers. When mothers are detained, entire families suffer. In addition, researchers have found that mothers who are asylum seekers are more likely to give up on their claim if they are detained and separated from their children.
5. **Access to counsel.** Many immigrant detainees, male or female, face hurdles to securing legal counsel. However, women who have experienced violence in the past or who are vulnerable to abuse inside the jail have an acute need of legal advocates, and especially ones that are independent of the detention system. In addition to pursuing legal relief, attorneys who build trusting relationships with detained clients can also advocate for the client's legal and human rights while in custody.

The U.S. government should increase the transparency of the detention system in a way that provides for a clearer understanding of the gender makeup of the detainee population in general, and the situation of women and other vulnerable populations in particular. Furthermore, the government should codify regulations that recognize and address the gender-specific needs of immigrants in detention.

HUMAN RIGHTS OF IMMIGRANT WOMEN IN DETENTION

I. United States Law

In 2000, the Immigration and Naturalization Service (the predecessor to ICE) developed 36 standards to ensure the "safe, secure, and humane treatment of individuals" detained in immigrant detention, but the standards are not codified in law and therefore are not legally binding. None of the 36 standards are gender-specific, and they only briefly reference care for pregnant or post-natal detainees. The standards do not address the prevention of sexual assault or rape, or the treatment of detainees who have suffered such abuses prior to being taken into custody. In December 2006 the Department of Homeland Security's Office of Inspector General released an audit of five immigrant detention facilities, finding that all five facilities violated some aspect of the detention standards.³⁰⁰ The Inspector General reported that detainees at all five facilities alleged physical, sexual, and verbal abuse by corrections officers, and criticized ICE for not addressing detainee reporting of abuse in its detention standards.³⁰¹ The Inspector General also reported that at three of the five facilities, medical personnel did not respond to medical requests from detainees within an appropriate timeframe.³⁰²

The Prison Rape Elimination Act of 2003, which calls for the Department of Justice to collect information and statistics regarding the incidence of rape in prisons, created the National Prison Rape Elimination Commission (NPREC) to "study federal, state, and local government policies and practices respecting the prevention, detection and punishment of prison sexual assaults." In December 2006, the commission held a

³⁰⁰ Department of Homeland Security Office of Inspector General, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, December 2006. http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf

³⁰¹ Department of Homeland Security Office of Inspector General, page 28.

³⁰² Department of Homeland Security Office of Inspector General, page 4.

hearing on prison rape and sexual assault in immigrant detention. Witnesses at this public hearing described sexual assaults they or their clients had experienced while in immigrant detention and shared recommendations on how such violations can be prevented. The commission is in the process of developing standards for the Prison Rape Elimination Act that will specifically address immigrant detention.

For county jails that are contracted by ICE to hold immigrant detainees, state laws regulate the provision of medical care and security. The vast differences in how jails in different parts of the country address the well-being of female inmates was noted by the Special Rapporteur on Violence Against Women during her visit to the United States in 1999. Special Rapporteur Radhika Coomaraswamy stated in her report, “There is a need to develop minimum standards with regard to state practices in women’s prisons, especially in the area of sexual misconduct.”³⁰³

One State’s Law

Illinois state law, which governs the state’s two county jails that have contracted with ICE to hold about 265 detainees, rarely provides for the special needs of female inmates, and does not address prevention of sexual assault, a need highlighted in the NPREC hearing. Illinois does provide for pregnant inmates or others with signs of unusual physical or mental distress to be referred to health care personnel as soon as possible upon their admission to a jail facility. The Illinois law also says that jails should “liaison with community medical facilities and resources,” a standard that would be particularly helpful for female asylum seekers needing access to medical and psychological care. But this standard is helpful only to the extent that it is implemented, however.

Unfortunately, implementation appears to be problematic. Attorneys at the National Immigrant Justice Center in Chicago have had difficulty in arranging visits for physicians who have volunteered to evaluate and treat immigrant detainees.

³⁰³ Coomaraswamy, Radhika, *Report of the mission to the United States of America on the issue of violence against women in state and federal prisons*, January 1999, page 13.

<http://daccessdds.un.org/doc/UNDOC/GEN/G99/100/12/PDF/G9910012.pdf?OpenElement>

II. International Law

The United States is a party to a number of international laws that require governments to protect incarcerated women from violence and provide them with proper health care, social services, and humane living conditions. Many of these treaties make special mention of the treatment of pre-natal or post-natal women, or women who have been victims of violence:

- Under the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the United States is obligated to educate personnel who are involved in the confinement of detainees about the anti-torture provisions of the convention. Detainees who are ill-treated should be able to file a complaint and have their cases promptly and impartially examined by the proper authorities.³⁰⁴
- The Standard Minimum Rules for the Treatment of Prisoners state that women's institutions should make arrangements for the treatment of pregnant and post-natal prisoners. Women prisoners should be supervised only by women officers.³⁰⁵
- The Declaration on the Elimination of Violence Against Women provides all women with equal protection under the law, the right to the "highest standard attainable" for physical and mental health care, and the right not to be subjected to torture or other cruel, inhumane or degrading treatment.³⁰⁶

Under this declaration, governments must exercise due diligence to prevent, investigate and punish acts of violence against women. Women who are victims of violence should have access to the justice system and effective remedies for the harm they suffer. "States should also inform women of their rights in seeking redress through such mechanisms," according to the declaration.³⁰⁷ Testimony from the December 2006 hearing on prison rape suggests that such mechanisms are not always available to women in immigration detention in the United States.

The declaration's prohibition of laws and practices that re-victimize women is particularly compelling for asylum seekers and other victims of gender-based violence. Many detained immigrant women who have suffered abuse say they are traumatized further by the experience of being detained in immigration custody. The declaration also states that governments must provide victims of violence access to rehabilitation services, childcare assistance, counseling, and health and social services.³⁰⁸ These provisions have routinely been absent from U.S. facilities that detain immigrant women victims of violence.

- The Convention on the Elimination of all Forms of Discrimination Against Women calls for governments to ensure that women who are incarcerated during a pregnancy or post-natal period receive free services when necessary, as well as adequate nutrition.³⁰⁹ Legal service providers,

³⁰⁴ Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Article 10.
<http://www.ohchr.org/english/law/cat.htm>

³⁰⁵ Standard Minimum Rules for the Treatment of Prisoners, Article 23.
<http://www.ohchr.org/english/law/treatmentprisoners.htm>

³⁰⁶ Declaration on the Elimination of Violence Against Women, Article 3.
<http://www.ohchr.org/english/law/eliminationvaw.htm>

³⁰⁷ Declaration on the Elimination of Violence Against Women, Article 4.

³⁰⁸ Ibid.

³⁰⁹ Convention on the Elimination of all Forms of Discrimination Against Women, Article 12.
<http://www.ohchr.org/english/law/cedaw.htm>

however, have reported that pregnant women complain of poor conditions and have even abandoned legitimate immigration claims because they feared the effects their detention would have on their pregnancy.

UNIQUE ISSUES FACING DETAINED IMMIGRANT WOMEN

I. Medical and Mental Health Conditions for Victims of Violence

Historically, the majority of detained immigrant women are held in custody because they are asylum seekers who arrived in the United States without proper travel documentation, or because they are victims of domestic violence that resulted in an encounter with ICE. While jailed, asylum seekers and immigrant victims of violence have little access to legal, medical, or psychological resources to help them cope with the trauma they have endured. In addition to these extremely vulnerable populations, an increasing number of female immigrants are held in custody for unauthorized work status or unlawful presence.

The detention centers and county jails that house immigrant detainees are not designed to serve asylum seekers or victims of violence with mental or medical health problems.³¹⁰ For example, a Sierra Leonean woman detained in Wisconsin experienced severe cramping and abdominal bleeding, a symptom she had suffered ever since she was forced to undergo female genital mutilation as a teenager. Her requests for medical care were frequently ignored. She also suffered from Post-Traumatic Stress Disorder due to the violence she witnessed during her home country's civil war and a rape she survived while she was living in the United States as a refugee. As a result, the woman occasionally became agitated during her nearly three years in the jail. ICE cited her outbursts as justification for housing her with violent criminal inmates.

An immigrant rights advocate in New York recalled an asylum seeker she met from the United Kingdom: The woman had survived sexual abuse by her father and was so terrified to return to her country that she endured detention in the United States. While detained, she was shackled in leg and belly chains during doctor visits outside the facility. The doctor was unable to properly examine the woman because the jail guards refused to remove the belly chains.

