

# **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.<sup>1</sup> On average, there are approximately 28,000 people detained on any given day.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> "Detention and Removal of Illegal Aliens," Office of Inspector General, Department of Homeland Security, April 2006; [www.ice.gov](http://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.

<sup>2</sup> 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>.

<sup>3</sup> "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](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf).

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

<sup>5</sup> 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>

<sup>6</sup> 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.)

<sup>7</sup> *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-

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.<sup>8</sup> Even for those individuals who have not experienced extreme levels of trauma in the past, detention is emotionally and financially devastating, 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.<sup>9</sup> 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 INS<sup>10</sup> had a daily detention capacity of 8,279 beds.<sup>11</sup> By 2006, that daily capacity had increased to 27,500 with plans for future expansion.<sup>12</sup> At an average cost of \$95 per person/per day, immigration detention costs the U.S. government \$1.2 billion per year.<sup>13</sup> Thousands of those in immigration detention are individuals who, by law, could be released.

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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>.

<sup>8</sup> 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.)

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

<sup>10</sup> 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.

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

<sup>12</sup> 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.shtml](http://www.dhs.gov/xnews/releases/pr_1162228690102.shtml)

<sup>13</sup> "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](http://www.ice.gov), August 7, 2006.

Two such groups are asylum seekers without sponsors for parole<sup>14</sup> 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 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.<sup>15</sup>

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

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<sup>14</sup>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)).

<sup>15</sup> 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.

the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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 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.

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<sup>16</sup> "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).

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

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

<sup>19</sup> See *Id* at 9.

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

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

<sup>22</sup> Article 12(3), ICCPR.

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

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.