

IN LIBERTY'S SHADOW

U.S. Detention of Asylum Seekers in the Era of Homeland Security

Foreword by Sigourney Weaver

This report is dedicated to Arthur C. Helton



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For the past quarter century, Human Rights First (the new name of Lawyers Committee for Human Rights) has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and make sure human rights laws and principles are enforced in the United States and abroad.

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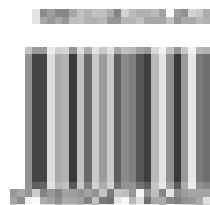
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Arthur Helton: 1949 - 2003

Dedication: Arthur C. Helton

This report is dedicated to Arthur C. Helton, who died in the bombing of the U.N.'s Baghdad headquarters in August 2003. Arthur dedicated much of his life's work to advocating that refugees in the U.S. and abroad be treated in accord with international human rights standards. He was a widely respected expert on refugee and migration issues.

Arthur led the Lawyers Committee for Human Rights' refugee program from 1982 to 1994. In that capacity he initiated discussions with U.S. immigration officials concerning the need to establish a fair process for the release from detention of asylum seekers who meet specific criteria for parole. After a successful pilot project, Immigration and Naturalization Service (INS) Commissioner Gene McNary issued a memorandum in April 1992 detailing the criteria under which an asylum seeker could be paroled from detention. In 1990, at least 13 years ago, Arthur began urging the INS to put its asylum parole criteria into formal regulations - a recommendation that is central to this report.

Arthur built the *pro bono* legal representation program at the Lawyers Committee, which recruits attorneys at law firms and trains them to represent asylum applicants. He developed extensive training materials and devoted thousands of hours to mentoring and advising hundreds of young lawyers. Over the years, this program has served thousands of refugees and has become a national model.

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Sigourney Weaver, a Human Rights First Board Member, talks to Eleanor Acer, the Director of the Asylum Program at Human Rights First, at a New Jersey Detention Center. Human Rights First is the new name of the Lawyers Committee for Human Rights.

Foreword

Working with Human Rights First (the new name of the Lawyers Committee for Human Rights) since 1986, I have seen firsthand the challenges facing those who flee to this country in search of asylum. Several years ago I met with asylum seekers who were detained at an immigration detention facility in the United States. I was shocked to learn that they were being held in what was basically a prison and treated, in effect, as criminals.

Many Americans are completely unaware of how this country treats people who arrive in this country in search of refuge, often risking their lives to get this far. A new Court TV film – that will air in January and February 2004 – will give many Americans an opportunity to learn about the U.S. detention of asylum seekers. “Chasing Freedom” tells the story of a young Afghan woman who flees to the United States after being persecuted by the Taliban for running a school for young girls and the *pro bono* attorney who takes on her asylum case.

The film was inspired by the case of a refugee we represented through a team of dedicated *pro bono* attorneys. “Mina,” as we have called her to protect her identity, has described what it was like for her to be brought to a U.S. immigration detention facility:

I was brought there in handcuffs and shackled to another person I did not know who was also seeking asylum. At the facility, they took away my clothes and gave me an orange prison uniform. I was treated like a criminal. I was kept in a room with 12 other women for 23 hours a day. There was no privacy. The toilets and shower were in the same room behind only a low wall — so that you could see someone's upper body as they sat on the

toilet. We were only taken out of the room for one hour a day; the outdoor recreation area was really like a cage — an internal courtyard with a fence for a roof. We could not see the trees or anything other than a small patch of sky through the fencing. Every day, guards woke us up at 6 am and told to stand in a line to be counted. They searched us several times a week.

In this report, Human Rights First describes the lack of a fair process that asylum seekers like the real “Mina” face in trying to be released from detention and the many significant changes that have been made to U.S. immigration policies in the wake of the horrific events of September 11.

I am working with Human Rights First to help convince the U.S. government to improve its treatment of asylum seekers. Read this report, and if you decide that you also want to help, I urge you to write a personal note and send it in to Secretary Tom Ridge of the Department of Homeland Security (you can use the postcard enclosed with this report).



Sigourney Weaver
Member, Board of Directors
Human Rights First
January 2004



1. Introduction

When I set foot on American soil, I had finally reached the land of liberty, the land of peace, and I had a strong feeling of gratitude toward the Most High who had allowed me to escape death and to reach a life of freedom.... After completing my statement [at the airport]...[an] officer arrived with handcuffs. Then he handcuffed my wrists, but I sincerely thought this was a case of mistaken identity. Later on he explained to me that this was the established procedure. We left for [a county] prison. They put me in a cell where it was really cold, and I had no blanket with me. The idea of a land of liberty was beginning to be cast into serious doubt in my mind.

After spending two days in this prison, I was transferred to another prison, and before leaving they not only handcuffed my wrists but also put shackles on my feet. Then they brought me to [an immigration] Detention Center, where I am presently detained. My hope of a land of liberty has been transformed into a nightmare. To this is added moral suffering due to detention, for I do not know how long I will spend in this detention center. It is as if I am living through a bad dream, and soon will wake and finally reach this land of freedom that I still seek.

– Statement of a Rwandan refugee who was detained in the U.S. for several months before being granted asylum¹

The United States has a long tradition of providing refuge to victims of religious, political, and other forms of persecution. This tradition has been eroded recently beginning with harshly restrictive federal legislation in 1996. This erosion has accelerated in the aftermath of the September 11, 2001 attacks on the United States. As a result of these changes, refugees have been caught up in a web of new laws, regulations and policies

advanced in the name of national security that have transformed the immigration system – and left refugees more vulnerable than ever.

Even before September 11, refugees faced many obstacles in their efforts to win asylum in the United States. A 1996 immigration law imposed a new filing deadline on asylum claims and a fast-track deportation process at airports and borders, called “expedited removal.” Under this process, asylum seekers face mandatory detention when they arrive in the United States. They are held in jails, prisons and detention facilities across the country.

While they can request release from detention on parole, the U.S. parole process for asylum seekers lacks the kinds of basic safeguards that help to ensure that a process is fair. The decision to keep an asylum seeker in detention is now entrusted to the Department of Homeland Security (DHS) and cannot be appealed to an independent judge. Unlike other detained immigrants, those who request refuge when they arrive at our airports cannot have the decision to detain them reviewed even by an immigration judge. The lack of basic safeguards in the asylum detention system has meant that victims of religious and political persecution, rape and torture are unnecessarily detained for months and sometimes years in this country.

In the time since the attacks of September 11, the difficulties faced by asylum seekers who are detained in the United States have increased significantly. This report is the result of a 12-month monitoring and research project aimed at assessing the impact of developments in the new security environment on those who seek refuge in the United States. This report’s focus is on detained asylum seekers, a population that is particularly vulnerable for reasons we outline in this report. Research for the report includes the monitoring of actions taken by the Immigration and Naturalization Service (INS), DHS, and the Department of Justice since September 11th which have an impact on asylum seekers, as well as a survey of *pro bono* attorneys and legal service providers around the country, interviews with asylum seekers, and an in-depth survey of the detention procedures of other countries.

The need for enhanced security is clear in the post September 11 world, and detention can be necessary in specific cases. But when some of the new immigration enforcement measures that have been labeled as promoting “national” or “homeland” security are examined more closely, too often fundamental fairness and basic protections have been sacrificed without a meaningful assessment of whether the particular change is actually needed to protect this country. The conduct of a fair asylum process and the maintenance of security are objectives that can both be met. The former need not be sacrificed to the latter.

This report examines changes in U.S. law, regulations, policies and practices – many initiated in the name of advancing security – that are affecting asylum seekers who are detained in U.S. jails and detention facilities. These changes include:

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- the expansion of the Attorney General’s immigration detention authority by regulation shortly after the attacks;
- the transfer of the functions of the former INS, including immigration detention authority, to the new Department of Homeland Security in March 2003;
- the launching of nationality-based detention policies, such as those targeting Haitian asylum seekers, and asylum seekers from Iraq and other “terrorist” producing nations – 33 mostly Arab and Muslim countries;
- the changes to the immigration appeals process, initiated by Attorney General Ashcroft, that have undermined the fairness of the asylum adjudication system; and
- more restrictive release practices for asylum seekers held in many parts of the country.

In this new era of homeland security, it has become increasingly apparent that the absence of essential due process safeguards in the asylum detention system has left asylum seekers at the mercy of a new approach: routine, and sometimes blanket, refusals to release asylum seekers rather than meaningful assessments of the need for detention in each individual case.

As a result of this approach:

- A Liberian Pentecostal pastor who had been targeted by the regime of Charles Taylor because he had criticized its use of child soldiers was denied release by DHS even though he was well known to leaders of churches in Maryland, Virginia, and West Virginia.
- Two men who fled persecution in Ukraine have been detained for nearly four years in U.S. jails and detention facilities even though they have extensive ties to the community – their release is supported by their former employers, fellow parishioners and friends in Pennsylvania.
- A 13-year-old Iraqi girl spent more than five months in detention in California before being released to her older brother, who was a legal resident of the United States.
- An 18-year-old Haitian named David Joseph, who has been detained for 14 months, was denied release by the Attorney General on grounds of “national security” even though there was no contention that he himself presented any threat to the public.

For those who are survivors of torture, rape and persecution, detention can be particularly traumatizing. The high rates of depression and post-traumatic stress syndrome (PTSD) suffered by detained asylum seekers have been documented in a comprehensive medical study issued in June 2003 by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture. While some asylum seekers are held in detention facilities, rather than prisons, those facilities are not much different from prisons. Based on our numerous interviews with detained asylum seekers, it is clear that the absence of a fair

process for determining whether an individual asylum seeker can be released on parole exacerbates the despondency that many feel.

The Bush Administration should make its detention practices conform with U.S. tradition and standards of international human rights law. At the end of this report we outline a series of recommendations for change. As a first step, the U.S. Department of Homeland Security should make the following changes:

- (1) First, create a new high-level refugee protection position in the Office of Secretary Tom Ridge.
- (2) Second, give asylum seekers the chance to have their detention reviewed by an immigration judge, like other immigration detainees.
- (3) Third, put the official parole criteria for asylum seekers into formal regulations.

A Nation of Immigrants, A Haven for Refugees

People fleeing persecution were among the founders of this country, a source of its traditions and democratic institutions. For over two hundred years immigrants to the United States have been a source of America's abiding strength. While the origins and beliefs, nationalities and backgrounds of those driven to flee from religious and political persecution have changed over time, the enormous contribution of refugees to our nation has become a part of the American ideal.

Refugees are often the best and the brightest of their own countries. They include leaders in the arts and sciences and often represent the best of the civil societies of their homelands. They include past and future leaders in the fight for democratic freedoms in their home countries. Many of those who seek a haven in the United States are ordinary people who need help to survive in the face of persecution.

Central to this country's identity is the image of a land that extends its arm to shelter those fleeing persecution and "yearning to breathe free." Refugees are a small fraction of the tens of millions of immigrants who have come to the United States to seek a better life. They stand out because they have faced injustice and persecution in their own countries.

The special standing of refugees, as people requiring *protection*, whose purpose in seeking access to a foreign land is to be sheltered from *persecution*, was reinforced by the experience of World War II. In June 1939, the United States turned back the *S.S. St. Louis*, a ship that left Hamburg carrying 937 people, most of them Jews, in flight from Nazi Germany. Coast Guard ships shadowed the *St. Louis* to ensure no one swam ashore. When returned to Europe, hundreds of the refugees were seized and sent to death camps.² The restoration of the United States' self-image as a haven to the persecuted was one factor that provided impetus for the United States to support a strong legal regime to protect refugees – and for the United States to continue to receive and shelter the refugees arriving on its own shores.