In some cases, a jail's protocol for addressing mental or medical health issues or behavioral issues deters women from seeking assistance. The Legal Aid Society of New York reported that one woman client who had been a victim of serious verbal abuse was afraid to ask for mental health treatment due to the jail's pattern of placing everyone seeking mental health care on suicide watch.

In Chicago, the National Immigrant Justice Center represented a Lithuanian woman whose abusive U.S. citizen husband locked her in a room to prevent her from leaving the couple's home. The client told her attorneys that she was further traumatized when she was locked in a county jail cell in immigrant detention. The woman, who was eventually granted protection under the Violence Against Women Act, became addicted to antidepressants while detained and had to be hospitalized upon her release.

II. Medical Conditions for Pregnant and Post-Natal Detainees

³¹⁰ When researchers interviewed detainees in 2003, they found that the levels of anxiety, depression and Post-Traumatic Stress Disorder among detained asylum seekers were substantially higher than those reported in previous studies of refugees living in refugee camps and asylum seekers living freely in the United States. 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, page 64. <<http://www.physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>>.

Pregnant women and mothers who are detained while they are still nursing have complained about a lack of proper treatment in immigrant detention.

The Department of Immigrant Health Service's 2003 Provider Handbook requires that all pregnant women receive an initial evaluation by an obstetric specialist and monthly visits by medical staff, but pregnant detainees have reported that the health care they receive is inadequate. A lawyer with the Florida Immigrant Advocacy Center said some of her pregnant clients have complained about a lack of proper medical care and poor nutrition while detained. Some clients who were eligible to remain in the United States have abandoned their cases and accepted deportation in order to leave detention so they could maintain a healthy pregnancy. Some ICE districts around the country have been known to allow pregnant detainees to bond out or receive humanitarian parole, but this practice is not universally implemented.

Legal service providers across the country, including those who have responded to recent workplace raids, were alarmed to encounter women immigrants who were detained within weeks of giving birth and while still nursing their newborn children. These women reported suffering extreme physical pain during their detention. Their spouses reported that the infant children who were left behind suffered physical distress, including fevers because they were forced to stop breastfeeding so abruptly.

III. Family separation

Immigrant women not only contribute to their families' finances, but also are frequently the primary caregivers for children and elderly relatives. When these women are detained, their children and families suffer.

As ICE increases the frequency of workplace raids, family separation issues are gaining wider public attention. The majority of the workers arrested during the March 6, 2007, raid in New Bedford, Massachusetts, were women. The aftermath of the raid gained national media coverage because social service providers, relatives, and babysitters struggled to care for infants and sick children who were abandoned when their parents were detained, with many subsequently transferred to facilities in Texas. More than half the workers arrested in a March 7, 2007, raid in Mishawaka, Indiana, were women with 32 children reportedly left behind. The women arrested in this raid were detained in Kenosha, Wisconsin, for several days, until the Mexican Consulate was able to secure their bond.

Even outside of workplace raids, mothers are being detained suddenly and cut off from contact with their children. In Chicago, a Polish delicatessen owner and mother who had received bad advice from a fraudulent immigration attorney was suddenly arrested and detained when she visited an ICE office after receiving a letter saying she could pick up her green card. The woman was unable to communicate with her teenage U.S. citizen children for several weeks while detained, and her family suffered financially from her absence at the delicatessen.

According to the 1999 report by Human Rights First, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*, detained mothers who are primary caregivers are more likely to give up on legitimate asylum claims and agree to return to dangerous situations in their home countries so that they can be reunited with their children.³¹¹ Some mothers in immigration custody have been prohibited from having contact visits, even with young children:

A Peruvian woman, who arrived at the Atlanta airport in December 1999, was handcuffed in front of her 9-year-old daughter and taken to a county jail. Her child – who was already traumatized from the persecution the family had suffered in Peru – was taken away and placed in another institution. When the woman learned that if she wanted to apply for asylum she would be detained and separated from her already traumatized child for longer, she withdrew her request for asylum and returned to Peru – even though she feared for their safety there.³¹²

IV. Sexual Assault and Rape

Detainees can be subject to rape, sexual assault, and other abuse by jail guards and by other inmates. Immigrant women detainees are often barred by language and cultural barriers from defending themselves or reporting abuse. In many cultures, speaking of sexual assault or rape is taboo, and women are blamed or shamed when they are raped.

³¹¹ Human Rights First, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*, December 2002, page 3. http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf

³¹² Human Rights First, page 15.

When women are isolated in immigrant detention with limited or no access to lawyers or social service providers, they will be even less likely to report such intimate and traumatic matters.³¹³

The public hearing on Sexual Violence in Immigration Detention Facilities hosted by the National Prison Rape Elimination Commission (NPREC) brought to light the prevalence of sexual assault in immigration detention in the United States. Shiu-Ming Cheer of the Civil Rights Unit of the South Asian Network testified that immigration agents and guards have used threats of violence and deportation to force detainees to perform sexual acts and to prevent them from reporting rape and sexual assault.

Guards have also threatened to place detainees in solitary confinement or to transfer them away from their families and attorneys if they report these abuses. Some women have dropped their asylum claims so that they can escape the detention center where the abuse happened. A witness at the NPREC hearing, a male-to-female transgender woman who was raped by an immigration official and had the courage to report the incident, testified that she later dropped her asylum petition because her living conditions in the jail became “hopeless” and she could no longer endure pressure by detention officers to withdraw her complaint.³¹⁴

In October 2000, the Women’s Commission for Refugee Women and Children reported “widespread sexual, physical, verbal and emotional abuse of detainees, especially women” at the Krome Service Processing Center, a detention center on the outskirts of Miami. The Justice Department launched an investigation into the conduct of at least 15 INS officers at Krome.³¹⁵ The women detainees were transferred to a criminal detention center farther away from their families and legal counsel. The Florida Immigrant Advocacy Center reported that in their new location, the women continued to complain of sexual harassment.

The Department of Homeland Security’s Office of Inspector General reported that in all five of the facilities it audited in 2006, immigrant detainees alleged that correctional staff physically, sexually, and verbally abused them while in custody. The Inspector General also found that even when women do report rape by a guard, there is no guarantee their attackers will be charged. When a female detainee at a facility in San Diego was sexually assaulted, the Office of Investigations issued a report, and the guard was fired. However, both the local U.S. Attorney’s Office and the Civil Rights Division declined to prosecute.³¹⁶

Gender-based violence in detention is not limited to abuse committed by detention officials. The practice of spreading women immigrant detainees throughout a facility and mixing them with criminal inmates, rather than grouping them with other immigrant detainees in civil custody, places them in greater danger of assault. The ICE detention standards that discourage mixing non-violent immigrant detainees with violent criminal inmates are rarely enforced. A lawyer from the Florida Immigrant Advocacy Center who has been able to make the eight-hour drive from Miami to visit immigrant detainees in Wacola County Jail near Tallahassee, Florida, reports that women immigrant detainees in that facility are held deep within the jail, mixed with criminal inmates, with no guards present and only one call box to use in an emergency.

Women who do have lawyers are not always allowed the privacy to speak with counsel out of earshot of other inmates. These detainees often hesitate to report abuse because they fear retribution if their conversation is overheard. The National Immigrant Justice Center represents a Thai detainee in Wisconsin who was sexually assaulted in custody by other inmates. She reported the sexual assault to jail guards, but

³¹³ Testimony of Shiu-Ming Cheer, Public Hearing on Sexual Violence in Immigration Detention Facilities, National Prison Rape Elimination Commission, December 13, 2006. http://www.nprec.us/proceedings_sxvimmigrdet_d13.htm.

³¹⁴ Ibid.

³¹⁵ Women’s Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, October 2006, page 1. <http://www.womenscommission.org/pdf/krome.pdf>

³¹⁶ Department of Homeland Security Office of Inspector General, page 28.

they refused to help her, even after one assault resulted in an overnight stay in the hospital. Because the jail facility did not afford her the ability have a private telephone conversation, the Thai woman could not safely tell her lawyer of the incident for three months. Finally, the client was able to arrange a private meeting with her attorney, who intervened to have the client transferred to another local facility.

V. Access to Counsel

Another briefing paper submitted for the May 2007 U.S. visit of the U.N. Special Rapporteur on the Rights of Migrants, *Access to Counsel and Due Process for Immigrants*, prepared by the National Immigrant Justice Center, covers the major concerns regarding immigrant detainees' access to counsel. For detained women, an attorney may be the only link to the outside world and often provide the only safe opportunity to report complaints of past abuse or of sexual assault inside the jails. Women who do not have legal representation face significant hurdles to advocating affectively for their own human rights, medical needs, and safety while in custody.

