



**Statement of
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Senate Judiciary Subcommittee on Human Rights and the Law

**Hearing on the Law of the Land: U.S. Implementation of Human Rights Treaties
December 16, 2009**

I. Introduction

Heartland Alliance's National Immigrant Justice Center (NIJC) commends Senator Durbin and the members of the Senate Judiciary Subcommittee on Human Rights and the Law for holding this first-ever Congressional hearing on U.S. implementation of human rights treaties. We appreciate the opportunity to submit a statement on this important issue.

The United States was founded on human rights principles. Recognizing the right to life, liberty, and the pursuit of happiness has made the United States a beacon for people fleeing oppression throughout our history. Sixty-one years ago, in the wake of a devastating war and in the middle of the greatest refugee crisis in world history, the United States played a leading role in drafting the Universal Declaration of Human Rights, a document designed to protect all individuals, regardless of their citizenship status. The Declaration laid the foundation for all subsequent international human rights law.

The International Covenant on Civil and Political Rights (ICCPR) implemented much of the Declaration in a binding treaty in 1976. In language that echoes the U.S. Constitution, the ICCPR addresses basic rights such as freedom of religion, freedom of speech, and freedom of assembly. The United States signed and ratified the ICCPR with reservations in 1992, but has failed to live up to its obligations, particularly when it comes to the treatment of non-citizens. The current U.S. immigration system violates both the letter and spirit of the ICCPR and demands the immediate attention of Congress.

NIJC is a non-governmental organization based in Chicago and dedicated to safeguarding the rights of noncitizens. NIJC advocates for immigrants, refugees, and asylum-seekers through direct legal representation, policy reform, impact litigation, and public education. NIJC and its *pro bono* partners provide legal representation to approximately 8,000 individuals annually, including low-income immigrants, refugees, victims of human trafficking, unaccompanied minors, and asylum seekers. Since its founding 25 years ago, NIJC has developed the largest *pro bono* network in the United States, totaling more than 1,000 attorneys from the nation's leading law firms.

NIJC has played a major role in advocating for reform of the immigration system through impact litigation, advocacy, and public education. As the co-convenor of the Department of Homeland Security (DHS)/NGO Enforcement Working Group, NIJC facilitates advocacy and open communication between DHS and human rights organizations, legal aid providers, and immigrant rights groups. With a national membership of more than three dozen organizations,

the Working Group advocates for full protection of internationally recognized human rights, constitutional and statutory due process rights, and humane treatment of noncitizens. The Working Group's unique vantage point gives it valuable insights into national concerns while supporting efforts to reform the immigration system.

Our statement will focus on the United States' obligations under the ICCPR and the treatment of noncitizens in the United States with respect to due process and arbitrary detention. The statement also sets forth recommendations to ensure fair treatment of noncitizens and humane detention conditions. NIJC's years of experience serving the immigrant population and working with colleagues throughout the country and internationally give us a unique perspective on the inner workings of the immigration system and its relationship to U.S. obligations under the ICCPR.

II. The United States has Failed to Implement the ICCPR's Due Process Protections for Noncitizens

Under the ICCPR, prior to expelling a noncitizen a signatory country must provide the individual with an opportunity to present evidence and to have their case reviewed by a "competent authority."¹ The noncitizen must also be allowed to be represented by counsel in the proceeding. In addition, signatory countries must provide detained individuals with timely judicial review of the lawfulness of their detention and must release individuals whose detention is found to be unlawful.² Current U.S. laws and policies violate these provisions of the ICCPR.

A. Lack of Review by a Competent Authority

During the past few years, serious concerns have been raised about the ability of the immigration court system to adjudicate cases competently. Several U.S. Circuit Courts of Appeals have found that current immigration court practice has "fallen below the minimum standards of legal justice."³ The circuit courts have similarly criticized the Board of Immigration Appeals (Board), the administrative appellate agency, for affirming the erroneous decisions of immigration judges with no opinion or with a "very short, unhelpful, boilerplate opinion."⁴ The reversal rate of immigration court decisions by circuit courts is as high as 40 percent, showing that the government and immigration courts are making frequent errors at the cost of the due process rights of noncitizens.⁵ This pattern of errors is the result of a system that is chronically

¹ "An alien lawfully in the territory of a State Party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." International Covenant on Civil and Political Rights [hereinafter ICCPR] art. 13, Dec. 19, 1966, 999 U.N.T.S. 171.