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The modern framework of international law for the protection of refugees builds upon treaties created as a humanitarian response to a problem that by definition crossed international borders. The 1951 Convention Relating to the Status of Refugees established the basic framework by which refugees are identified and protected around the world. The terms of the 1951 Convention, which applied to refugees fleeing persecution prior to its enactment, were extended to cover all future refugee situations through the 1967 Protocol Relating to the Status of Refugees – a treaty to which the United States is a party. The United States strongly supported the basic principles of these post-World War II norms. These international conventions grew out of the recognition that refugees should not be returned to the hands of their persecutors – a principle as important in the 21st century as it was in the aftermath of World War II.

Since World War II, the United States has granted refuge to a wide range of people from around the world. In recent decades they have included peaceful pro-democracy and human rights advocates jailed by repressive regimes; torture survivors from Liberia, Iraq, Tibet and other places; victims of religious persecution from China, Egypt, Iran, and Sudan; women persecuted because of their resistance to restrictive gender-based rules; journalists targeted in Colombia, Haiti, and other countries because of their efforts to expose the truth; and many other victims of human rights abuses from around the world.

These refugees are a source of strength to this country. In the era of homeland security, it is more important than ever for this nation to stay true to the principles on which it is built – and to its identity as a nation of immigrants and refuge for the persecuted.

My husband and I came here for protection. Everybody says the U.S. is a country of liberty and democracy, and all we wanted was to live in peace. We heard here they protect people. All we expected was protection and peace. I had no idea I'd be in a jail. I never dreamed I would be wearing clothes like this. I never thought we would leave only to now go through this. But, there is God, and hopefully someone will help us.

– Iraqi woman, seeking asylum and detained in a Florida jail³



Immigrants arrive at Ellis Island.

2. U.S. Law on Detaining Asylum Seekers: An Overview

Expedited Removal and Mandatory Detention

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.⁴ 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.⁵

The law calls for “mandatory detention” of all asylum seekers who are subject to expedited removal. As a result, asylum seekers who arrive at airports and borders are held in detention facilities and jails around the country. Those who request asylum after entering the United States are not generally detained. In the last two years, at least 16,000 new asylum seekers have been subject to mandatory detention upon their arrival in the United States.⁶

Parole from Detention

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,” and only then can be released on parole. Before release, they must also meet the criteria detailed in INS (now DHS) parole guidelines.⁷ These

guidelines provide that release from detention on parole “is a viable option and should be considered” for asylum seekers “who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum involving violence or misconduct.”⁸ The practical obstacles to winning parole are overwhelming.

The current parole criteria are set out in “guidelines,” articulated in various INS memoranda, rather than in formal and enforceable regulations.⁹ These guidelines allow for the release on parole of an asylum seeker who demonstrates:

- A credible fear of persecution in an interview with a U.S. asylum officer;
- His or her identity;
- That he or she has family in the U.S. or other community ties; and
- That he or she poses no danger to the community and is not otherwise barred from asylum.

The Department of Homeland Security has the sole authority to parole these asylum seekers. Under the current rules, a decision to deny parole cannot be appealed.



Hua Zhen Chen, a victim of forced abortion, was detained for nearly two years.

3. An Inherently Unfair Process

The U.S. asylum detention system lacks the safeguards necessary to ensure due process and guard against unfair and arbitrary detention:

- The initial determination to detain an asylum seeker is a blanket one, not based on an individualized determination, but rather on whether a person possesses valid travel documents.
- Subsequent parole decisions are entrusted to the DHS, which is the detaining authority, rather than to an independent authority.
- The parole criteria applied by INS, now DHS, are set forth only in guidelines rather than in enforceable regulations.

No Appeal to a Judge

The Department of Homeland Security acts, in effect, as both judge and jailer with respect to parole decisions for asylum seekers. If parole is denied by DHS, the decision cannot be appealed to a judge – even an immigration judge. While immigration judges can review DHS custody decisions for other immigration detainees, they are precluded from reviewing the detention of so-called “arriving aliens,” a group that includes asylum seekers who arrive at airports and borders.¹⁰ Federal courts have refused to review parole denials for asylum seekers, in some cases citing a lack of jurisdiction and in other cases emphasizing that they are obligated to defer to the judgment of immigration officials.¹¹

Most European countries that detain asylum seekers provide for independent or judicial review of the decision to detain, as do Canada and South Africa. A survey

conducted by the Lawyers Committee identified at least 25 countries that provide some kind of independent review when they detain asylum seekers.¹² While the review procedures in some of these states are flawed, their laws at least make clear that asylum seekers are entitled to have their detention reviewed promptly by a judge or similar independent authority. For instance:¹³

- In Denmark, where about 50 percent of asylum seekers are detained at some point, review of detention by an independent City Court after three days is mandatory and can be appealed to the High Court.
- In Germany, where detention of asylum seekers is not mandatory, detention lasting more than 24 hours can be ordered only by local courts and can be appealed to district and regional civil courts within two weeks.
- In France, where an entering asylum seeker can be detained for a maximum of four days by border police, further detention is only allowed by order of an independent court, which may extend detention in eight day increments for a total of 20 days. The decisions of that court to extend detention can be appealed to the Court of Appeal.
- In Ireland, a detained asylum seeker is brought automatically before a judge who may decide that the individual should be released or, alternatively, that the individual may be detained for a 10-day period. Subsequent renewals of the 10-day period must be authorized by the court.
- In the United Kingdom, which detains more than 1,000 asylum seekers each year upon arrival and while awaiting deportation, decisions to detain asylum seekers can be reviewed by an independent authority through a request for a bail hearing, a process which is no longer automatic.

International Legal Standards

The International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, 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.”¹⁴ The U.N. Human Rights Committee has emphasized that 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 . . .”¹⁵

The detention guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) call for procedural guarantees, including “automatic review before a judicial or administrative body independent of the detaining authorities,” when an asylum seeker is detained.¹⁶

- In South Africa, if an asylum seeker is detained, any detention over 30 days is subject to automatic, independent judicial review under law. This review, however, does not take place in many instances.
- In Canada, if an asylum seeker is detained for 48 hours he or she must be brought before an independent administrative review board as soon as possible to determine whether the government can establish a need to continue the detention under criteria established by law.
- In Lithuania, police have authority to detain asylum seekers for identity purposes. About one hundred asylum seekers were in detention at the end of 2002.¹⁷ Detention that exceeds 48 hours must be authorized by a court, which can allow detention in a registration center until a final decision is made in the asylum case. Every 30 days from then on the government must reapply for detention, and the court must respond to each application within 10 days.
- In Hungary, during the first five days of detention, a detained asylum seeker may request review from the local court. Such review focuses on whether the alien's policing authority correctly applied the law in ordering the detention.
- In Poland, a local court must make the decision to detain an asylum seeker beyond seven days. This decision may be appealed to the district court within seven days of the date of issuance of the decision.

In both the United States and Australia, the law provides for mandatory detention of asylum seekers who arrive without proper documents. In both countries the law currently fails to provide for meaningful individualized assessments of the need for detention by an independent or judicial authority.¹⁸

Liberian Pastor Denied Release

In April 2003, the DHS detained a pastor of a Pentecostal Church in Liberia when he arrived at a U.S. airport in search of refuge. The Pastor's visa was determined to be invalid by immigration inspectors because he had not left the country on time during a prior visit. The Pastor – a critic of the repressive government of President Charles Taylor and its recruitment of child soldiers – was handcuffed and shackled for transit to the immigration detention facility. He soon requested parole – submitting the valid passport he had used to travel to the United States and affidavits from religious clergy colleagues in West Virginia, Virginia, and Maryland, attesting to his identity and work in Liberia. The pastor also had family living in the United States. Even though he had submitted extensive proof of his identity and close religious ties in the United States, the DHS denied his parole request. The denial could not be appealed to an immigration judge. The pastor was detained for three and a half months and was only released in July 2003 after being granted asylum.¹⁹

INS/DHS Release Criteria Not in Regulations

Over the years, the INS parole guidelines for asylum seekers, which were issued in a series of INS memoranda, have been applied inconsistently by local INS offices, with some local INS officials routinely failing to apply the guidelines.²⁰ 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.²¹ In June 1995, asylum seekers and others who were detained at an immigration detention facility in Elizabeth, New Jersey (known as the “Esmor” facility) rioted in response to abusive treatment by prison guards. This violent incident triggered a national examination of INS detention of asylum seekers.²² The INS’ report on the riot revealed serious deficiencies in the implementation of the parole program at the facility.²³ The Lawyers Committee, which has addressed the failure to follow the parole guidelines in a series of reports, filed a formal petition to this effect to the INS in 1996. We requested that the INS issue formal regulations codifying its asylum parole guidelines. We continue to believe that this will help ensure that the guidelines are implemented properly and consistently.²⁴

The problem of inconsistent application of parole criteria was so severe that, in December 2000, the INS issued a regulation confirming that the INS Commissioner could exercise authority over local INS parole determinations. The clarification was reportedly needed because some INS District Directors had maintained that INS headquarters did not have the authority to interfere in their parole determinations.²⁵

Rwandan Family Denied Release

Three asylum seekers from Rwanda, a married couple and a relative, fled Rwanda after surviving direct threats on their lives because of their pro-democracy political affiliations. In search of refuge, the family came to the United States because they had family here.

Although they had traveled with valid passports and visas, the family was detained by the INS at the airport when they told officials that they had come to seek asylum – making their “non-immigrant” visas invalid in the eyes of immigration officers. The two men were taken to a large detention facility in one state and the young woman was moved to a prison for criminals in another state. At the prison, no one spoke her language. Prison authorities, without explanation, sheared off her long braided hair.

After passing their credible fear screening interviews, all three applied for parole, so they could live with their U.S. relatives while final resolution of their cases was pending. The young woman was released on parole by the immigration office. The two men, however, were both denied parole by immigration officials in the other state. Even though the two men had the same community ties and same proof of identity (their own valid passports), their parole applications were denied on different grounds. The INS found that one man did not have sufficient documentation of his identity – even though the INS’ own forensic experts authenticated his passport and visa. The other man was denied on the ground that he “had not established sufficient community ties” – even though both men and the woman were being sponsored by the same U.S. citizen relative, an individual who was well-respected in his community. The two men were finally released in January 2002 – after four months of detention – when they were granted asylum. The family is now reunited and living together in the United States.²⁶

Despite the December 2000 regulation reaffirming the authority of the INS Commissioner over local INS parole determinations, the asylum parole guidelines themselves have not been codified into regulations – leaving local immigration officials free to ignore the guidelines. A survey conducted by the Lawyers Committee confirms that, even after this change, the guidelines are disregarded in many locations – leaving many asylum seekers in detention for long periods of time even though they meet the criteria for release. *Pro bono* attorneys in California, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and parts of Texas reported that the asylum seekers they represent are regularly denied parole from detention despite meeting the parole guidelines. In Florida, as discussed later in this report, Haitian asylum seekers arriving by boat are routinely denied parole under a special Haitian detention policy.

It is impossible to know how many asylum seekers are paroled or denied parole from detention – and the average period of detention they suffer – because of the failure of the INS (now the DHS) to provide accurate, regular statistical information to the public about the detention of asylum seekers. In 1999, frustrated by the failure of immigration officials to produce such information, Congress passed a law requiring the INS to provide statistical information about the detention of asylum seekers to Congress on an annual basis, and to the public whenever requested. But immigration authorities have persistently failed to comply with this law.²⁷ In February 2003 the Lawyers Committee filed a formal request under the Freedom of Information Act for information relating to the detention and parole of asylum seekers (including the information that is required to be provided to Congress). The Department of Homeland Security has still not provided this information to us.