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



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BACKGROUND BRIEFING NOTE

The Detention of Asylum Seekers in the United States: Arbitrary under the ICCPR³¹⁷

The U.S. detention system for asylum seekers lacks the kinds of safeguards that prevent detention from being arbitrary within the meaning of the International Covenant on Civil and Political Rights (ICCPR). ICCPR Article 9(1) prohibits the United States from subjecting asylum seekers to arbitrary detention. Article 9(4) requires that anyone deprived of liberty by arrest or detention is “entitled” to proceedings before a court which will decide “without delay” on the lawfulness of the detention and order release when detention is not lawful.³¹⁸

Under current U.S. law, asylum seekers are subject to mandatory detention upon their arrival in the United States. While they can request release on parole from the immigration authority, now the U.S. Department of Homeland Security (DHS), once they pass through a screening procedure, the release process varies widely across the country, and in some areas of the country, asylum seekers are rarely released. A report, issued in 2005 by the bi-partisan U.S. Commission on International Religious Freedom (USCIRF), confirmed the wide variations in these release practices.³¹⁹

There is no process for appealing the DHS decision to detain initially, nor the subsequent decision to deny parole, to a court or to another independent judicial or administrative authority. To further exacerbate the situation, neither immigration law nor regulations spell out the length of time that asylum seekers can be detained while their proceedings are progressing.³²⁰ The United States has also, over the last five

³¹⁷ This Briefing Note was also submitted to the U.N. Working Group on Arbitrary Detention on October 25, 2006.

³¹⁸ For a more detailed discussion, see Amnesty International, *Why Am I Here? Children in Immigration Detention* (2003) p.p. 7-11.

³¹⁹ U.S. Commission on International Religious Freedom, *Asylum Seekers in Expedited Removal* (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/ERS_RptVolIII.pdf. The Commission, a governmental body that advises the President and Secretary of State on religious freedom matters, recommended significant reforms to the U.S. system for detaining asylum seekers.

³²⁰ Eleanor Acer, *Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers*, Refuge, vol. 20. no. 3 (2002), p.p. 48-49; Human Rights First, *Refugees Behind Bars* (1999), available at <http://www.humanrightsfirst.org/pubs/descriptions/behindbars.htm>; Lawyers Committee for Human Rights (Now Human Rights First), *Petition to the INS and Department of Justice Seeking a Rule on Procedures for Parole of Detained Asylum Seekers*; January 1999; Frederick N. Tulsy, “Uncertain Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes,” *San Jose Mercury*

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

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

- A Burmese woman, a member of a religious and ethnic minority group, was detained for nearly two years in a Texas immigration jail, even though she would clearly face torture and persecution because of her political views if returned to Burma.³²¹
- A Sri Lankan fisherman, who was kidnapped and forced to pay ransom to his kidnappers, has been detained in a New Jersey immigration jail for two years.³²²
- A pastor, who fled Liberia after criticizing the use and abuse of child soldiers, was detained for three months in a New Jersey immigration jail.³²³
- A young human rights worker from Cameroon, who was arrested, jailed, and tortured there on three harrowing occasions, was detained for 16 months at New York and New Jersey immigration jails, before he was granted asylum and released.
- Two refugees from the Darfur region of Sudan were detained for about five months in a U.S. immigration jail before being granted asylum and finally released.³²⁴

A comprehensive medical study, conducted by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, confirmed that asylum seekers detained in these facilities suffer from high levels of depression and post-traumatic stress syndrome (PTSD), and that these conditions get worse, the longer that they are detained.³²⁵

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

³²¹ Rachel Swarns, “Burmese Woman Can Stay,” *New York Times*, June 12, 2006; In re S-K-, 23 I & N Dec. 936 (BIA 2006). (Recognizing eligibility for relief under the U.N. Convention Against Torture, but declining to grant asylum because of her support for the Chin armed wing, even though she presents no danger to U.S. security). The resolution of this woman’s asylum case has been prolonged by the U.S. government’s failure to adequately address the impact of the so-called “material support” bar on asylum cases. See Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum*, (2006) and U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America*, 87th Session, July 10-28, 2006, CCPR/C/USA/Q/3/CRP.4; At the same time, U.S. immigration officers have refused to release her from immigration jail even though she has family in the United States and her identity is not in question.

³²² Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum*, (2006) available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf> (p. 16). The fisherman’s case involves the interpretation and application of the “material support” bar to asylum as he was the victim of duress at the hands of the LTTE (known as the Tamil Tigers).

³²³ David Crary, Associated Press, “Critics Decry Immigrant Detention Push,” *Washington Post*, June 24, 2006.

³²⁴ Rachel Swarns, “2 Darfur Men Gain Asylum,” *New York Times*, November 19, 2004; Sewell Chan (Rachel Swarns contributed reporting), “Darfur Strife Behind them, Two Detainees Win Freedom,” *New York Times*, November 21, 2004; Rachel Swarns, “Sudan Conflict Reaches U.S. Immigration Courts,” *New York Times*, September 28, 2004.

³²⁵ Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2002), p.p. 55-86.

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

A. Detention is Automatic for Arriving Asylum Seekers

Under a 1996 immigration law, known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the “1996 immigration law”), immigration inspectors at U.S. airports and borders were given the power to order the immediate deportation of people who arrive in the United States without proper travel documents. Many refugees arrive without proper travel documents, unable to obtain them from the governments which they flee. Even asylum seekers who arrive on valid passports have been subject to expedited removal.³²⁶ While genuine asylum seekers are not supposed to be deported under this summary process – called “expedited removal” – the process is so hasty and lacking in safeguards that mistakes can and do happen.³²⁷

The ICCPR looks beyond the technical legality of detention under domestic law, presupposing a fair review of the circumstances of the individual to determine the necessity of detention.³²⁸ The U.N. Human Rights Committee, in examining the detention of a Cambodian asylum seeker in Australia, concluded that detention should be considered arbitrary when it was not necessary in light of all the circumstances of the individual asylum seeker’s case:

The Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not *necessary in all the circumstances of the case*, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context . . .³²⁹

Consistent with Article 9, Article 31 of the U.N. Convention Relating to the Status of Refugees provides that, “Contracting States shall not apply to the movements of such refugees restrictions other than those which are *necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.”³³⁰ The Executive Committee of the United Nations High

³²⁶ Asylum seekers who arrive on valid passports have been detained and put into the expedited process when immigration inspectors decided that their visas were invalid for instance, if the individual had not departed the United States on time during a prior visit or if the asylum seeker told inspectors that he wanted to apply for asylum – thereby showing an “immigrant intent” and making the “non-immigrant” visa invalid in the eyes of the immigration inspector. See Human Rights First, *In Liberties Shadow* (2004) p. 12. See also USCIRF Report, *Asylum Seekers in Expedited Removal*, p. 52.

³²⁷ Eric Schmitt, “When Asylum Requests are Overlooked,” *New York Times*, August 15, 2001; John Moreno Gonzalez, “Amityville Woman Seeks \$8 Million in JFK Mix-Up” *Newsday*, July 12, 2000; Human Rights First, *Is this America?* (2002), available at http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm.

³²⁸ Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (N.P. Engel: 1993), p. 172 (“It is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily.”)

³²⁹ *A. v. Australia*, United Nations Human Rights Committee, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997), available at www.unhcr.ch/tbs/doc.nsf/

³³⁰ U.N. Convention, and Protocol, Relating to the Status of Refugees, 1951 Convention and 1967 Protocol, art. 31(1) available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/openssl.pdf?tbl=PROTECTION&id=3b66c2aa10> (emphasis added). This protection applies to asylum seekers, a point confirmed in the conclusions of a group of experts convened by the UNHCR to examine issues relating to Article 31. Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: November 8 & 9, 2001), available at www.westnet.com.au/jackhsmit/roundtable-summaries.pdf (Conclusion 10 (g) “The effective implementation of

Commissioner for Refugees (UNHCR), of which the United States is a member, has concluded that detention of asylum seekers “should normally be avoided” and may only be resorted to “if necessary” and on “grounds prescribed by law” for certain specified reasons relating to the individual asylum seeker.³³¹ The UNHCR Detention Guidelines similarly provide that, in order to ensure consistency with Article 31, “detention should only be resorted to in cases of necessity.”³³² A November 2001 roundtable of experts assembled by the UNHCR confirmed that a determination of whether detention is “necessary” for purposes of Article 31 can only be made by considering the individual case of an asylum seeker.³³³

U.S. law calls for “mandatory detention” of all asylum seekers who are subject to expedited removal. As a result, asylum seekers who arrive at U.S. airports and borders are held in detention facilities and immigration jails around the country. Those who request asylum after entering the United States are not generally detained.³³⁴

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

B. The Parole Process for Detained Asylum Seekers is Arbitrary

While the 1996 law requires the detention of asylum seekers during the expedited removal process, asylum seekers are no longer subject to expedited removal once they have shown a “credible fear of persecution” – a process that can take several weeks or longer. At this point, they are technically eligible for release on parole if they satisfy the criteria for parole.³³⁵ These criteria are contained in written “guidelines” which state that release from detention on parole “is a viable option and should be considered” for asylum seekers “who meet

Article 31 requires that it apply also to any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure.”)