² "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4).

³ *Benslimane v. Gonzales*, 430 F.3d 828, 829-830 (7th Cir. 2005) (citing to decisions by the Third, Second, and Ninth Circuit Courts of Appeals, which criticized the Board of Immigration Appeals and the immigration courts).

⁴ *Iao v. Gonzales*, 400 F.3d 530, 534-35 (7th Cir. 2005).

⁵ *Benslimane v. Gonzales*, 430 F.3d at 830 .

overburdened and underfunded.⁶ Immigration judges typically handle more than 1,500 cases per year without the assistance of law clerks.

The lack of adequate review within the immigration court system is compounded by laws that limit federal courts' review of immigration decisions. For example, the Immigration & Nationality Act creates significant obstacles to judicial review for individuals denied relief by DHS, even asylum seekers. NIJC, with allies at the American Civil Liberties Union, is currently litigating two cases before the U.S. Supreme Court regarding the jurisdiction of federal courts to review denials of asylum.⁷

The failure of the government to ensure competent adjudications of immigration cases and the obstacles individuals face to appeal unjust decisions violate the U.S. obligations under the ICCPR.

B. Barriers to Access to Representation

Legal representation is critical to the ability of noncitizens to obtain immigration relief. Immigration law and the process are complex and difficult to navigate without competent legal representation. This is particularly true with respect to asylum-seekers, who are almost three times more likely to be granted asylum if they are represented by counsel than if they appear *pro se* in immigration hearings.⁸

Under U.S. law, however, noncitizens do not have a right to counsel at government expense. The U.S. Immigration and Nationality Act (INA) provides noncitizens with merely the "privilege" of counsel.⁹ The United States does not provide counsel for any noncitizens in immigration proceedings, including vulnerable populations such as unaccompanied minors, asylum seekers, torture survivors, or victims of trafficking. By allowing noncitizens only the mere "privilege" of representation at no government expense, the United States effectively limits representation to noncitizens who are capable of locating and have the financial means to secure counsel on their own.

For many noncitizens the barriers to finding legal representation are compounded by their isolation in immigrant detention facilities. Noncitizens apprehended by immigration authorities are often moved to facilities that are far from the location of their arrest, even if they have well-established family and community ties in that area. Most immigration detention facilities are located in remote areas, prohibitively far from urban centers where most *pro bono* attorneys or even private attorneys are found.¹⁰ Even if a detained

⁶ Transactional Records Access Clearinghouse, Syracuse University, Immigration Courts: Still a Troubled Institution, June 2009, available on line at <http://trac.syr.edu/immigration/reports/210>.

⁷ *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), petition for cert. filed, (Aug. 11, 2009) (No. 09-194) and *Khan v. Filip*, 554 F.3d 681 (7th Cir. 2009), petition for cert. filed, (Aug. 20, 2009) (09-229).

⁸ Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 *Stan. L. Rev.* 295, 340 (2007).

⁹ INA § 240(b)(4)(A).

¹⁰ National Immigration Law Center, ACLU of Southern California, and Holland & Night, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers, July 2009, available on line at <http://nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf>; Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States, December 2009, page 4 and pp. 46-

noncitizen manages to obtain representation, the individual may then be transferred to another immigration detention facility located so far away from their attorney that the representation must be terminated. In some cases, the rapid transfer of detainees between facilities creates situations in which attorneys cannot locate their own clients.¹¹ The effect of detaining noncitizens in remote locations thus effectively restricts their right to counsel in violation of the United States' treaty obligations under Articles 3 and 26 of the ICCPR.

C. Lack of Review of Detention

The United States currently provides different categories of noncitizens with differing levels of review over detention decisions. For example, arriving asylum seekers do not have the ability to petition an immigration judge for release from detention. DHS has the exclusive discretionary authority to decide whether an asylum seeker should be detained and its decision is not subject to review. The unreviewable detention of arriving asylum seekers violates the ICCPR's requirement that individuals who are detained be provided with timely judicial review of the lawfulness of their detention.