U.S. Committee on Religious Freedom Addresses Parole Variations

On May 17, 1999, the Secretary of State's Advisory Committee on Religious Freedom submitted its final report and addressed the detention of asylum seekers and concerns about the variation in release policies among INS districts. The Committee on Religious Freedom concluded that: "The unnecessary detention of already traumatized victims of religious persecution, as well as other types of persecution, should be examined with the goal of providing release. . . . Serious concerns have been raised over the length of time these traumatized individuals are spending in detention facilities, the conditions they are being kept in, the types of detention facility that are being used and the variation in policies from district to district."²⁸

No Limit on Length of Detention

Neither U.S. laws nor regulations set a limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending. In fact, human rights organizations and news reports have documented cases of asylum seekers who have been detained for three, four, and even five years.²⁹ In researching the U.S. immigration detention system, the *Dallas Morning News* obtained statistics revealing that 361 asylum seekers and other detainees who had not been convicted of any crime had been detained for over three years.³⁰

In June 2001, the U.S. Supreme Court ruled that the indefinite detention of non-citizens who had been admitted to the United States and were later ordered deported would raise serious concerns under the U.S. Constitution. In *Zadvydas v. Davis*, the Court decided that the law at issue contained an implicit reasonable time requirement, which the Court determined to generally be a period of six months.³¹ The Court's decision involved immigrants already present in the United States rather than those detained upon their arrival at U.S. airports or borders. The U.S. government has taken the position that the ruling in this case does not apply to these "arriving aliens," a category which includes arriving asylum seekers.³²

Viktor Odnovyun and Oleksiy Galushka Detained for Four Years

Viktor Odnovyun and Oleksiy Galushka have been detained for nearly four years at a county jail in Pennsylvania and at the Wackenhut facility in Queens, New York. The two arrived in the United States in March 1999, seeking asylum from Ukraine where they were persecuted by security forces because of their work with non-governmental organizations. They were detained when they arrived at a U.S. airport. Although they were traveling on their own Ukrainian passports, they lacked visas to enter the U.S. In September 1999, an immigration judge granted them withholding of removal but denied them asylum because he believed they had the right to live in Argentina. After a series of appeals, the INS agreed to release the two men in connection with a federal court settlement agreement.



Oleksiy Galushka (left) and Viktor Odnovyun (right).

After over three years in INS detention, Odnovyun and Galushka were released. They settled in Pennsylvania because they had built up extensive community ties while detained at the York, Pennsylvania jail. Galushka volunteered at York Hospital, while Odnovyun volunteered at the local Orthodox Church and the International Friendship House, a home for released asylum seekers. After they received their work authorizations, Odnovyun was able to start sending money home for the medical care of his teenage son, who has been battling cancer in the Ukraine.

On June 17, 2003, they drove from Pennsylvania to New York to attend an immigration court hearing, expecting to return to their home and jobs. Both men had additional job offers pending: Galushka from the hospital where he had volunteered, and Odnovyun from a medical supply firm. The Immigration Judge found that they could be tortured if returned to their home country and granted both men withholding of removal under the U.N. Convention Against Torture. But the DHS trial attorney announced that she would appeal the judge's decision and directed that both men be re-detained immediately.

Their *pro bono* attorneys filed a new parole application – supported by 28 letters of support from their employers, friends, and fellow parishioners in Pennsylvania. The DHS denied the parole application in late September 2003 in a letter that referred to the two men collectively as “she,” stating that that DHS “cannot be assured that she will appear for immigration hearings or other matters as required.” The letter did not address the fact that Odnovyun and Galushka, when previously released on parole, had appeared for all immigration hearings.

Both Odnovyun and Galushka participated in a hunger-strike at the Queens detention facility in late October 2003. They began eating again on November 1 after losing about 20 pounds each.³³



Security inspection at Harrisburg, Pennsylvania airport.
AP Photo / Brad C. Bower

4. The New “Security” Environment

Since September 11 the situation of detained asylum seekers has become more precarious.³⁴ The government’s authority to detain immigrants was expanded by regulation by Attorney General Ashcroft shortly after the attacks. In March 2003 this expanded authority was transferred to the new Department of Homeland Security. The Department of Justice and DHS have created nationality-based detention policies targeting Haitian asylum seekers and asylum seekers from 33 nations and two territories – mostly Middle Eastern and other Islamic countries and territories. Attorney General Ashcroft has also initiated dramatic changes to the immigration appeals process. These changes have undermined the fairness of the asylum adjudication system – leaving some asylum seekers detained for long periods of time as they appeal their asylum denials to the federal courts.

A Lawyers Committee survey of *pro bono* attorneys and legal service providers around the country revealed that it has become even more difficult since September 11 for asylum seekers to obtain release from detention on parole. Attorneys who work with asylum seekers in California; Illinois; Minnesota; Michigan; Louisiana; Texas; Washington, DC; New Jersey; and New York report that increasingly, asylum seekers who meet the parole criteria are not released from detention. In some areas, attorneys have been told that a policy of blanket parole denial is in effect, though no such policy has been made public. The fundamental flaws in the asylum detention system – its lack of independent review and codification in regulations – have left it more susceptible than ever to an approach of routinely refusing to release asylum seekers. In many of these cases, immigration officials have declined to conduct meaningful assessments of the need for detention in each individual case.

Today, federal authorities repeatedly invoke national security concerns to justify new policies – policies that call for the detention of even asylum seekers who present no risk to the public by depriving them of the opportunity to demonstrate that they do not present a risk and merit release on parole. This blanket approach is unnecessary, since existing DHS regulations and the DHS parole guidelines already specifically prohibit the parole of anyone who would be barred from asylum or would present a risk to the community.³⁵ In addition, the asylum system contains numerous and rigorous safeguards designed to exclude those who pose a danger. So, for example, every asylum applicant's fingerprints are taken and sent to the FBI for a security check. The names and birth dates of arrivals and applicants are also checked against various FBI, State Department, and CIA databases.³⁶ Anyone who presents a risk to U.S. security is barred under the law from obtaining asylum, as are those who have persecuted others and committed serious crimes.³⁷

Expanded Detention Authority

In the wake of the September 11 attacks, the U.S. government took a number of steps to broaden its authority to detain non-citizens. Under the USA-PATRIOT Act, signed into law in October 2001, the government now has unprecedented power to detain non-citizens who are designated as terrorist threats by the Attorney General. These immigration detention powers are, however, subject to some degree of judicial review and Congressional oversight.³⁸ At the same time, U.S. immigration authorities vested upon themselves expansive detention authority through a series of regulatory changes made by the Attorney General in the fall of 2001.

Pregnant Rape Survivor Denied Release

Cecelia, like all women asylum seekers apprehended at the Port of Houston or at the Houston airport, was placed in detention at Newton County Prison, more than three hours from Houston (where her court hearings were held). There are currently no legal resources to assist asylum seekers in Newton County. She was pregnant as a result of rape she endured in Kenya, but was refused parole even though she had family willing to support her in Houston. At seven months, she became agitated about the fate of her child and YMCA International Services in Houston petitioned for her parole. A *pro bono* attorney was told by deportation officials that it "wasn't going to happen," because "the security risks outweighed humanitarian concerns." Cecelia, who was unrepresented, lost her asylum claim, but appealed. She was finally released just a few weeks before labor.³⁹

Now, a DHS trial attorney (the prosecutor in immigration proceedings) is empowered, in effect, to suspend a judge's release order in the case of essentially any type of immigrant. There is no requirement that the individual be suspected of a crime or terrorist activity. This new power, which was used against some of the many Arab and Muslim men detained in the United States in the aftermath of the September 11 attacks, was not initially applied to many asylum seekers since, as noted above, asylum seekers who are detained at U.S. borders and airports don't even have the ability to ask an immigration judge to review their detention. But it highlights the extent to which immigration judges, as part of the Justice Department, lack the independence necessary to ensure oversight of detention decisions.

The Department of Homeland Security

On March 1, 2003, the Immigration and Naturalization Service (INS) was abolished and its functions transferred to the new Department of Homeland Security. The mission of the Department of Homeland Security, which is spelled out in the Homeland Security Act, is to prevent terrorist attacks in the United States., reduce the vulnerability of the United States to terrorism, and minimize the damage from terrorist attacks.

Rape Survivor Denied Release by DHS

Asata Duckly, a rape survivor from Liberia, was denied parole by the DHS and only released after seven months in U.S. detention when an immigration judge granted her asylum. Duckly fled Liberia after being threatened because of her husband's political connections. She had previously been raped by the forces of then-president Charles Taylor. She arrived at JFK Airport in New York on December 30, 2002, traveling like many refugees on false documents. She was detained at the airport for more than four days, shackled to a bench, and then brought in handcuffs and shackles to the detention facility in Elizabeth, New Jersey. Despite the fact that a close family friend agreed to house and support her if she were released, Duckly was denied parole by the new Department of Homeland Security on March 28, 2003. She remained very depressed during her seven months in detention, and was only released on July 7, 2003 after an immigration judge granted her asylum.⁴⁰

Although the Department of Homeland Security is now the place where refugee protection decisions are made, the Department's mission statement lacks any mention of ensuring that the United States lives up to its obligations to refugees seeking asylum – obligations contained in U.S. law and international treaty obligations. Immigration enforcement and services functions have been separated into different bureaus within the Department of Homeland Security (DHS). While the legal and operational expertise on asylum rests with U. S. Citizenship and Immigration Services (CIS), the authority over the detention of asylum seekers falls under a separate interior enforcement bureau known as the Bureau of Immigration and Customs Enforcement (ICE), which is part of a separate enforcement directorate (Border and Transportation Security). Yet another enforcement bureau, the Bureau of Customs and Border Protection (CBP), has authority over immigration inspections and expedited removal.

In April 2003, 90 private organizations around the country wrote to DHS Secretary Ridge to raise concerns about having immigration functions relating to asylum seekers divided into three separate DHS bureaus. The letter and accompanying briefing paper, prepared by the Lawyers Committee for Human Rights, recommended that a number of safeguards be put in place within the Department to ensure that the policies and practices of the Department are consistent with U.S. and international law refugee protection obligations.

Those safeguards have not yet been created, and the lack of coordination within DHS on a range of refugee and asylum issues has become increasingly evident, particularly as the Department deals with issues that cut across these bureaus. For instance, individual ICE trial attorneys, who act in effect as prosecutors in immigration court cases, do not report to the asylum legal experts (in CIS) even when taking legal positions on interpretations of asylum law, which they must necessarily do in almost every asylum case. No formal procedures or guidelines have been issued publicly by DHS that establish safeguards to prevent the summary deportation of asylum seekers when DHS enforcement officers exercise the expanded authority to deport sea arrivals (a measure that primarily affects Haitian asylum seekers) through expedited removal. In August 2003, a group of leading Jewish organizations raised concerns about the U.S. practice of prosecuting asylum seekers. These groups received back two different form letters – one from the DHS Secretary's office and the other from an ICE official – but neither letter was responsive to the substantive questions they raised.

Meanwhile, the Department of Homeland Security, through its interior enforcement bureau (ICE), is now exercising the power to detain and deny parole to asylum seekers. In a December 2003 meeting concerning the detention of Haitian asylum seekers, ICE officials made clear that their goal is “homeland security” and that the role of ICE is to “remove all the removable aliens” and “expedite the hearing process.” The ICE officials also stressed that they believe that some sort of a “tether” is needed to ensure that people who are paroled appear for their hearings and do not abscond.⁴¹ While ensuring appearance at immigration hearings is an appropriate goal to pursue through detention policy, several studies discussed later in this report have shown that asylum seekers released from

detention appear at very high rates for their immigration court hearings.⁴² The kinds of "tethers" that ICE officials are pursuing include the use of electronic monitoring devices and intensive supervised release programs, which are discussed later in this report.