³³¹ U.N. High Commissioner for Refugees, Executive Committee Conclusion on Detention of Refugees and Asylum Seekers No. 44 (1986) (“If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order”)

³³² U.N. High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, Guideline 3 (1999) available at <http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bd036a74>.

³³³ “[A]ppropriate provision should be made at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of [Article 31], and that the relevant standards, in particular international human rights law, are taken into account.” Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees, Geneva Expert Roundtable: Organized by the UNHCR and Graduate Institute of International Studies (Geneva: November 8 & 9, 2001), available at www.westnet.com.au/jackhsmi/roundtable-summaries.pdf.

³³⁴ In 2002 and 2003, at least 16,000 new asylum seekers were subjected to mandatory detention upon their arrival in the United States. The number of asylum seekers in general, and the number seeking protection at U.S. airports and borders has declined significantly in the last few years. In fiscal year 2002, 10,000 asylum seekers were referred for credible fear interviews, and in fiscal year 2003, 6,000 asylum seekers were referred for credible fear interviews, meaning that at least this many asylum seekers were subject to expedited removal and the mandatory detention provisions: Meeting with Joseph Langlois, Director, Asylum Division, United States Citizenship and Immigration Services, November 12, 2003, copy of minutes on file with Human Rights First.

³³⁵ Immigration and Nationality Act (INA) § 235(b)(1)(B)(iii)(IV); INA § 212(d)(5)(A); 8 Code of Federal Regulations (CFR) § 235.3(c); 8 CFR §212.5(a); Memorandum from Office of INS Deputy Commissioner, “Implementation of Expedited Removal,” March 31, 1997, reprinted in 74 *Interpreter Releases* (April 21, 1997).

the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”³³⁶

Over the years, the parole guidelines for asylum seekers, which were issued in a series of Immigration and Naturalization Services (INS) memoranda – rather than in formal regulations – have been applied inconsistently by local immigration offices, with some local officials routinely failing to apply the guidelines.³³⁷ The press, attorneys, human rights organizations, and refugee protection experts have reported extensively on inconsistencies and deficiencies in the administration of the asylum parole guidelines.³³⁸ A 2004 report issued by Human Rights First revealed that the parole guidelines continued to be disregarded in many locations - with *pro bono* attorneys in California, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reporting that the asylum seekers they represented were regularly denied parole from detention despite meeting the parole guidelines.³³⁹

The results of this survey were later confirmed by a major report issued by the U.S. Commission on International Religious Freedom in February 2005. The comprehensive statistical analysis conducted by USCIRF showed that while asylum seekers in some areas were routinely released, in other parts of the country, asylum seekers are rarely released, with release rates as low as 0.5% in New Orleans, 3.8% in New Jersey, and 8% in New York.³⁴⁰ The Commission also found no evidence that DHS Immigration and Customs Enforcement (ICE) is following its parole criteria, and given the variations in release rates across the country, concluded that the formal release criteria are not being consistently applied. The statistics in the USCIRF report also showed a significant drop in the rate at which local immigration officers have released asylum seekers from these jail-like facilities on parole in the years since September 11, 2001.³⁴¹

C. Lack of Independent Review

Under U.S. procedures, the decision of whether or not to parole an arriving asylum seeker is entrusted to the Department of Homeland Security (DHS) (and previously to the INS), the same authority that is charged with seeking to detain and deport the individual. The DHS, in effect, acts as both judge and jailer with respect to parole decisions. Asylum seekers are not brought before a court that is charged with assessing the need for their continued detention. And, when the DHS denies parole to an arriving asylum seeker, the law does not provide for an appeal of this determination to an independent judicial authority, or even an immigration judge.³⁴²

³³⁶ Memorandum from Michael A. Pearson, Immigration and Naturalization Service (INS) Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, “Expedited Removal: Additional Policy Guidelines,” December 30, 1997.

³³⁷ Eleanor Acer, *Living up to America’s Values*, p.p. 48-49; Human Rights First, *Refugees Behind Bars*; Tulskey, “Uncertain Refuge: Asylum seekers Face Tougher U.S. Laws, Attitudes.”; Ohito, “Inconsistency at INS.”; Beach & Yost, “INS Jailing Many Asylum Seekers.”

³³⁸ Human Rights First, *In Liberty’s Shadow*, p.p. 12-13; Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (1998); Women’s Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, (1998); Nina Bernstein and Marc Santora, “Asylum Seekers Treated Poorly, U.S. Panel Says,” *New York Times*, February 8, 2005.

³³⁹ Human Rights First, *In Liberty’s Shadow*, p. 13.

³⁴⁰ USCIRF, *Asylum Seekers in Expedited Removal*, p.p. 71-89

³⁴¹ USCIRF Report, *Asylum Seekers in Expedited Removal* (Between 2001 and 2003, the release rate fell by 27 per cent).

³⁴² 8 C.F.R. § 1003.19; 8 C.F.R. § 1003.19(h)(2)(i)(B).

While immigration judges can review DHS custody decisions for other immigration detainees, DHS has taken the position that immigration judges are precluded from reviewing the detention of so-called “arriving aliens,” a group that includes asylum seekers who arrive at airports and borders.³⁴³

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

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may, decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.³⁴⁴

This provision applies to all detainees, including immigration detainees.³⁴⁵ The U.N. Human Rights Committee in its decision in *Torres v. Finland*,³⁴⁶ explained that Article 9(4) of the ICCPR “envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence....” In the case of *A v. Australia*, the U.N. Human Rights Committee, in finding that a limited court review did not satisfy the requirements of Article 9(4), emphasized that court review “must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law,” and must be “in its effects, real and not merely formal.”³⁴⁷ 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.”³⁴⁸

D. No Limit on the Length of Detention

Neither U.S. statutes nor regulations specify a limit on the length of time an asylum seeker may be detained while his or her removal and asylum proceedings are pending.³⁴⁹ The press and human rights groups have

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

³⁴⁴ ICCPR, art. 9(4), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371 (entered into force Mar. 23, 1976), available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm

³⁴⁵ U.N. Human Rights Committee, General Comment 8/16 (“The important guarantee laid down in paragraph 4 [of article 9], i.e. the right to court control of the legality of detention, applies to all persons deprived of their liberty by arrest or detention.”); U.N. Commission on Human Rights, resolution 1997/50, Commission on Human Rights, U.N. doc. E/CN.4/RES1997/50, 15 April 1997 (Requesting that Working Group on Arbitrary Detention “devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy ...”).

³⁴⁶ *Torres v. Finland*, U.N. Human Rights Committee, Communication No. 291/1988 (2 April 1990) (concluding that asylum seeker’s detention during period in which he was unable to appeal detention order to court violated ICCPR Article 9(4)).

³⁴⁷ *A v. Australia*, U.N. Human Rights Committee, Communication No. 560/1993 (3 April 1997) U.N. Doc. CCPR/C/59/D/560/1993 (finding that a court review, which was limited to a finding that the asylum seeker was indeed a “designated person” within the meaning of Australia’s Migration Amendment Act, did not satisfy the requirements of Article 9(4) of the ICCPR).

³⁴⁸ UNHCR Detention Guidelines; See also UNHCR Exec. Comm. Concl. 44 (“Detention measures taken in respect of refugees or asylum seekers should be subject to judicial or administrative review”).

³⁴⁹ While the U.S. Supreme Court has recognized that indefinite detention would raise serious due process concerns under the U.S. Constitution, and has held that the indefinite detention of persons subject to final orders of removal violates the immigration statute, the U.S. Department of Justice has argued that these holdings are limited to cases involving final orders of removal. See *Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding in case of persons who previously entered the U.S. that statutory provision governing detention after final order of removal, read in light of the Constitution’s requirements, does not permit indefinite detention); *Clark v. Martinez*, 543 U.S. 371 (2005) (applying the same holding to persons who have not been admitted to the U.S.);

documented numerous examples of asylum seekers who have been detained for lengthy periods of time.³⁵⁰ Statistics contained in the USCIRF report revealed that about 32% of arriving asylum seekers are jailed for 90 days or more.³⁵¹ However, others are held for significantly longer periods of time.