III. The United States has Failed to Implement the ICCPR's Prohibition Against Arbitrary Detention

Under the ICCPR, "no one shall be subjected to arbitrary arrest or detention" or "deprived of his liberty except . . . in accordance with such procedures as are established by law."¹² Again, echoing the U.S. Constitution, the treaty also provides that "all persons deprived of their liberty shall be treated with humanity."¹³ In our experience, the U.S. immigration detention system does not meet its obligations under the ICCPR's provisions protecting detained individuals.

A. Arbitrary Detention

Over the past several years, the number of noncitizens held in the immigration detention system has increased dramatically. The United States currently detains approximately 33,000 noncitizens on a given day, a 60 percent increase from just four years ago.¹⁴ Most detained noncitizens do not have any criminal convictions; they are held in custody while their case is pending in the immigration court system. A recent study found that noncitizens without criminal convictions typically spend more than two months in detention, although hundreds have been held in custody for more than a year.¹⁵

51, available on line at <http://www.hrw.org/en/node/86789> [hereinafter Human Rights Watch Report].

¹¹ Human Rights Watch Report, pp. 43-46

¹² "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." ICCPR, art. 9(1)

¹³ "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." ICCPR, art. 10(1)

¹⁴ Dr. Dora Schriro, special advisor on ICE Detention and Removal, Immigration Detention Overview and Recommendations, Department of Homeland Security Immigration and Customs Enforcement, October 6, 2009, available online at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

¹⁵ *Id.*

The United States does not provide its immigration officers with clear guidance regarding which noncitizens should be detained and which should be released. Therefore, the population of detained immigrants in the United States includes individuals who recently entered the country without authorization as well as long-time lawful permanent residents who committed a minor infraction more than a decade ago. It includes vulnerable populations such as asylum seekers, torture survivors, pregnant women, and individuals with chronic and serious illnesses, including mental illness.

As noted above, the United States detains arriving asylum seekers who have been found by immigration officers to have a credible fear of persecution. While current asylum parole guidelines suggest that immigration officers have the authority to release such asylum seekers from detention, asylum seekers must meet strict requirements to win release or parole, including demonstrating to ICE that their release is in the “public interest,” an undefined term that does not encourage immigration officials to grant release. As a result of the lack of clarity, immigration officers inconsistently apply the parole guidelines. Factors as arbitrary as geography, rather than the merits of the case, often determine whether an asylum seeker will be released.¹⁶

The United Nations Human Rights Committee has found that detention is arbitrary when imposed without consideration of the totality of the individual’s circumstances.¹⁷ Under this finding, the United States’ policy of detaining noncitizens regardless of their particular situation violates the ICCPR’s prohibition against arbitrary detention.

B. Inhumane Detention Conditions

For noncitizens held in immigrant detention, daily life is often fraught with isolation. As noted above, the immigrant detention system expanded rapidly over the past four years. Although the increase in detainees was a result of an increase in enforcement activity by immigration officials, the United States did not plan for the corresponding increase in detainees. Due to this failure, the United States relies on state and local jails and private contractors to house more than 70 percent of immigration detainees. Decisions about where to detain an individual and whether to transfer an individual to another facility often are based on the capacity of facility contractors, rather than on the needs of a detained individual attempting to prove her eligibility for relief from removal. The use of local and private contractors also means that immigrants—who are detained under civil authority—face the same conditions as convicted criminals, such as confinement in cells, transportation in shackles, lack of contact visits (even with young children), and lack of privacy when using the bathroom or shower.¹⁸ Additionally, many detainees are held within the general population of criminal inmates.¹⁹

¹⁶ For example, in fiscal year 2003, only 0.5% of arriving asylum-seekers in New Orleans were released prior to a decision in their case while in Harlingen, Texas, 98% of arriving asylum-seekers were paroled. UCIRF Report, *supra* note 10, Executive Summary at page 8, available online at http://www.uscirf.gov/images/stories/pdf/asylum_seekers/execsum.pdf.