Nationality-Based Detention

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 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.⁴³

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.⁴⁴ While the vast majority of these individuals were not asylum seekers, some refugees were caught up in this wave of detentions.⁴⁵

Findings of the Inspector General

A 198-page report issued by the Department of Justice's Office of the Inspector General (OIG) in June 2003 makes clear that many of those detained after September 11 on immigration violations did not receive core due process protections, and the decision to detain them was at times "extremely attenuated" from the focus of the September 11 investigation.⁴⁶ The OIG found that the "vast majority" of the detainees were accused not of terrorism-related offenses, but of civil violations of federal immigration law.

The September 11 detainees were subject to a set of Justice Department policies that resulted in serious violations of their due process rights. For instance, with the new regulations that expanded immigration detention authority after the attacks in place, many detainees did not receive notice of the charges against them for weeks, and some for more than a month after being arrested.⁴⁷ The OIG reported that 192 detainees waited longer than 72 hours to be served with charges; 24 were held between 25-31 days before being served; 24 were held more than 31 days before being served; and five were held an average of 168 days before being served. Also, the lack of timely notice of the charges against them undermined the detainees' ability to obtain legal representation, to request bond, and to understand why they were being detained.⁴⁸

On September 8, 2003, the OIG released a new report analyzing the written responses of the Justice Department and DHS to the recommendations made in its June 2003 report. The OIG made clear that both agencies are taking steps to address many of the concerns. The OIG also made clear that significant work remained before its remaining recommendations would be fully implemented.⁴⁹

With respect to asylum seekers, the Administration has initiated two nationality based detention policies – one aimed at Haitian asylum seekers and the other aimed at asylum seekers from 33 nations and 2 territories, all primarily Arab and Muslim populations. In both cases, asylum seekers were deprived of meaningful assessments of the need for continued detention and in both cases “security” was cited as a justification for the blanket detention measures.

The Haitian Detention Policy

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.

I didn't think the United States would treat people differently just because of the place they were born, I thought everyone was equal here. But we have the same blood. It became clear to us that the only reason we were in jail indefinitely is because we are Haitian.

– Testimony of Ms. Marie Jocelyn Ocean, granted asylum after five months in a U.S. jail

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 U.S. 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. As discussed earlier in this report, the Attorney General 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.”⁵⁰
- In November 2002, the INS issued a notice authorizing expedited removal for 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 ensured that Haitians arriving in the future would not have the right to seek release from detention from an immigration judge.⁵¹

- 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.⁵²
- On April 17, 2003, the Attorney General issued a sweeping decision 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. As detailed below, the Attorney General asserted that "aliens from countries such as Pakistan" were using Haiti as a "staging point for migration to the United States."⁵³

David Joseph

Citing national security and referring to the "current circumstances of a declared National Emergency," Attorney General John Ashcroft issued a sweeping decision on April 17, 2003 preventing an 18-year-old Haitian asylum seeker from being released from detention. In the decision (known as *In re D-J*), the Attorney General concluded that the asylum seeker, whose name is David Joseph, was not entitled to an individualized assessment of the need for his detention.⁵⁴ There was no allegation that Joseph himself presented any risk to the public.

Joseph came to the United States with his younger brother and about 200 other Haitian men, women and children on the October 2002 boat. Joseph has now been detained for about 14 months in the United States.



David Joseph, an 18-year-old asylum seeker, has been detained for 14 months.

The Attorney General concluded that if Joseph and others were released, their release "would come to the attention of others in Haiti," which would "encourage future surges in illegal migration by sea," which in turn would "injure national security by diverting valuable Coast Guard and DOD [Department of Defense] resources from counterterrorism and homeland security responsibilities."⁵⁵ The Attorney General also asserted that the U.S. government lacked the resources to adequately screen the Haitians prior to release, presenting an additional security risk. This concern, the Attorney General explained, was supported by the State Department's assertion "that it has observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States."⁵⁶

The Attorney General directed immigration judges and the immigration appeals board to consider national security arguments in future cases, stating that: "in all future bond proceedings involving aliens seeking to enter the United States illegally, where the Government offers evidence from sources in the Executive Branch with relevant expertise establishing that significant national security interests are implicated, IJs and the BIA shall consider such interests."⁵⁷

Operation Liberty Shield

On March 17, 2003, on the eve of war with Iraq, the Department of Homeland Security announced that as part of “Operation Liberty Shield” it would detain for the duration of their asylum proceedings asylum seekers from a group of nations and territories “where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.”⁵⁸ Under “Operation Liberty Shield,” arriving asylum seekers – even those who met the relevant parole criteria and presented no risk to the public – were to be detained for the duration of their asylum proceedings if they were seeking refuge from one of the targeted nations. The effect of Operation Liberty Shield was to deprive asylum seekers from these nations of the opportunity to have the necessity of their detention assessed on an individualized basis.

The justification of this measure was national security though it called for the detention of even those asylum seekers who were not a risk to the public. Secretary Ridge issued a written statement on March 18, 2003, explaining that “these heightened security measures will help deter terrorism and increase protection of America and Americans.”⁵⁹ At a press conference he stated that: “We just want to make sure that those who are seeking asylum, number one, are who they say they are and, two, are legitimately seeking refuge in our country because of political repression at home, not because they choose to cause us harm or bring destruction to our shores.”⁶⁰ This, however, is exactly what individualized parole decisions were designed to do – the parole criteria specifically require an assessment of identity and prohibit the release of anyone who presents a danger.

The Department of Homeland Security refused to officially disclose the list of affected nationalities, stating that the complete list was “law enforcement sensitive.” From information received by the Lawyers Committee, 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.

International Law on Non-discrimination

The principle of non-discrimination is central to both international refugee and human rights law. The Convention Relating to the Status of Refugees requires states to apply its provisions “without discrimination as to race, religion or country of origin.” The UNHCR Detention Guidelines urge that a decision to detain an asylum-seeker “must be exercised in a non-discriminatory manner.” The International Covenant on Civil and Political Rights provides that: “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶¹

Immediately after the policy was announced, numerous civil rights, faith-based, human rights, and refugee advocacy organizations expressed their concern about it.⁶² The U.S. Conference of Catholic Bishops' (USCCB) Committee on Migration, in a statement issued by Bishop Thomas G. Wenski, stated that the policy "harms individuals who are fleeing terror, is inappropriately discriminatory, violates accepted norms of international law, and undermines our tradition as a safe haven for the oppressed."⁶³ The U.N. High Commissioner for Refugees criticized the association of asylum seekers and refugees with terrorism as "a dangerous and erroneous one," since asylum seekers "have themselves escaped acts of persecution and violence, including terrorism, and have proven time and again that they are the victims and not the perpetrators of these attacks."⁶⁴

Operation Liberty Shield was officially terminated at the end of April 2003. According to DHS information, 42 people were detained as a result of the policy. Despite the termination of the policy, attorneys around the country continue to report that asylum seekers from Arab and Muslim countries are being routinely detained for the duration of their asylum proceedings.

New Pilot Program: Additional Detention Tested

In August 2003, the Department of Homeland Security through its interior enforcement arm, ICE, initiated a pilot program in Connecticut to detain a new category of asylum seekers and other immigrants. As noted earlier, while asylum seekers who arrive at airports and borders are subject to mandatory detention, those who come forward and file their asylum claims with U.S. immigration authorities after entering the United States are not generally detained.

Under the pilot program, non-citizens who were denied asylum or other relief by immigration judges in Hartford, Connecticut could be immediately detained by DHS. The pilot program was scheduled to terminate in September 2003. DHS and ICE have not released public information indicating whether they plan to expand this "pilot program." Launched without notification to the public, the existence of the pilot program was only confirmed by DHS after the press began to report on the detentions.⁶⁵

Detaining asylum seekers who had voluntarily come forward to U.S. authorities is counterproductive. Not only does it discourage refugees from seeking protection, but it also penalizes asylum seekers for voluntarily identifying themselves to U.S. immigration authorities.

Changes to Appeals Process Affect Detained Asylum Seekers

On February 6, 2002, Attorney General Ashcroft publicly announced his plans to make dramatic changes to speed up the way that the Board of Immigration Appeals (the "BIA"), the court of last resort for many asylum seekers, considers and decides cases pending before it. The changes were described as necessary to tackle the significant backlog

of cases at the BIA and to promote national security.⁶⁶ The Attorney General's changes included: (1) requiring individual members of the BIA to review and decide most cases with one-sentence orders; (2) limiting the BIA's scope of review; and (3) decreasing the time for detainees to obtain legal representation and file appellate briefs.⁶⁷ Despite the stated intent of improving efficiency, the number of BIA adjudicators was reduced from 19 to 11.⁶⁸

These changes, which went into effect on September 25, 2002, have dramatically affected the ability of asylum seekers, and particularly detained asylum seekers, to obtain a full and fair hearing on their claims. Prior to the implementation of the streamlining regulations, the BIA typically decided cases by three-judge panels and granted 25 percent of these appeals. Since then, the numbers have changed markedly. A law firm is working with the Lawyers Committee in analyzing approximately 1,400 asylum, withholding of removal, and/or Convention Against Torture cases decided by the BIA during September of 2002.⁶⁹ In approximately 80 percent of these cases, a single BIA adjudicator affirmed the decision of the immigration judge in a one-sentence opinion. Moreover, the BIA granted asylum, withholding of removal, and/or Convention Against Torture relief in *less than 5 percent* of these cases.⁷⁰

Asylum Denial in Forced Abortion Case Affirmed Without Explanation

Among the cases reviewed by the Lawyers Committee through a *pro bono* law firm, is the decision of a single Board member in September 2002 to affirm without explanation an asylum denial to a young Chinese woman. She had testified that she was the victim of a forced abortion. The young woman, who was detained in the United States, filed her appeal *pro se* – meaning without an attorney. The woman had testified that Chinese authorities had forced her to undergo an abortion for marrying and also becoming pregnant when she was too young. The young woman, who introduced a wedding photo as proof of her marriage and a receipt from Chinese population control authorities for a fine relating to her marriage, testified that she suffered from terrible morning sickness at the beginning of her pregnancy.

The immigration judge had said that he did not believe her testimony for three reasons. First, he did not think it possible that the young woman could have vomited “on a near daily basis” during her first trimester of pregnancy. Second, the judge found she lied about the wedding photo because she had testified that no pictures were taken at her wedding banquet, even though she had also testified that the photograph was taken at a nearby photographer's studio. Finally, he found that the receipt she produced as evidence of a fine imposed by Chinese population control authorities reflected a fine for underage marriage rather than underage pregnancy, although the former would not have come to the authorities' attention without the latter. Without issuing an opinion – and therefore without addressing the immigration judge's findings on credibility – a single board member affirmed the immigration court's decision.⁷¹

The negative impact of the "streamlining" regulations on detainees (who are frequently unable to secure the assistance of counsel) has been devastating. In fact, the Lawyers Committee was first alerted of this dramatic shift in decision making by asylum seekers at a local detention facility. They told our attorneys that they were troubled because detainees at the facility were now receiving only one sentence affirmations of immigration judges' asylum denials. Previously the BIA had corrected at least some of the decisions that the asylum seekers (and *pro bono* attorneys) believed to be incorrect. When asylum seekers at another facility recently went on a hunger strike, one of the concerns they raised was the BIA's new summary decisions. The BIA's new expedited procedures have no doubt lessened detention time for many detainees since their cases move much more quickly (albeit less fairly). But asylum seekers who would have won asylum at the BIA before these changes came into effect now must increasingly turn to federal appeals courts, adding significantly to their time in detention.