The failure to specify a limit on the length of time that an asylum seeker can be detained while his case is pending is problematic under international law. In *A v. Australia*, the U.N. Human Rights Committee recognized that “every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention can be assessed.”³⁵² The U.N. Working Group on Arbitrary Detention, in its Deliberation No. 5, has set forth a number of guarantees to be considered in assessing whether an asylum seeker’s deprivation of liberty is arbitrary under international law. One of these guarantees provides that: “A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.”³⁵³

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

The principle of non-discrimination is central to both international refugee law and international human rights law. Article 3 of the Refugee Convention (incorporated through the 1967 Protocol) requires signatory nations to “apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin.” In accordance with this central tenet, the UNHCR Detention Guidelines recommend that any decision to detain an asylum seeker should “only be imposed in a non-discriminatory manner.”³⁵⁴ The November 2001 expert roundtable convened by UNHCR agreed, concluding that “[r]efugees and asylum seekers should not be detained on the grounds of their national, ethnic, racial or religious origins”³⁵⁵

Consistent with the 1967 Protocol and Refugee Convention, the ICCPR obliges all contracting states to ensure to “all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind”³⁵⁶ The ICCPR also specifies that this principle of non-discrimination includes national or social origin, birth or other status.³⁵⁷

In the months following September 11, the press began documenting cases in which asylum seekers from Arab or Muslim backgrounds who would previously have been released from detention on parole were denied release. For instance, two Christian women who fled Iraq were denied parole in Miami, even though one of the women had strong community ties – her sister is a U.S. citizen and her mother a U.S. legal

Nadarajah v. Gonzales 443 F.3d 1069, 1075 (9th Cir. 2006) (holding, contrary to government’s position, that general detention statutes do not authorize indefinite detention of non-citizens whose claims for asylum or other relief are still pending).

³⁵⁰ Human Rights First, *Refugees Behind Bars*, p.p. 6-7; M. Clancy, “Nigerian Finally Wins Asylum After Long Fight,” *Herald News*, July 20, 2001 (Nigerian refugee granted asylum after 3 years and 4 months in detention); D. Malone, “Man Locked up for Four Year but Convicted of Nothing,” *Dallas Morning News*, April 1, 2001 (Sri Lankan asylum seeker detained for four years); C. Hedges, “Immigrant Detained for 3 and a half years Emerges from Labyrinth,” *New York Times*, November 6, 2000 (Congolese refugee granted asylum after three and a half years in jails and detention facilities); B. Walth, “Asylum Seekers Greeted With Jail,” *Oregonian*, December 10-15, 2001 (Liberian asylum seeker detained for six years, Chinese asylum seeker detained over two years, Sri Lankan asylum seeker detained for four years); Dan Mallone, “851 Detained for Years in INS Centers – Many are Pursuing Asylum,” *Dallas Morning News*, April 1, 2001.

³⁵¹ USCIRF, *Asylum Seekers in Expedited Removal*, p. 75.

³⁵² *A v. Australia*, U.N. Human Rights Committee, Communication No. 560/1993 (3 April 1997) U.N. Doc.

CCPR/C/59/D/560/1993

³⁵³ U.N. Working Group on Arbitrary Detention, Deliberation No. 5, Principle 7, UN doc. E/CN.4/2000/4, 28 December 1999, Annex II.

³⁵⁴ UNHCR Detention Guidelines.

³⁵⁵ Summary Conclusions, Geneva Expert Roundtable, 11(c).

³⁵⁶ ICCPR, Art. 2(1).

³⁵⁷ ICCPR, Art. 26.

permanent resident. A young Iraqi man who had fled forced conscription by the Iraqi regime was denied parole even though he had a U.S. citizen brother and parents who also lived in the United States.³⁵⁸

In the wake of the September 11 attacks, over 1,200 non-citizens – primarily men of Arab or Muslim background – were detained by the U.S. government. The Justice Department’s Inspector General has extensively documented a range of disturbing abuses, including lengthy detentions without charges, denial of access to counsel, and abusive treatment.³⁵⁹ While the vast majority of these individuals were not asylum seekers, some refugees were caught up in this wave of detentions.³⁶⁰

During 2001 and 2003, the Department of Justice and DHS initiated nationality based detention policies targeting Haitian asylum seekers and asylum seekers from thirty-three nations and two territories – mostly Middle Eastern and other Muslim countries and territories.³⁶¹ Under these initiatives, federal authorities invoked national security concerns to justify policies that called for the detention of asylum seekers who presented no risk to the public.³⁶² In fact, these policies have actually deprived those asylum seekers of the opportunity to demonstrate that they do not present a risk and instead merit release on parole.

“Operation Liberty Shield”

One of these initiatives was launched in March 2003, on the eve of war with Iraq. As part of “Operation Liberty Shield,” DHS announced that it would detain for the duration of their asylum proceedings, asylum seekers from the thirty-five nations and territories “where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.”³⁶³ The effect of Operation Liberty Shield was to deprive asylum seekers from these mostly Arab or Muslim nations of the opportunity to have the necessity of their detention assessed on an individualized basis. After much public criticism, this policy was officially terminated, though attorneys around the country continued to report that asylum seekers from Arab and Muslim countries were being routinely detained for the duration of their asylum proceedings.³⁶⁴

The Haitian Detention Policy

³⁵⁸ Richard A. Serrano, “Ashcroft Denies Wide Detainee Abuse,” *Los Angeles Times*, October 17, 2001; Richard A. Serrano, “Judge Denies Young Iraqi’s Bid to Join Family,” *Los Angeles Times*, January 14, 2002; Andres Viglucci and Alfonso Chardy, “Iraqi Christians get caught up in a Security Web,” *Miami Herald*, December 26, 2001; Jody Benjamin, “Mideast Detainees Await Freedom,” *South Florida Sun-Sentinel*, December 8, 2001.

³⁵⁹ Amnesty International, *Amnesty International’s Concerns Regarding Post September 11 Detentions in the USA*, (2002) (AI Index: AMR 51/044/2002); Jim Edwards, “Attorneys Face Hidden Hurdles,” *New Jersey Law Journal*, December 3, 2001.

³⁶⁰ Jody A. Benjamin, “Iraqi Refugees Cleared by FBI Could Still Face Deportation,” *South Florida Sun-Sentinel*, December 12, 2001.

³⁶¹ Department of Homeland Security, “Operation Liberty Shield”, press release, March 17, 2003, available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml “Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period.”

³⁶² Id.

³⁶³ Department of Homeland Security, “Operation Liberty Shield”; Human Rights First, *In Liberty’s Shadow*, p. 24. (DHS refused to officially disclose the list of affected nationalities, stating that the complete list was “law enforcement sensitive”). The list appears to have included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen as well as Gaza and the West Bank; See also Ricardo Alonso-Zaldivar, “Showdown With Iraq; Rights Groups Blast Policy to Detain Asylum Seekers”, *Los Angeles Times*, March 19, 2003; Human Rights First, *In Liberty’s Shadow*, p.p. 24-25.

³⁶⁴ Human Rights First, *In Liberty’s Shadow*, p.p. 24-25 (for a detailed discussion of “Operation Liberty Shield”).

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

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

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

- For the initial group of Haitians and any others whose detention was under exclusive INS control, the INS and now DHS continued a detention policy of denying parole to Haitian asylum seekers who came to the United States by sea.
- Following the arrival of the October 2002 boat, the INS began invoking its recently expanded detention power by suspending the decisions of immigration judges to release asylum seekers on bond. The Attorney General had expanded this detention power after the September 11 attacks – a change that was justified in part “to prevent the release of aliens who may pose a threat to national security.”³⁶⁵
- In November 2002, the INS issued a notice authorizing expedited removal of Haitian and other migrants who arrive by sea – with the exception of Cubans. The notice contended that a “surge” in illegal migration by sea “threatens national security” by diverting Coast Guard resources. The change was aimed at ensuring that Haitians arriving in the future would not have the right to seek release from detention from an immigration judge.³⁶⁶
- In March 2003, the new Department of Homeland Security asked the Attorney General to review the immigration appeal board’s decision to release an 18-year-old Haitian asylum seeker on bond, and to direct that release decisions for other Haitians also be stayed.³⁶⁷
- On April 17, 2003, the Attorney General issued a sweeping decision, in a case known as *In re D-J*, which cited national security in concluding that the 18-year-old Haitian was not entitled to an individualized assessment of the need for his detention, and directed immigration judges and the immigration appellate board to consider national security arguments in future detention custody decisions. The Attorney General asserted that “aliens from countries such as Pakistan” were using Haiti as a “staging point for migration to the United States.”³⁶⁸

³⁶⁵ Review of Custody Determinations, 66 Fed. Reg. 54909 54909-54912 (2001).