¹⁷ See *A. v. Australia*, UN Human Rights Committee, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993, April 30, 1997, available online at www.unhcr.ch/tbs/doc.nsf/. See also Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, March 2008, page 10, available online at <http://www2.ohchr.org/english/issues/migration/rapporteur/visits.htm>.

¹⁸ Human Rights First, U.S. Detention of Asylum Seekers Seeking Protection, Finding Prison, June 2009, page 23, available online at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

¹⁹ Department of Homeland Security, Immigration Detention Overview and Recommendations, October 2009, page

Individuals held in immigrant detention often also lack access to basic medical care, such that the conditions of their detention fail to meet the standards for humane treatment. Since 2003, more than 106 immigrants have died in detention.²⁰ DHS has admitted that it lost track of some of these individuals until advocates and the media brought the deaths to their attention.²¹ The conditions of immigration detention facilities are particularly inhumane for vulnerable populations such as asylum seekers, most of whom have fled brutal persecution in their home countries. Many detained asylum-seekers have physical injuries, as well as significant psychological issues, that frequently go untreated while they remain in detention for long periods, waiting to have a full hearing on their asylum case.

The practice of arbitrarily detaining noncitizens in remote, penal detention facilities violates the United States' obligations under the ICCPR.

IV. Recommendations for Ensuring Compliance

In order for the U.S. government to comply with its international treaty obligations under the ICCPR, NIJC recommends the following:

- The United States must ensure that the immigration court system is independent and accountable, with adequate court staffing, immigration judges who have authority to control their own dockets and courtrooms, DHS attorneys who are assigned to cases from start to finish, an electronic case management system, and an effective appellate system.
- Noncitizens should have the right to seek meaningful judicial review of decisions issued by the immigration courts.
- The United States must ensure that every detained asylum seeker be afforded a timely opportunity to have his or her detention reviewed by an immigration judge, according to clear standards.
- The United States must provide noncitizens with full access to legal counsel.
- DHS must end the practice of arbitrarily transferring noncitizens between detention facilities. DHS also must ensure that detention facilities are located in

21, available on-online at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. See also Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, March 2009, page 37, available online at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>.

²⁰ Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, New York Times, August 12, 2008, available online at <http://www.nytimes.com/2008/08/13/nyregion/13detain.html>; Dana Priest and Amy Goldstein, *System of Neglect*, Washington Post, May 11, 2008, available online at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html; Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, March 2009, available online at <http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed>. See also Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody*, February 2009, available online at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>; and links to all New York Times articles on in-custody immigrant deaths at http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

²¹ Nina Bernstein, *Officials Say Detainee Fatalities Were Missed*, New York Times, August 17, 2009, available online at <http://www.nytimes.com/2009/08/18/us/18immig.html>.

areas where detained noncitizens have an opportunity to access *pro bono* representation.

- DHS should exercise prosecutorial discretion when it carries out its detention mandates and should create a risk assessment tool, in order to determine if an individual poses a threat to the community or a flight risk. DHS must release noncitizens who do not pose a risk. In addition, DHS should create a national secure alternatives to detention program for noncitizens who DHS determines must be detained.
- DHS should establish a presumption of parole for asylum -seekers who pass a credible fear interview, with straightforward standards for rebutting the presumption in light of flight or security risks.
- DHS should ensure that detention facilities provide adequate space for family visitation, confidential meetings with attorneys and health care practitioners, and indoor and outdoor recreation. DHS must not detain noncitizens with the general population of criminal inmates.
- Congress should also enact legislation to protect the rights and ensure the health and safety of detained noncitizens. Furthermore, Congress and independent investigators must exercise rigorous and ongoing oversight to measure the impact of these reforms to ensure that the United States' obligations under the ICCPR are upheld.

V. Conclusion

The ICCPR, like the U.S. Constitution, recognizes the rights of all individuals to due process. As a nation committed to the rule of law, we must restore our human rights reputation and ensure that we are complying with our international obligations to defend the inherent human dignity of every person, regardless of citizenship status.