National Survey: Detention and Parole More Restrictive than Ever

The United States' policies on releasing asylum seekers on parole, already quite restrictive in some parts of the country, have become much more restrictive since September 11, 2001. This more restrictive parole policy is not the result of any publicly articulated change in parole criteria. Rather it seems to be the result of a widespread yet informal shift in policies and practices.⁷²

A survey of *pro bono* attorneys around the country reflects a number of shifts in asylum detention practices over the last two years. These shifts appear to include:

- (1) An increase in the detention of asylum seekers who arrive at airports or borders even though they are traveling on their own valid passports.
- (2) More restrictive release policies in many parts of the country.
- (3) A rise in the continued detention of asylum seekers after their having been granted asylum or other relief by immigration judges, as DHS attorneys pursue appeals.

This does not necessarily mean that there has been a rise in the number of detained asylum seekers. In fact, the number of new asylum seekers is declining.⁷³ But apparently a higher percentage of detained asylum seekers are being detained for the duration of their asylum proceedings, rather than being released after a preliminary screening period.

(1) Detention of Asylum Seekers with Valid Passports

In a number of cases, asylum seekers are being detained at U.S. airports and borders even though they arrived in the U.S. with valid passports. In some cases, their visas – although facially valid – were viewed as invalid by INS or DHS immigration inspectors (for instance, if the individual had not departed the U.S. on time during a prior visit). In other cases the visa was viewed as invalid simply because the asylum seeker told U.S.

immigration 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. The asylum seekers whose cases we examined were detained after they arrived at various airports around the country, including Logan Airport in Boston, Massachusetts, New Jersey’s Newark Airport, JFK Airport in New York, Miami Airport in Florida, and O’Hare Airport in Chicago.

Most of these asylum seekers were initially detained by U.S. immigration authorities and denied parole even though there was no issue whatsoever as to their identities. In one case, the refusal to parole a West African asylum seeker was never explained in writing. He was detained at several county jails in the Midwest after he arrived at a U.S. airport in early 2003 and told an immigration inspector that he wanted to seek asylum.⁷⁴

In this and other cases, immigration officials are penalizing asylum applicants simply because they state honestly that they are seeking asylum. The refusal to parole asylum seekers who arrive in this country traveling on their own valid passports shows just how widely ignored the parole guidelines are since these asylum seekers clearly have their passports to confirm their identities, thereby satisfying the identity element of the official parole guidelines.

(2) More Restrictive Release Policies

In various parts of the country, lawyers have reported that parole practices for asylum seekers have become more restrictive since September 11. For instance:

- The Midwest Immigrant & Human Rights Center, which assists detainees held in Illinois, Wisconsin, and Nebraska, reported that “asylum seekers detained by DHS almost never obtain parole,” and that “[t]he pattern of parole denial appears to be the result of an informal DHS security policy implemented in the wake of September 11.”⁷⁵
- Freedom House in Detroit, Michigan reported that local immigration officials “do not parole asylum seekers period.”⁷⁶
- Minnesota Advocates for Human Rights reported that immediately after September 11, asylum seekers were “virtually never released” and that even now parole “remains difficult to obtain.”⁷⁷
- The Florida Immigrant Advocacy Center (FIAC), which provides free legal services to detainees at the Krome Detention Facility, reported that since September 11, it has become much more difficult for asylum seekers from Arab or Muslim countries, as well as Haitians arriving by sea, to be released from detention on parole or bond. FIAC Executive Director, Cheryl Little, states: “Since 9-11, many asylum seekers in Florida with no ties to terrorism have been subjected to harsh government policies that arbitrarily deny them release and prevent them from effectively presenting their cases.”⁷⁸

- The Lawyers' Committee for Civil Rights of the San Francisco Bay Area reports that parole is generally not granted in the San Francisco Bay Area. While in some cases it may be granted if the asylum seeker meets the parole criteria, in other cases asylum seekers have been denied parole even when they have proof of identity and community ties.⁷⁹
- The Women's Commission for Refugee Women and Children was told, in an August 2003 meeting with DHS (ICE) officials in Los Angeles, California, that since September 11, immigration officers have basically stopped paroling asylum seekers from detention. Non-profit organizations working with asylum seekers in Los Angeles informed Amnesty International in November 2003 that they were not seeing asylum seekers paroled in Los Angeles.⁸⁰
- The Volunteer Lawyers Project in Buffalo, New York, which provides legal information and representation to asylum seekers detained through expedited removal in the Buffalo Federal Detention Facility, reports that parole applications rarely receive any response, resulting in prolonged detention for asylum seekers.⁸¹
- Lawyers at YMCA International Services in Houston, Texas, report that detained asylum seekers are almost never granted parole. Since September 11, even those who have already been given asylum by an immigration judge are denied parole and must wait in detention while the government pursues appeals to higher courts.⁸²

Armenian Political Activist Denied Parole

"Peter," an asylum seeker from Armenia, was detained by DHS after arriving with false documents in San Francisco in April 2003. Because of his activism in an opposition political party in Armenia, Peter had been detained under inhumane conditions and severely beaten by the Armenian police. He was detained by DHS at Yuba County Jail, at least three hours away from his lawyer in San Francisco, California. After passing his credible fear screening interview, Peter applied for parole using his own Armenian passport, his birth certificate, and an Armenian identification paper containing a photograph, all of which he had been carrying when he entered the United States. His application for parole was supported by his wife's sisters, one a United States citizen and the other a legal permanent resident. After six weeks without an answer to his parole request, DHS finally wrote that Peter could not be released because he had used a false document to enter the United States. On that very same day, after having spent two months in jail, Peter was granted asylum by an immigration judge and released.⁸³

In New Jersey and New York, where two of the largest detention facilities for asylum seekers are located, asylum seekers were rarely paroled, even before September 11. Since then, it has become even more restrictive. Both districts have failed to parole asylum seekers who had significant proof of their identity and close community ties. In November 2003, the Lawyers Committee, along with the American Friends Service Committee, the Catholic Legal Immigration Network, and the Hebrew Immigrant Aid Society, wrote to DHS officials in New Jersey urging improvements in the fairness of parole practices at the Elizabeth, New Jersey detention facility. In response to a local DHS official's claim that he was not aware of asylum seekers who had been granted asylum but were not previously paroled, the groups informed DHS that over the last few years three organizations alone had represented 78 asylum seekers who had not been granted parole but were released after months in detention only after an immigration judge granted them asylum or other relief from deportation.⁸⁴

Hunger Strike at New York Detention Site

In October 2003, detainees at the Wackenhut facility in Queens, New York began a hunger strike. The detainees reported that all the men at the facility began refusing to eat their meals on Wednesday, October 22. While most began eating again during the following week, at least two detainees did not eat until November 2, losing about 20 pounds each. The detainees told the press and the Lawyers Committee that they were protesting a number of problems, including:

- Detention of asylum seekers with no criminal backgrounds.
 - Lack of automatic, timely, independent review of each person's detention.
 - Lack of parole grants even for people who meet all parole criteria and submit requests with full support, including proof of community ties.
 - Refusal to release detainees who are granted withholding of removal relief under the Convention Against Torture or the Refugee Convention.
 - Absence of hope for release while detainees exercise their due process right to appeal their cases, and the one-sentence denials now routinely issued by the Board of Immigration Appeals.
 - Conditions of detention, including jail-like uniforms, inadequate food, exorbitant phone costs, no meaningful access to fresh air, no privacy in dormitories for bathroom and phone use, and no privacy in visiting with family and friends.⁸⁵
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(3) Detention After Judge Grants Relief

Another disturbing trend is the continued detention of individuals who have been granted asylum or other relief from deportation by an immigration judge. In some of these cases, DHS is appealing the judge's decision, and continues detaining the asylum applicant during the appeal process. For instance, after an immigration judge ruled that a Colombian asylum seeker should get asylum, the DHS in Chicago decided to continue to detain him, even though he had already been detained for eight months in a county jail. Two months later, with his mental and physical health deteriorating, DHS finally released him from jail.⁸⁶ In the case of Viktor Odnoyyn and Oleksiy Galushka (whose cases are discussed on page 15 of this report), DHS in New York actually re-detained the two men even though they had previously complied with the requirements of their parole.

Delays in Security Checks

For some asylum seekers, detention has been prolonged for months because of delays associated with post-September 11 security checks. These delays affected asylum seekers from at least 25 countries, including Somalia, Pakistan, Saudi Arabia, Iran, and Iraq. These checks, initiated after September 11, have prolonged the detention of children, sick people, and the elderly as well as other asylum seekers.⁸⁷

Iraqi Girl Detained for Five Months

A 13-year-old Iraqi girl, spent more than five months in detention before being released on a bond of \$1,500, to the care of her older brother, who was a legal resident of the United States. Her release, and that of her other family members, was prolonged because of delays in new U.S. security check procedures. The girl's 62-year-old father, who was in poor health, was finally released in August 2002 – eight months after the family came to the United States to seek asylum.⁸⁸



Cherlande Dorvil, 3 years old, detained six months.

5. Detention and its Impact

On any given day, the U.S. government holds more than 20,000 non-citizens in immigration detention facilities and jails. We believe that several thousand of those being detained are asylum seekers.⁸⁹ For years, U.S. immigration authorities have failed to provide regular statistical information about the number of asylum seekers in detention – even though a federal statute requires the government to report these numbers to Congress.⁹⁰ The government has failed to respond to our February 2003 request, under the Freedom of Information Act, for statistics relating to the detention of asylum seekers. But based on the number of asylum seekers who have been given credible fear interviews by asylum officers, it is clear that during the last two fiscal years, at least 16,000 new asylum seekers have been detained on their arrival at U.S. airports and borders.⁹¹

Mental Health of Asylum Seekers

Detention can be particularly difficult for the many refugees seeking asylum who are survivors of rape, torture, and other traumatic experiences. Medical experts have documented the fact that refugees often suffer from Post Traumatic Stress Disorder, major depression, or other illnesses.⁹² As one expert explained: “For someone who’s been tortured and locked up in a cell as a political prisoner in their native countries...the experience of being locked up here again can trigger panic attacks, flashbacks.”⁹³

A June 2003 medical report, issued by Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, has documented the impact of detention on asylum seekers.⁹⁴ The report, which is the first systematic and comprehensive study of the health of detained asylum seekers, confirmed:

- In case after case, the U.S. practice of imprisoning asylum seekers inflicts further harm on an already traumatized population.
- Detained asylum seekers suffer extremely high levels of anxiety, depression and Post Traumatic Stress Disorder: 86 percent of the interviewed asylum seekers suffered significant depression, 77 percent suffered anxiety and 50 percent suffered from Post Traumatic Stress Disorder.
- The already poor psychological health of asylum seekers worsens the longer that they are detained. Loss of liberty triggers disturbing memories of persecution suffered by asylum seekers in their home countries, while the length of time in jail and uncertainty of duration contributed to the deterioration of mental health.
- Psychological counseling services are either not available or very limited despite high levels of symptoms of psychological distress in many detained asylum seekers.

Conditions of Detention

Asylum seekers are held in jails and detention facilities around the country. Among the largest of the facilities are the 200-bed contract detention facility in Queens, New York (run by Wackenhut Corrections Corporation/ the GEO Group), the 300-bed facility in Elizabeth, New Jersey (run by Corrections Corporation of America), the 226-bed Krome Service Processing Center and detention facility in Miami, Florida (run by DHS), the El Centro Service Processing Center in El Centro, California, and the Port Isabel Service Processing Center in Harlingen, Texas.