³⁶⁶ Department of Justice, “Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act,” (Order No. 2243-02), November 13, 2002, available at <http://www.immigration.gov/graphics/lawsregs/fr111302.pdf>

³⁶⁷ DHS Under-Secretary for Border & Transportation Security, Asa Hutchinson, Referral of Decision to the Attorney General, March 20, 2003.

³⁶⁸ *In re D-J*, 23 I & N Dec. 572 (A.G. 2003), at 579.

These steps are detailed in various Human Rights First publications, including *In Liberty's Shadow* and in Human Rights First's amicus brief submitted to the U.S. Court of Appeals for the Eleventh Circuit in the case of *Moise v Bulger*.³⁶⁹ This detention policy has continued to affect Haitian asylum seekers.³⁷⁰

F. Inappropriate Conditions and Psychological Harm

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

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

- Widespread use of segregation, isolation, or solitary confinement for disciplinary reasons;
- Significant limitations on the privacy, personal freedom, and individuality afforded to detainees;
- A scarcity of private, individual toilets and showers for detainee use outside the presence of others;
- Use of physical restraints on detainees in 18 of the 19 facilities;
- Sight and/or sound surveillance in virtually all housing units, and 24-hour surveillance lighting in all units;
- Security related searches of all detainees in the general living and housing areas;
- Multiple "counts" throughout the day to monitor detainee whereabouts (a single facility refrained from this technique);
- Lack of staff training focused on the special needs and concerns of asylum seekers, and even less training designed to enable the staff to recognize or address the specific problems of victims of torture or trauma; and
- Failure to provide access to the updated legal materials listed in DHS detention standards.³⁷¹

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

- In case after case, the government's practice of imprisoning asylum seekers inflicts further harm on an already traumatized population;

³⁶⁹ Human Rights First, *In Liberty's Shadow*; Human Rights First, *Amicus brief, Haitian Detention Policy*, (July 2002) available at http://www.humanrightsfirst.org/asylum/amicus/haitian_am_brief.pdf; Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, (1998); Florida Immigrant Advocacy Center, *Securing Our Borders: Post 9/11 Scape-goating of Immigrants*, (2005), available at <http://fiacfla.org/reports/securingborders.pdf>; Eleanor Acer, *Living up to America's Values*.

³⁷⁰ Florida Immigrant Advocacy Center, "Post-9/11 Laws and Policies are Closing United States to Refugees and Immigrants Nationwide, Says Major New Report", press release, May 6, 2005, available at <http://fiacfla.org/pressreleases.php#85>; Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*; Megan McKenna and Joanne Kelsey, "An opportunity for U.S. to finally do right by Haitian refugees," *Baltimore Sun*, January 11, 2006, available at <http://www.womenscommission.org/newsroom/articles/BaltSun.shtml>.

³⁷¹ USCIRF, *Asylum Seekers in Expedited Removal*, p. 239.

- Detained asylum seekers suffer extremely high levels of anxiety, depression and Post Traumatic Stress Disorder. 86% of the interviewed asylum seekers suffered significant depression, 77% suffered anxiety and 50% suffered from Post Traumatic Stress Disorder;
- The already poor psychological health of asylum seekers worsens the longer that they are detained; and
- Asylum seekers suffer verbal abuse by immigration inspectors at U.S. airports, as well as verbal abuse and other mistreatment at the hands of officers staffing detention facilities.³⁷²

G. Families and Children in Detention

Two detention facilities designated to accommodate families – T. Don Hutto Residential Facility in Texas and Berks Family Care Facility in Philadelphia - have also been found to be inappropriate and jail-like in a recent report completed by two U.S. non-governmental organizations.³⁷³ In the Hutto facility, children and babies are required to wear prison uniforms,³⁷⁴ children as young as six are separated from their parents at night and separation and threats of separation are used as disciplinary tools.³⁷⁵ As with adult asylum seekers, there is no consistency in the parole process for families seeking asylum. In the Berks facility, even families with young children have been detained for up to two years.³⁷⁶

³⁷² Physicians for Human Rights and the Bellevue/NYU Center for Survivors of Torture, *From Persecution to Prison; Human Rights First*, “Refugees Seeking Asylum Suffer Behind Bars: Groundbreaking Medical Study Documents Harm Suffered by Detained Asylum Seekers”, press release, June 17, 2003, available at www.humanrightsfirst.org/media/2003_alerts/0617.htm

³⁷³ Women’s Commission for Refugee Women and Children and the Lutheran Immigration and Refugee Service, *Locking up Family Values: The Detention of Immigrant Families*.

³⁷⁴ *Ibid*, p.38 & 43

³⁷⁵ *Ibid*, p. 2, 29, 30, 40, 42

³⁷⁶ *Ibid*, p. 33

Arbitrary Detention of Asylum Seekers in the United States:

Amnesty International USA and Human Rights First Joint Summary of Concerns

1. Detention is Automatic for Arriving Asylum Seekers

U.S. law calls for “mandatory detention” of all asylum seekers who are subject to expedited removal. As a result, asylum seekers who arrive at U.S. airports and borders are held in detention facilities and immigration jails around the country. Yet, under international law, detention of asylum seekers may only be resorted to “if necessary” and on “grounds prescribed by law” for certain specified reasons relating to the individual asylum seeker.

2. Parole Process for Detained Asylum Seekers is Arbitrary

Parole guidelines are not codified in formal regulations and the criteria are applied inconsistently by local immigration offices. A major report issued by the U.S. Commission on International Religious Freedom in February 2005 reflected substantial variations in release rates across the country and a drop in the rate at which local immigration officers paroled asylum seekers from detention facilities in the years since September 11, 2001.

3. Lack of Independent Review

In cases involving arriving asylum seekers, parole decisions are made by the Department of Homeland Security (DHS), which is the same authority charged with detention and deportation. Arriving asylum seekers are not provided with access to a court charged with assessing the need for their continued detention. When DHS denies parole to an arriving asylum seeker, there is no administrative or judicial venue for appeal.

4. No Limit on the Length of Detention

Neither U.S. statutes nor regulations specify a limit on the length of time an asylum seeker may be detained while his or her removal and asylum proceedings are pending. The press and human rights groups have documented numerous examples of asylum seekers who have been detained for lengthy periods of time, many for more than one year.

5. Inappropriate Conditions and Psychological Harm

Asylum seekers are detained in prison-like facilities which are inappropriate for non-criminals. Medical experts have concluded that these conditions create a serious risk of long-term psychological harm. Facilities designated to accommodate families and children are unsuitable.

6. Discrimination against Asylum Seekers Based on Nationality

Since 2001, the Department of Homeland Security has initiated discriminatory nationality based detention policies, which have targeted Haitian asylum seekers and asylum seekers coming from primarily Muslim countries and territories, invoking national security concerns to justify these policies.

CASE EXAMPLES

- A stateless family from the West Bank, including a pregnant woman, her husband and four children, were separated and detained for three months at a Texas residential facility and at a New

Jersey immigration jail, until the Board of Immigration Appeals agreed to reopen and rehear their asylum case.

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

Recommendations

RECOMMENDATIONS OF DETENTION/DEPORTATION WORKING GROUP

II. OVER USE OF IMMIGRANT DETENTION AND ALTERNATIVES TO DETENTION

(A) Mandatory Detention, Indefinite Detention, Expedited Removal, Prolonged Detention

- Mandatory Detention should be eliminated; DHS should be required to make individualized determinations of whether or not a noncitizen presents a danger to society or a flight risk sufficient to justify their detention.
- All DHS detention decisions should be subject to review by an Immigration Judge, ie. Immigration Judges. should be given jurisdiction to redetermine the custody of any non-citizen detained in DHS custody, including those classified as Arriving Aliens, and those with final administrative orders of removal.
- The Department of Homeland Security should aggressively pursue alternative to detention such as supervised release.
- Where detention is necessary, The Department of Homeland Security should aggressively pursue alternative forms of detention, including home detention, community-run shelters, and half-way houses.
- The Department of Homeland Security must comply with the Supreme Court's decision in *Zadvydas v. Davis* and *Clark v. Martinez*: Individuals who cannot be returned to their home countries within the foreseeable future should be released as soon as that determination is made, and certainly no longer than six months after the issuance of a final order.
- All indefinite detainees must have access to timely and fair post-order custody reviews.
- Upon release, such individuals should be released with employment authorization, so that they can immediately obtain employment.
- To address concerns related to flight risk or dangerousness, the DHS should aggressively pursue re-integration programs for indefinite detainees. Such programs would significantly mitigate any risk of danger to the community or of flight, and are less costly than detention.