Detention Standards

In 2001 the INS finally produced a Detention Operations Manual that sets out minimal standards for treatment of detained asylum seekers and other immigrants.⁹⁵ The manual includes provisions for visitation from family and friends, access to health care, group legal rights presentations, telephonic access to legal representatives, visitation from legal representatives, accurate lists of free legal service providers for dissemination to detainees, and availability of relevant legal materials. Although these standards are welcome, at first they were applied to only those not housed in jails, prisons, and other facilities, amounting to only half the population of detained immigrants.⁹⁶ Detention facilities may not comply with these standards fully; because these standards have not been codified as regulations but are only operational guidelines, there is no legal remedy to enforce them.

The Department of Homeland Security (ICE) also rents space in state prisons and local jails around the country in order to detain asylum seekers. Among the jails where asylum seekers are detained are the York County Prison in Pennsylvania; Turner Guilford Knight Correctional Center (TGK) and Broward County jails in Miami, Florida; Tri-County Detention Center in Ullin, Illinois; Ozaukee County Jail in Port Washington, Wisconsin; Yuba County Jail in Yuba County, California; Riverside Regional Jail in Prince George County, Virginia; and Hasting Correctional Center in Hastings, Nebraska.

While some of these facilities are euphemistically referred to as “detention facilities,” for those being held there, they are essentially prisons. Asylum seekers are stripped of their clothing, required to wear prison uniforms, transported in handcuffs or shackles, not allowed to have contact visits with family, and treated like prisoners. In some detention centers, such as the Wackenhut Detention Center in New York and the Elizabeth Detention Center in New Jersey, detainees live in warehouse buildings and their “outdoor” time consists of a visit to a room within the building that has a chain mesh ceiling which allows some fresh air to come in the room. For activity, detainees in some facilities are allowed to work in facility upkeep and are paid one dollar per day for their labor. Visiting hours and facilities for visitation are often extremely limited.

Jean-Pierre Kamwa

Jean-Pierre Kamwa, from Cameroon, is a torture survivor who was detained in the United States for five months before he was granted asylum with the help of the Lawyers Committee. He now works as a counselor for refugees and asylum seekers, and regularly visits other asylum seekers who are in immigration detention. Kamwa has explained that: “These detainees have, like I had when I arrived in the U.S., already been deeply affected by what happened to them before they left their homes. Now they are in a windowless detention center with no fresh air. They don’t know what will happen to them, if they will be deported, or if they will be allowed to remain. They become more and more depressed, sometimes they attempt suicide.”⁹⁷



Jean-Pierre Kamwa speaking at a Detention Watch Network event.

Over the years, human rights organizations and the press have documented deficiencies in the treatment of asylum seekers at jails and facilities around the country.⁹⁸ In their recent study, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture reported that asylum seekers have suffered verbal abuse and other mistreatment at the hands of officers staffing detention facilities. Many asylum seekers are survivors of psychological trauma and physical torture, sometimes at the hands of prison or army guards in their home countries, yet detainees are not given adequate access to medical care and are almost never provided psychological counseling.⁹⁹ In response to reports of “widespread sexual, physical, verbal and emotional abuse of detainees, especially women” at the Krome Service Processing Center, an INS detention center on the outskirts of Miami, Florida, the Justice Department launched an investigation into the conduct of at least 15 INS officers at that facility.¹⁰⁰ The female detainees were moved to TKG, a county jail in Florida, where women reported strip-searching, deprivation of sleep, and the seizing of rosaries and other personal and religious objects.¹⁰¹

My wife and my parents, you know, in Africa, they understand this a different way. I have never been in prison before, I have never committed any kind of crime – they don't understand what I have done to deserve this.

We need natural lighting. . . . When I came in, I could read and see letters from a distance, but now I tend to lose focus, because of the constant [fluorescent] light in the dorm. . . . Even outdoors here is not outside. . . . If at least in a month, they could give people one chance to go outside, it would help to breathe fresh air. It would also bring down the stress that we are feeling. . . . Keeping people indoors all the time, with the light coming only from above, just like a chicken. . . . Even criminals in federal prisons get natural light, they get to go outdoors. . . . And these people have done crimes, great crimes – but asking for asylum is something so simple, I don't think people should be penalized for it to that extent. . . .

– A Ugandan Pastor, seeking asylum and currently detained by DHS in a U.S. immigration detention facility¹⁰²

Women in Detention

When refugee women are detained, they are often faced with particular difficulties – including lack of privacy, separation from children and vulnerability to abuse in detention. We detailed these concerns in our earlier report, entitled *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers*.¹⁰³ The vulnerability of women to abuse in detention was confirmed by an August 21, 2003 report that an asylum seeker at the detention facility in Elizabeth, New Jersey was sexually assaulted by a guard at the facility.¹⁰⁴ Women who were detained at TKG reported incidents of sexual harassment and molestation by male trustees.¹⁰⁵

Detention of Children

There has been increased attention recently to the detention of children seeking asylum in the United States.¹⁰⁶ U.S. immigration authorities reportedly detain more than 5,000 unaccompanied minors each year, some of them asylum seekers.¹⁰⁷ Many are held in juvenile jails and shelters, others are locked up in motel rooms, although some children have been detained in adult jails and detention facilities.¹⁰⁸ In 2001 more than 80 percent of the nearly 2,000 children detained in secure facilities were non-delinquent juveniles.¹⁰⁹ Some of these children are asylum seekers who have experienced persecution against themselves or their family members and seek protection. Others have been smuggled into the country by human traffickers or smugglers.¹¹⁰

Guinean Teenager Detained for Nearly Three Years

Malik Jarno, a 16-year-old orphan from Guinea, arrived in this country in January 2001 in search of refuge. He was detained in a series of county jails and was initially detained with adults. The INS continued to maintain that he was an adult, based solely on dental and bone radiographs, even though his aunt gave U.S. authorities a copy of his birth certificate which confirmed his age. An immigration judge denied his application for asylum and Jarno filed appeals with the assistance of his *pro bono* attorneys. They also provided psychological evaluations that showed he functions in the mentally retarded range. His attorneys feared he would be deported despite his disability, his fear of return to Guinea and confirmation by an expert at the Guinea Health Office of the United States Agency for International Development that “Malik Jarno would face the almost certain prospect of a bleak and life-threatening future in Guinea, would have great difficulty finding people to care or provide for him, and would almost certainly be forced to live on the streets of Conakry if forced to return here.” On December 22, 2003, the Board of Immigration Appeals agreed to reopen Jarno’s case. After three years in detention, and much public pressure, DHS finally released Jarno the next day.¹¹¹

Many unaccompanied immigrant children lack the capacity to understand the legal proceedings against them and are not provided with an adult to look after their best interest. As a result, many of them are unable to avail themselves of the relief to which they may be entitled. In addition, those who have no immigration relief often languish for years in detention in circumstances that are completely inappropriate for children.¹¹²

When a teenaged asylum seeker arrives at a U.S. airport or border and states that he or she is under 18, immigration authorities often use dental examinations and x-rays to attempt to assess the teenager's age. The INS, and now the DHS, relies on these tests even when the asylum seeker presents documentation confirming that he or she is under 18.¹¹³ As a result, U.S. immigration authorities have classified children as adults and ordered them detained in adult jails – although the dental and x-ray tests employed have been criticized as flawed and unreliable by medical and dental experts.¹¹⁴ Even the U.S. Department of State has instructed its diplomatic and consular posts not to rely on radiological testing to determine age because “growth rates vary significantly in different populations” and there may be “significant differences between an individual’s chronological age and his/her bone age.”¹¹⁵

Although legislation enacted in 2002 transfers the care and custody of children to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services,¹¹⁶ the details of this transfer have not yet been resolved. Therefore, unaccompanied children seeking asylum are still at risk. Furthermore, the Homeland Security Act did not incorporate significant safeguards that were included in the proposed Unaccompanied Alien Child Protection Act of 2001. For example, children are still subject to these questionable age determination tests, to shackling and handcuffing, and to the use of solitary confinement – a practice that can be particularly harmful to psychologically vulnerable children. The legislation also did not provide for either pro bono legal representation for children or for the appointment of guardians *ad litem* to act in the best interest of the child.

Cost of Detention

The cost of jailing refugees who seek asylum here are significant. The DHS detention and removal budget is now over \$1 billion per year. According to the Department of Homeland Security, it costs over \$600 million to detain non-citizens each year.¹¹⁷ It is also estimated that it costs on average \$85 to detain a single person in immigration detention per day.¹¹⁸ It has been estimated that detaining asylum seekers costs taxpayers at least \$130 million per year.¹¹⁹ The current policy, which results in lengthy and unnecessary detention of refugees, is wasteful.

Impact on Ability to Win Asylum

The U.S. government does not provide funding for legal representation of asylum seekers. A study conducted by the Georgetown University Institute for the Study of International Migration, which analyzed U.S. government statistics, showed that asylum seekers are up to six times more likely to be granted asylum when they are represented. The Georgetown analysis also revealed that more than one out of three asylum seekers in immigration court lack legal representation. For detained asylum seekers, the situation is worse – more than twice as many detained asylum seekers lack representation when compared to non-detained asylum seekers in immigration proceedings.¹²⁰ Detained asylum seekers, particularly those who are being held in remote areas, are often far from legal service providers.

For those who cannot afford to pay for counsel, the availability of free legal assistance is limited.¹²¹ The need for representation far exceeds the limited resources of non-profit legal organizations. In addition, some attorneys must travel great distances to meet with their clients at jails and facilities located in remote or inaccessible areas. All of these factors limit the number of lawyers who are willing and able to take these cases.

Detained asylum seekers face greater burdens in attempting to prove their cases.¹²² The ability of a detained asylum seeker to gather documentation and locate and communicate with witnesses who could corroborate the facts of her claim is severely hampered by the very fact of detention.¹²³ Although telephones are available in detention facilities, she or he may not be able to afford a phone card or may be limited to collect calls, which some lawyers and non-profit organizations do not accept. The telephones are routinely located in large “pod” or “dorm” areas that may hold scores of other detainees, so that no meaningful degree of privacy is available to make calls to legal counsel or potential witnesses.¹²⁴ In addition, detained asylum seekers often have little or no meaningful access to up-to-date legal materials or country condition reports that are essential to the preparation of their cases.¹²⁵



Dialine Dorvil, 14, was detained for six months.

6. Alternatives to Detention – A Step Ahead, A Step Back

A number of programs, known as “alternatives to detention,” have been tested in the United States. These programs generally provide for release of individual detainees from jail with some additional measures to monitor the individual upon release, such as requiring the individual to report periodically to an immigration office. Despite the successful testing of pilot programs, and the authorization of some funding for these efforts, the U.S. government has not initiated nation-wide use of alternatives to detention.

The Department of Homeland Security has taken steps to begin an alternative to detention program in eight cities. It is not yet clear whether this will be a permanent initiative of the new Department, or if it is simply the result of the fact that Congress has authorized some funding. Concerns have been raised that in some cases, the DHS’s use of alternatives to detention has been directed at monitoring individuals who would have been released from detention anyway, rather than providing detained individuals with a true alternative to detention.

The Vera Supervised Release Model

A number of successful models of alternatives to detention have been tested in the United States. These models have demonstrated high appearance rates for asylum seekers – ranging from 93 percent to 96 percent – with significant cost savings for the U.S. government.