(E) Alternatives to Detention

The overuse of immigration detention in the United States violates the spirit of international laws/covenants and, in many cases, also violates the actual letter of those instruments. The availability of effective alternatives renders the increasing reliance on detention as an immigration enforcement mechanism unnecessary. Through these alternative programs, there are many less restrictive forms of detention and many alternatives to detention that would serve our nation's protection and enforcement needs more economically, while still complying with international human rights law and ensuring the just and humane treatment of migrants in this country.

Detention should only be used when it is necessary. In those rare circumstances where detaining an individual is the only viable option, there should be strict standards regarding detention conditions and immigrants should have access to regular judicial review of their confinement. To help serve this end, detention standards should be codified in regulations and vigorously enforced. Parole policies should be utilized and expanded, and DHS should work more closely with the NGO community to develop alternative programs. The NGO community, through the experience of running its own programs and working with clients enrolled in government-sponsored alternatives like ISAP, is uniquely positioned to assist the government in implementing these effective alternatives that will ensure greater compliance, adhere more faithfully to international law, and guarantee significant savings of public funds.

III. CONDITIONS OF DETENTION

1. Create Detention Standards in Compliance with Human Rights Principles:

At the Human Rights Committee meeting in June 2006, the United States government cited the issuance of the Detention Standards in 2000 as evidence of compliance with international principles on the treatment of immigration detainees. In its concluding remarks, the Human Rights Committee encouraged the United States “to adopt all measures necessary for their effective enforcement.” Unfortunately, the Detention Standards issued in 2000 are not legally binding and the U.S. government has largely failed to comply with their provisions.

The U.S. government should create legally binding human rights standards governing the treatment of immigration detainees in all facilities, regardless of whether they are operated by the federal government, private companies, or county agencies. Affirmative rights to humane treatment should be created through Congressional authority as well as agency binding regulations. Experts, NGOs and directly affected community members should participate in the process of creating minimum standards and regulations through the creation of a Congressional commission.

2. Greater transparency:

The United States government should require greater transparency in contracting, oversight, and access to information regarding detention operations. The current process for ICE to contract with a county jail or prison is unknown. Unlike in the Federal Bureau of Prisons method of contracting for jail beds, there is no “Request for Proposals” or publication in the Federal Register. As a result, community groups, legal service providers, and migrants have no involvement in the government’s decision of where to locate detainees. This hidden process keeps the financial gain derived from ICE contracts a secret. Further, the government should require greater access to federal monitors, investigators, and auditors to permit NGO and detainee involvement in the oversight process. Finally, the US government should create less restrictive policies for access to jail records and detainee medical records to assist with legal representation.

3. Effective national oversight:

The United States government should create a “layered approach” to the monitoring and oversight of conditions for migrants in custody of ICE.

First, Congress should create an overarching institution, independent from DHS, which monitors every detention center and county jail with which ICE contracts. Monitors with expertise in environmental, health and hygiene, mental health, and security should routinely conduct thorough investigations at each facility. In addition, states or counties should institute facility based investigation teams, independent from

jail or county governance to receive and investigate individual and system-wide allegations of human rights abuses and constitutional violations. Alternatively, Ombudspersons or legislative committees should be created to monitor conditions on an on-going basis. Finally, such oversight institutions should be required to report to the U.S. Congress as well as the public; and all reports and investigations should be publicly available and open to outside scrutiny.

IV. ACCESS TO COUNSEL AND DUE PROCESS FOR DETAINED IMMIGRANTS

1. Indigent Detainees in Removal Proceedings Should Be Appointed Counsel

Indigent non-citizens detained in the custody of the Department of Homeland Security (DHS) and placed into removal proceedings, should have the right to appointed counsel. Removal proceedings are legally complex, adversarial in nature, and can result in consequences that have been found by this nation's highest Court to be severe and harsh, including "the loss of property and life; or of all that makes life worth living."³⁷⁷ The Right to counsel is a due process right that is fundamental to insuring fairness and justice in proceedings. To ensure compliance with domestic and international law, court appointed counsel should be available to detained immigrants.

The need for appointed counsel for indigent non-citizens in removal proceedings is critical, especially given the current political environment, which favors vigorous enforcement of laws authorizing detention and deportation. In addition to increased use of law enforcement tactics, and the criminal prosecution of immigration violations, there is a significant growth in the number of detainees and in federal or ICE-contracted detention bed space.

In 2006, the American Bar Association, the largest national voice of the legal community, publicly expressed its support of and recommendation for the due process right to counsel for all persons in removal proceedings.³⁷⁸ Such a recommendation is consistent with U.S. domestic and national principles of a fair trial, and international standards relating to the same.

2. All detained immigrants should receive legal orientation or "Know Your Rights" presentations

ICE should ensure that non-citizens have access to legal orientation presentations. As stated above, these presentations are often the only means by which individuals learn of their rights and are given an opportunity to obtain legal representation. To ensure due process protections for all immigrants in the United States, legal service providers who seek to conduct these presentations should be allowed access to all facilities utilized by ICE. Further, following a workplace raid, detained non-citizens should receive a legal orientation presentation as soon as practicable to ensure that they are apprised of their rights under U.S. immigration law and to invoke their right to whatever relief is available to them under the law.

3. Detained non-citizens should be held in centers that are easily accessible to legal service providers and pro bono counsel

Given that the difficulties in representing detained non-citizens are exacerbated when these individuals are held in remote and/or rural locations, ICE should ensure that the facilities holding non-

³⁷⁷ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1921).

³⁷⁸ American Bar Association, Commission on Immigration, Report to the House of Delegates, February 2006, *available at* http://www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf.

citizens in removal proceedings are located near the detainees' counsel or near urban areas where the detainee will have access to legal service providers and *pro bono* counsel.

4. Video-conferencing should be utilized only with the consent of the detained non-citizen

Hearings conducted by VTC violate immigrants' due process rights by denying them the right to an in-person hearing with an immigration judge. The use of video-conferencing also impedes the immigration judge's ability to assess an immigrant's credibility. These outcomes are unnecessary and unfair. Congress should consider modifications to the law to ensure that immigrants are never deprived of a meaningful day in court.

5. The Department of Homeland Security should promulgate the detention standards into regulations

As noted above, the ICE detention standards purport to establish protections for immigrants in detention, requiring access to counsel, working telephones, health care and other basic rights. The ICE detention standards are useful benchmarks, but because they are not codified into regulations, they are not enforceable in law. Congress should enact legislation requiring the agency to codify the current regulations.

6. ICE should terminate its practice of pressuring immigrants to sign stipulated orders of removal

ICE should curtail the practice of pressuring immigrants to sign stipulated removal orders until after the immigrants have had a legal orientation and an opportunity to consult with an attorney. Some immigrants may be eligible for bond or other types of immigration relief under the law. Immigrants that are ineligible for immigration relief may still be eligible for voluntary departure, a better choice for many than waiting in detention for an indeterminate period of time until they are forcibly removed. Most importantly, no one should be pressured to sign away rights granted by our laws. ICE's actions are inconsistent with the values and traditions of the American justice system. Everyone deserves a day in court and the opportunity to present their case to a judge.

V. ISSUES FACED BY VULNERABLE POPULATIONS

(A) Detention/ Deportation Issues Impacting Unaccompanied Children

- Urge lawmakers to pass the Unaccompanied Alien Child Protection Act of 2007 re-introduced by Senator Feinstein in March 2007. It has twice been passed by the U.S. Senate in unanimous votes in both the 108th and 109th sessions of Congress and offers the promise of systemic reform and protection of unaccompanied immigrant children that would provide the requisite responsibility, transparency, and accountability of all governmental stakeholders, thereby facilitating the protection of unaccompanied children. However, the House of Representatives failed to entertain a vote on the legislation in both sessions of Congress. In the 110th Congress, it is likely that the proposed bill will go before both chambers of Congress and be incorporated into a comprehensive immigration reform bill. **BUT** need to urge lawmakers to increase the age of juveniles eligible to apply for Special Immigrant Juvenile Status from 18 to 21 years (otherwise half of applicant pool for SIJS is left out).

- Remove children from jail-like detention centers and place them in home-like facilities. Due care should be given to rights delineated for children in custody in the ABA Standards for the Custody, Placement, and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States.
- In abiding faithfully to a best interest of the child standard, there should be a mechanism through which this information can be given weight or credence in removal proceedings. In situation where return has been decided, measures should be undertaken to ensure the safety of the child upon return. Examples include: assessment of country conditions and the ability of the competent authorities to protect the minor; home assessment in the case of potential family reunification or the securing of alternative arrangements with the competent child welfare authorities.
- Alternatively, ORR should increase funding for guardians *ad litem* or Child Advocates for unaccompanied children who are going through removal proceedings. These Advocates can help identify the children's eligibility for relief, and advocate for their best interests. Lawmakers should be urged to pass introduced legislation that would establish child advocates and allow for their involvement in immigration proceedings and related matters.
- Temporary Protected Status should be amended to grandfather unaccompanied children whose parents have TPS so they can derive status through their parents.
- A specific BP/ICE juvenile protocol, inclusive of Flores standards, with plans for implementation and accountability. There must be mandatory training for BP personnel on the Flores settlement, and legal rights of minors.
- BP must allow visits by independent non-governmental organizations and representatives to their processing and holding stations so that conditions of detention can be monitored.
- Unaccompanied minors must never spend more than 48 hours in BP custody. Temporary holding cells that imprison minors are not appropriate settings for any child to spend more time than is absolutely necessary. The Office of Civil Rights and Civil Liberties made this recommendation in a report released internally within DHS in the spring of 2006. These recommendations and other changes in BP policy must be implemented immediately.
- BP must begin providing adequate food and water immediately to all detained minors. Children cannot be allowed to subsist for 3 or 4 days or more eating only crackers and drinking tap water.
- There must be no private contract for the operation of BP facilities. While Wackenhut Corporation has taken over the transportation of BP detainees along the U.S./Mexico border, unaccompanied minors should never be held or transported by officials working for private corporations, who will have even less accountability for the treatment of juvenile detainees than DHS.

(Recommendations for city/state authorities)

- Require that all Administration for Children's Services intake forms, permanency hearing reports, and service plan review forms include the question, "where were you born?" for children with

whom ACS has contact along with instructions on the form to the worker to refer that young person to an immigration attorney for consultation.

- Create a SIJS unit within ACS under the Director of Immigrant Services.
- Fund a non-profit organization whose sole purpose would be to help young people in guardianships obtain SIJS. Assuming the SIJS Unit is created, this could be done by reallocating Department of Youth and Community Development funds currently being used to fund nonprofits to help youth in foster care to those who seek to aid children who are being appointed a legal guardian.
- Propose to the State Legislature that all Family Court and Surrogate's Court judges be required, in the course of every Family Court proceeding to ask the child's place of birth and if s/he is found to be born outside the U.S., to refer the young person to the appropriate nonprofit to ensure all immigration options are explored.
- If a child is not living with his or her parents at enrollment or is enrolled by someone other than his or her parents, the school shall provide the youth with a list of free legal providers.

(B) Situation of Immigrant Women Detained in the United States

- In collaboration with legal service providers and non-governmental organizations that work with detained immigrant women, ICE should develop gender-specific detention standards that address the medical and mental health concerns of immigrant women who have survived mental, physical, emotional or sexual violence.
- In collaboration with legal service providers and non-governmental organizations that work with detained immigrant women, ICE should elaborate on current standards that address the medical treatment of detained pregnant or post-natal immigrant women.
- The Department of Homeland Security should codify the detention standards in legally binding regulations so that the protections these standards offer detained immigrants will be enforced.
- Whenever possible, immigrant women who are suffering the effects of persecution, abuse, or who are pregnant or nursing infants, should not be detained. If these vulnerable women cannot be released from ICE custody, the Department of Homeland Security should develop alternative programs such as intense supervision or electronic monitoring, typically via ankle bracelets. These alternatives have proven effective during pilot programs. They not only are more humane for immigrants who are particularly vulnerable in the detention setting or who have family members who require their presence, but they also cost, on average, less than half the price of detention.³⁷⁹
- As a part of its normal reporting of statistics on the makeup of the detained immigrant population, ICE should be required to collect and report gender-specific data that will help service providers better understand the female detention population. This data should include the proportion of detainees who are asylum seekers and the proportion who have reported being victims of violence.

³⁷⁹ Detention Watch Network, "Why Detention is Not Smart Enforcement," <http://detentionwatchnetwork.org/aboutdetention>.

- Research should be undertaken to better understand the makeup of the detained women immigrant population and the conditions they face. Such research would give service providers and advocates a better understanding of the proportion of detained immigrant women who are asylum seekers or victims of violence. It would also help clarify the frequency with which ICE detains women during pregnancy or post-natal periods.

(C) Asylum Seekers in Detention

The United States should bring its laws and practices relating to the detention of asylum seekers into line with international standards and U.S. traditions of fairness. International law requires that the detention of asylum seekers is the exception and should normally be avoided. Asylum seekers should not be subject to automatic or mandatory detention, and should only be detained in those cases where detention is necessary for public safety or to ensure national security. The need for detention should be determined in a hearing before a court or similar independent authority. Thorough reform of the U.S. detention system for asylum seekers will require a combination of legislative, regulatory and administrative actions – as well as a change in the training of DHS staff who are entrusted with assessing the need to detain individual asylum seekers. Our recommendations include:

1. **Review by an Immigration Judge.** The United States should ensure that the decision to detain an asylum seeker is promptly assessed by an independent court.
 - The Department of Homeland Security and the Department of Justice should work together to ensure that arriving asylum seekers, like other immigration detainees, have the chance to have their custody reviewed in a hearing before an immigration judge. DHS and DOJ should revise regulations to make clear that asylum seekers can request these custody determinations from immigration judges.
 - The U.S. Congress should enact legislation to ensure that immigration judges are independent of the Department of Justice, and instead part of a truly independent court system. This legislation should also provide for the right of asylum applicants to seek review of parole decisions by immigration judges.
2. **Codify INS/DHS Parole Guidelines in Formal Regulations.** The INS/DHS asylum parole guidelines should be codified into formal regulations so that asylum seekers who meet the parole criteria – criteria which include posing no danger to the community, community ties, establishing identity, and satisfying the “credible fear” standard – can be released from detention on parole. These regulations should also specify that:
 - A quality assurance procedure and an internal DHS review process should be implemented to ensure the fairness and accuracy of parole determinations.
 - An asylum seeker’s identity may be established through various kinds of evidence including the submission of identity documentation or sworn statements from individuals who can attest to the asylum seeker’s identity.
3. **Non-discrimination.** Detention policies should not discriminate against asylum seekers on the grounds of race, religion, national origin, or any other immutable characteristic. The basic principle of non-discrimination is central to international refugee and human rights law, as well as U.S. law.
4. **Children.** DHS should ensure that minors who seek asylum are not detained by DHS but are in fact promptly transferred into the care of the Office of Refugee Resettlement. Congress should enact legislation to ensure that children are provided with pro bono representation and guardians. In December

2005, the Senate passed The Unaccompanied Alien Child Protection Act of 2005 (S 119), and legislation has since been introduced that, if advanced, would ensure that unaccompanied children would be housed in shelters or foster care or with their families, and minimum care standards for detention.

- 5. Families in Detention.** Families should not be held in prison-like facilities. All efforts should be made to release families from detention and place them in alternate accommodations that are suitable for families with children.
- 6. Alternatives to Detention.** Asylum seekers should generally not be detained. In cases where it is determined that some degree of supervision is needed, DHS should consider alternatives to detention – with a presumption in favor of the least restrictive alternative - including supervised release, and for women with children, release to facilities operated by non-profit agencies. Alternatives might also include use of refugee accommodation centers, group homes, supervised release programs, release to a guarantor, or release on bond.
- 7. Improve Detention Conditions.** Asylum seekers should no longer be detained in inappropriate prison-like facilities. When detention is necessary (rather than an alternative to detention or parole), asylum seekers should be held in more humane facilities – as recommended by the U.S. Commission on International Religious Freedom. Asylum seekers should not be co-mingled with criminals or held in remote county and local jails. The Department of Homeland Security should issue regulations codifying the existing detention standards relating to access and conditions of detention. All asylum seekers should be provided with appropriate medical care, including professional counseling for survivors of torture, rape or gender-based persecution. All detention facilities that house women seeking asylum should be staffed with female officers and female health care staff.