The most comprehensive model alternative program was a pilot project conducted by the Vera Institute of Justice in contract with the INS from 1997 to 2000. In this pilot program, which was called the Appearance Assistance Program, the Vera Institute supervised the release of asylum seekers and other non-citizens. In order to be released to supervision, participants were required to report regularly in person and by phone. Their whereabouts were monitored. Participants were also provided with information about the consequences of failing to comply with U.S. immigration laws. Participants in a less intensive program were given reminders of court hearings and were provided with legal information, and referrals to lawyers and other services.¹²⁶

The Vera Institute pilot project reported an appearance rate of 93 percent for asylum seekers released through its appearance assistance program. It also concluded that the cost of supervision was 55 percent less than the cost of detention. The Vera study found that: “[i]t costs the INS \$3,300 to supervise each asylum seeker who appears for hearings compared to \$7,300 for those detained.” Based on its research, the Vera study concluded that: “Asylum seekers do not need to be detained to appear for their hearings. They also do not seem to need intensive supervision.”¹²⁷

Another successful alternative model was coordinated by the Lutheran Immigration and Refugee Service (LIRS). Through that project, the INS released 25 Chinese asylum seekers from detention in Ullin, Illinois to shelters in several communities. The community shelters reminded participants of their hearings, scheduled check-ins with the INS, organized transportation and accompanied asylum seekers to their appointments. Nonprofit agencies also found *pro bono* attorneys for all of the asylum seekers who were released to the shelters. The project achieved a 96 percent appearance rate.¹²⁸

Funding for Alternatives Used Instead for More Detention?

Encouraged by the success of the Vera pilot project, the U.S. Congress allocated \$3 million for alternatives to detention during fiscal 2002.¹²⁹ But rather than developing broader supervised release programs similar to the Vera project, U.S. officials indicated they were contemplating spending the money on building new detention facilities and/or shelters. On August 16, 2002, Senators Leahy, Kennedy, Hatch, and Brownback, who had been instrumental in authorizing the funds, wrote to the Attorney General to stress that the funds were intended for Vera-like supervised release programs and to express their concern about “reports that the INS intends to use “\$3,000,000 earmarked for ‘alternatives to detention’ to build new detention centers or shelters”¹³⁰ When Congress re-authorized these funds for fiscal year 2003, it specifically directed that the “\$3,000,000 for alternatives to detention [be used to] promote community-based programs for supervised release from detention such as the Vera Institute for Justice’s Appearance Assistance Project or other similar programs. These funds shall not be available for new or existing detention facilities, including non-secure detention and/or shelter care detention facilities.”¹³¹

Ankle Bracelets for Asylum Seekers in Florida

In August 2003, the Department of Homeland Security (ICE) initiated a program in Miami, Florida through which asylum seekers were released from detention but subject to electronic monitoring devices (EMDs). The Women's Commission for Refugee Women and Children, the Florida Immigrant Advocacy Center, and the Lawyers Committee for Human Rights wrote to DHS Secretary Ridge to express concern about the use of these devices as a substitute for less intrusive parole options for asylum seekers. The groups noted that the devices could be useful in allowing for the release of individuals who would otherwise be detained.

Asylum seekers subject to the Miami program were not permitted to leave their homes for more than five hours, hampering their ability to meet with lawyers or to attend to medical or family matters. In one case, ICE authorities believed an asylum seeker had violated the requirements of the program when he left his home to appear for his immigration court hearing at the Krome Service Processing Center.¹³²

DHS Requests Proposals from Contractors To Run Intensive Supervised Release Projects in Eight Cities

The Department of Homeland Security (ICE) has solicited proposals from contractors for a new alternative to detention program called the Intensive Supervision Appearance Program (ISAP). The intensive supervision program is planned for 2004, and for 200 participants each year in eight cities: Baltimore, Maryland; Denver, Colorado; Kansas City, Missouri; Miami, Florida; Philadelphia, Pennsylvania; Portland, Oregon; San Francisco, California; and St. Paul, Minnesota.

It is not clear to what extent this program will be available to asylum seekers. DHS has said that at least some of the participants will be asylum seekers; others will be non-criminal aliens and aliens on "orders of supervision." The list of locations selected does not include New Jersey and New York – states with two of the largest U.S. detention facilities for asylum seekers.

Public interest organizations have voiced concerns about the ISAP program's proposed use of electronic monitoring devices for some individuals. There is also concern that the program – like the Miami monitoring device program – may be applied to immigrants who would otherwise be released from detention without supervision, instead of to detainees who would not otherwise be released. In response to these concerns, DHS has stated that it: "does not intend to utilize the ISAP to 'widen the net' for persons that would normally be released anyway. It is designed to improve appearance rates at immigration hearings for those persons that would otherwise be held in secure detention."



7. Recommendations

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. Asylum seekers should not be subject to automatic or mandatory detention, and should only be detained in those cases where detention is found to be necessary. The need for detention should be determined in a hearing before a judge or similar independent authority.

Thorough reform of the U.S. detention system for asylum seekers will take 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.

We have outlined below a series of significant changes that need to be made in order to improve U.S. detention practices. As a practical first step, Human Rights First (the new name of the Lawyers Committee for Human Rights) urges that the Department of Homeland Security make three changes that would help ensure the basic fairness of the asylum detention system:

- (1) First, create a new high-level refugee protection position in the Office of Secretary Tom Ridge.**
- (2) Second, give asylum seekers the chance to have their detention reviewed by an immigration judge, like other immigration detainees.**
- (3) Third, put the official parole criteria for asylum seekers into formal regulations.**

These three changes, on their own, will not magically transform the U.S. asylum detention system, but they will inject much-needed safeguards to help ensure that asylum seekers are treated fairly. Our comprehensive recommendations are detailed below.

Review by an Immigration Judge. Central to international and U.S. notions of fairness is the right to be able to challenge the decision to detain before a judge or other independent authority. Providing asylum seekers with the chance to have their detention in the United States reviewed by an independent judge will require action by both the Administration and by the U.S. Congress.

- **The Department of Homeland Security** should work with the Department of Justice 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 implement regulations establishing the right of asylum applicants to have parole decisions reviewed by an immigration judge.
- **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, if this change has not been made by federal regulations.

High-Level DHS Position. The Department of Homeland Security should create a senior position within the Office of the DHS Secretary, called Director of Refugee Protection. This person should be charged with ensuring that DHS meets its refugee protection obligations under U.S. and international law.

- The Director of Refugee Protection should report directly to the Secretary of Homeland Security and his or her chief of staff. The Director of Refugee Protection should have the authority to convene meetings among the different bureaus and issue recommendations to the Secretary and other senior DHS officials designed to ensure that the Department acts consistently with requirements of national and international law.
- This position should be filled by an experienced refugee protection expert with both a strong background in asylum law and refugee law, and an understanding of how the different DHS bureaus can work together to fulfill these legal obligations.

Other Safeguards within DHS. The Department of Homeland Security should also create these additional safeguards:

- **Asylum and Refugee Legal Standards.** DHS should devise a structure to ensure that the two immigration enforcement bureaus and other components of DHS

accurately and consistently apply the legal standards relating to asylum and refugee issues, and that the legal guidance of DHS (CIS) attorneys on these matters is followed throughout DHS. Individual ICE attorneys should report directly to, and be supervised by, asylum legal experts in CIS when they are handling asylum cases.

- **Expedited Removal and Inspections.** DHS should ensure adequate oversight of immigration inspections by senior officials within both CBP and CIS, including through a reinvigorated high-level working group on expedited removal and expanded training of inspectors by the asylum division.
- **Additional Detention Oversight Mechanisms.** DHS should also ensure that asylum specialists with legal and operational expertise in asylum matters have oversight regarding the detention of asylum seekers, even if they are located in other DHS bureaus, such as CIS. A working group on asylum detention issues should be created that would include officials from the DHS Secretary’s Office, DHS General Counsel’s office, ICE, CBP and CIS, modeled on the expedited removal working group, as well as quality assurance and appeals mechanisms.

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 appeals 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.
- Asylum seekers who are determined by immigration judges to be entitled to asylum or “withholding of removal” and present no risk to the community should be released.

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.

Improve Detention Conditions. 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 detention standards that will ensure this fundamental principle,

along with other important protections, is strictly observed. 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.

Children. DHS should ensure that asylum seekers under the age of 18 years 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. Senator Dianne Feinstein (D-CA) has introduced S 1129 The Unaccompanied Alien Child Protection Act of 2003 (S1129) and Representative Zoe Lofgren (D-CA) introduced a House version of the same bill, H.R. 3361, to address concerns relating to the detention of children that were not included in the Homeland Security Act.

Alternatives to Detention. When refugees seek asylum protection, the presumption should be that they not generally be detained. In cases where it is determined that some degree of supervision is needed, DHS should consider alternatives to detention, 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.

Release Detention Statistics. The Department of Homeland Security should publicly release accurate and current statistics regarding the number of asylum seekers in detention, the length of detention for asylum seekers, and rate of release of asylum seekers in compliance with US law.

Endnotes

¹ Statement of Rwandan asylum seeker, written in December 2001, on file with the Lawyers Committee. This asylum seeker, who was represented *pro bono* by volunteer lawyers through the Lawyers Committee, was later granted asylum.

² A popular account of the incident and recent research to establish the fate of the 937 passengers appears in Lyric Wallwork Winik, "The Hunt for Survivors of a Doomed Ship," *Parade Magazine*, December 7, 2003.

³ Statement of detained Iraqi asylum seeker, dated December 13, 2001, provided by her representatives at the Florida Immigrant Advocacy Center.

⁴ There are various reasons that some refugees resort to false documents. They may be stripped of their travel documents by their persecutors, and those who seek asylum are routinely denied visas. *See* INA § 235; Daniel Williams, "Macedonia Slows Flow of Incoming Refugees," *The Washington Post*, March 31, 1999 ("Many refugees have reported that Yugoslav authorities are stripping them of their passports and other personal documents...."). Even asylum seekers who arrive on valid passports have been subject to expedited removal when immigration inspectors decided that their visas are invalid – although facially valid – for instance if the individual had not departed the U.S. 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.

⁵ Eric Schmitt, "When Asylum Requests are Overlooked," *The New York Times*, August 15, 2001, at A6; John Moreno Gonzalez, "Amityville Woman Seeks \$8 Million in JFK Mix-Up," *Newsday*, July 12, 2000.

⁶ 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, on November 12, 2003, copy of minutes on file with LCHR.

⁷ Immigration and Nationality Act (INA) § 235(b)(1)(B)(v); INA § 235(b)(1)(B)(iii)(IV); INA § 212(d)(5)(A) (providing for parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" for an alien applying for admission); 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) ("[o]nce an alien has established a credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under section 240, release of the alien may be considered under normal parole criteria"); guidelines cited in Note 8, *infra*.

⁸ 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. In October 1998, the INS again explained in written guidance that "[a]lthough parole is discretionary in all cases where it is available, it is INS policy to *favor release* of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community" (emphasis added).

Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, "Detention Guidelines Effective October 9, 1998," October 7, 1998.

⁹ *See* December 1997 and October 1998 INS Guidelines, Note 8, *supra*.

¹⁰ 8 CFR. § 1003.19 (h)(2)(i)(B).

¹¹ While asylum seekers have tried to file federal court habeas petitions, it often takes months or longer for federal courts to decide a petition, making the effort pointless for many asylum seekers. Federal courts have in some cases refused to review INS parole determinations in the wake of the

1996 law, and in other cases have deferred to INS parole determinations as long as the INS cites a reason for its parole denial. *See Veerikathy v INS*, 98 Civ. 2591, 1998 U.S. Dist. LEXIS 19360 (E.D.N.Y. Oct. 9, 1998); *see also Bertrand v. Sava* 684 F.2d 204 (2d Cir. 1982); *Zhang v. Slattery*, 840 F. Supp. 292 (S.D.N.Y. 1994).

¹² *See* Lawyers Committee for Human Rights, *Review of States' Procedures and Practices Relating to Detention of Asylum Seekers*, September 2002, available at http://www.lchr.org/refugees/reports/cntry_rev_02/country_reps.htm. (LCHR Detention Survey 2002) Prepared with the *pro bono* assistance of the law firm Debevoise & Plimpton. In some countries, independent review may be provided for in legislation though it is not likely to occur in practice.

¹³ Unless otherwise noted, all information is taken from LCHR Detention Survey 2002, note 18, *supra*.

¹⁴ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Article 9(4) (entered into force March 23, 1976). (ICCPR)

¹⁵ *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)).

¹⁶ United Nations High Commissioner for Refugees (UNHCR), *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, 1999; *see also* UNHCR, Executive Committee, *Conclusion 44* (1986) ("detention measures taken in respect of refugees or asylum seekers should be subject to judicial or administrative review.").

¹⁷ United States Committee for Refugees, *World Refugee Survey 2003: Lithuania*, available at <http://www.refugees.org/world/countryindex/lithuania.cfm>.

¹⁸ *See* Refugee Council of Australia, *Facts*, available at <http://www.refugeecouncil.org.au/>.

¹⁹ For confidentiality reasons, the Pastor's name is not provided. He is represented by attorneys at the law firm Lowenstein Sandler SPC through the *pro bono* representation program of the Lawyers Committee for Human Rights.

²⁰ Lawyers Committee for Human Rights, *Refugees Behind Bars*, 1999, available at <http://www.lchr.org/pubs/descriptions/behindbars.htm>; Petition to the INS Seeking a Rule on Procedures for Parole of Detained Asylum Seekers, submitted to the INS and DOJ by the Lawyers Committee for Human Rights, January 1996 (Petition Seeking Rule on Parole); Frederick N. Tulskey, "Uncertain Refuge: Asylum Seekers Face Tougher U.S. Laws, Attitudes," *San Jose Mercury News*, December 10, 2000; Mirta Ohito, "Inconsistency at INS," *The New York Times*, June 22, 1998; Toby Beach & Peter Yost "INS Jailing Many Asylum Seekers," *The Boston Globe*, November 17, 1998, at A27.

²¹ *Id.*; *see also* Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (September 1998); Women's Commission for Refugee Women and Children, *Forgotten Prisoners: A Follow-Up Report on Refugee Women Incarcerated in York County*, July 1998.

²² *See* Ronald Smothers, "Asylum Seekers Testify on Abuse of Jail Guards," *The New York Times*, February 6, 1998; Elizabeth Llorente, "Asylum-Seekers Live in Jail-Like Conditions," *The Bergen County Record*, April 11, 1999 (Esmor "fueled a debate about the very idea of locking up asylum seekers..."); "The Lessons of Esmor," *The New York Times*, June 21, 1995, at A18; Ashley Dunn, "Jail Official Blames Revolt on Agency: Length of Stay is Cited in Immigrants Uprising," *The New York Times*, June 21, 1995, at B1.

²³ INS headquarters Detention and Deportation Division, *The Elizabeth, New Jersey Contract Detention Facility Operated by ESMOR Inc.: Interim Report*, at 54-55 (July 20, 1995). The report noted that a stronger APSO parole program would have served the goals of making appropriate use of detention space, while protecting the rights of credible asylum seekers.

²⁴ *See* Lawyers Committee for Human Rights, *Interim Report on the Pilot Parole Project of the Immigration and Naturalization Service*, November 1990; Lawyers Committee for Human Rights, *Problems in Implementation of the Asylum Pre-Screening Officer Program*, September 1994; LCHR *Refugees Behind Bars*, 1999; Lawyers Committee for Human Rights, *Refugee Women at Risk*, September 2002.

Lawyers Committee for Human Rights publications are available at <http://www.lchr.org>. See Petition Seeking Rule on Parole, Note 21 *supra*.

²⁵ 65 Fed. Reg. 82254-82256, "Clarification of Parole Authority," INS No. 2004-9965 (28 Dec. 2000) (The change was needed because "[s]ome have interpreted Sec. 212.5 [the relevant parole regulation] to mean that the authority to grant parole is limited to the DD [district director] and the CPA [chief patrol agent.]").

²⁶ For confidentiality reasons, the names of these refugees are not revealed here. The family was represented by the law firm of McCarter & English, LLP through the pro bono representation program of the Lawyers Committee for Human Rights.

²⁷ See 8 U.S.C. 1377 §§ 903 (b) and (c).

²⁸ Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States, May 17, 1999, at 48.

²⁹ LCHR *Refugees Behind Bars*, 1999 (Somali asylum seeker detained for 4 years before being granted asylum); Michael Clancy, "Nigerian Finally Wins Asylum After Long Fight," *The Herald News*, July 20, 2001 (Nigerian refugee granted asylum after 3 years and 4 months in detention); Dan Malone, "Man locked up for four years but convicted of nothing," *The Dallas Morning News*, April 1, 2001 (Sri Lankan Asylum seeker detained for four years); Chris Hedges, Immigrant Detained for 3 and 1/2 years Emerges from Labyrinth," *The New York Times*, November 6, 2000 (Congolese refugee granted asylum after 3 and 1/2 years in jails and detention facilities); Brent Walth, "Asylum Seekers Greeted With Jail," *The Oregonian*, December 10-15, 2001 (Liberian asylum seeker detained for 6 years, Chinese asylum seeker detained over 2 years, Sri Lankan asylum seeker detained for 4 years).

³⁰ Dan Mallone, "851 Detained for Years in INS Centers - Many are Pursuing Asylum," *The Dallas Morning News*, April 1, 2001.

³¹ *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct.249 (2001). "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the reasonably foreseeable future conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701.

³² 66 Fed. Reg. 56967 - 56982, "Continued Detention of Aliens Subject to Final Orders of Removal," Nov. 14, 2001 (excluding arriving aliens from regulations issued pursuant to *Zadvydas* decision).

³³ Viktor Odonvyun and Oleksiy Galushka are represented by volunteer attorneys through the *pro bono* representation program of the Lawyers Committee for Human Rights.

³⁴ Immediately after the September 11 attacks the refugee resettlement program was suspended for four months. In fiscal year 2002, the maximum number of refugees who could be resettled to the United States was dropped to 70,000. Even this lowered limit was not reached: "Refugee arrivals into the United States decreased from almost 69,000 in fiscal year 2001 to 27,000 in fiscal year 2002." Department of Homeland Security, *2002 Yearbook of Immigration Statistics: Refugees*, October 2003.

³⁵ 8 CFR § 212.5(a) (prohibiting parole of anyone who is a security risk). The 1997 INS Guidelines, note 8, *supra*, specify that parole is only a viable option for asylum seekers who meet certain criteria and "are not subject to any possible bars to asylum involving violence or misconduct." The 1997 INS Guidelines detail procedures to be followed if some concern arises that an individual may be a security risk, may be subject to a terrorist bar or may otherwise be a danger to the community. These procedures include an investigation and inquiries to the FBI and other appropriate agencies. The 1998 INS Guidelines, note 9, *supra*, provide that "it is INS policy to favor release of aliens found to have a credible fear of persecution, *provided that they do not* pose a risk of flight or *danger to the community*" (emphasis added).

³⁶ INA § 208(d)(5)(A)(i).

³⁷ INA § 208(b)(2) (amended by the US PATRIOT Act of 2001, Pub. L. No. 107-56 sec. 411 (b)).

³⁸ See INA § 236A (b); Lawyers Committee for Human Rights, *A Year of Loss: Reexamining Civil Liberties since September 11*, September 2002, at 17, available at http://www.lchr.org/pubs/descriptions/loss_report.pdf.

³⁹ This information was provided by the *pro bono* attorney at YMCA International Services in Houston, Texas, who represented her in connection with her parole application.

⁴⁰ Ms. Duckly was represented *pro bono* by the Hebrew Immigrant Aid Society.

⁴¹ Several studies (see note 44 below) have demonstrated that asylum seekers who are paroled appear for hearings at very high rates. A report of the General Accounting Office (GAO) issued in September 2001 concluded that the information that they examined indicated a 42 % rate of failure to appear. But several reviews of the GAO's conclusion have shown that the GAO's analysis was flawed. The Department of Justice's Executive Office for Immigration Review, noting that the GAO's study period of only one year and a half does not take into account the appearance rates of the many asylum seekers whose hearing dates are set further in the future, estimated that the actual non-appearance rate would be about 25%, while an academic study that analyzed the GAO's findings concluded that the failure to appear rate was actually 19%, and would drop further to 15% if it excluded individuals who had likely proceeded on to Canada, their original destination. General Accounting Office, *Illegal Aliens: Opportunities Exist to Improve the Expedited Removal Process* (Letter Report GAO/GGD-00-176), September 1, 2001, at 62 and 68; Center for Human Rights and International Justice University of California, Hastings College of the Law, *Evaluation of the General Accounting Office's Second Report on Expedited Removal: The Expedited Removal Study*, October 2000, available at <http://www.uchastings.edu/ers/>; see Lawyers Committee for Human Rights *Is This America? The Denial of Due Process to Asylum Seekers in the United States*, Lawyers Committee for Human Rights, October 2000, available at <http://www.lchr.org>.

⁴² An August 2000 Report issued by the Vera Institute of Justice noted a 91% appearance rate for asylum seekers released into a supervised program coordinated by Lutheran Immigration and Refugee Services, and a 1990 study conducted by the Lawyers Committee for Human Rights of the APSO pilot parole project indicated a compliance rate for scheduled appearances of 97% for asylum seekers paroled in New York through a "community process." Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume 1, August 2000, at ii; Lawyers Committee for Human Rights, *Interim Report on the Pilot Parole Project of the INS*, November 1990, at 21-22.

⁴³ 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 Security Web," *Miami Herald*, December 26, 2001; Jody Benjamin, "Mideast Detainees Await Freedom," *The South Florida Sun-Sentinel*, Dec. 8, 2001.

⁴⁴ Amnesty International, *Amnesty International's Concerns Regarding post September 11 detentions in the USA*, March 2002 (AI Index: AMR 51/044/2002); Jim Edwards, "Attorneys Face Hidden Hurdles," *New Jersey Law Journal*, Dec. 3, 2001.

⁴⁵ Jody A. Benjamin, "Iraqi Refugees Cleared by FBI Could Still Face Deportation," *South Florida Sun-Sentinel*, December 12, 2001.

⁴⁶ Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, June 2003, p. 69, available at <http://www.usdoj.gov/oig/special/03-06/index.htm>.

⁴⁷ *Id.*, p. 35.

⁴⁸ *Id.*, p. 158.

⁴⁹ Office of Inspector General, U.S. Department of Justice, *Analysis of Responses by the Department of Justice and Department of Homeland Security to Recommendations in the OIG's June 2003 Report on the*

Treatment of September 11 Detainees, September 5, 2003, p. 2, available at <http://www.usdoj.gov/oig/special/03-06/analysis.htm>.

⁵⁰ Review of Custody Determinations, 66 Fed. Reg. 54909 54909-54912 (2001).

⁵¹ 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> (accessed March 7, 2003).

⁵² DHS Under Secretary for Border & Transportation Security Asa Hutchinson, Referral of Decision to the Attorney General, March 20, 2003.

⁵³ *In re D-J*, 23 I & N Dec. 572 (A.G. 2003), at 579.

⁵⁴ *Id.*

⁵⁵ *Id.* at 579.

⁵⁶ *Id.* at 580.

⁵⁷ *Id.* at 581. David Joseph was represented in his bond proceedings by the Florida Immigrant Advocacy Center.

⁵⁸ The DHS Press Kit on Operation Liberty Shield is available at <http://www.dhs.gov/dhspublic/display?content=520>.

⁵⁹ The press statement issued by Secretary Ridge on March 18, 2003 is available at <http://www.dhs.gov/dhspublic/display?content=519>.

⁶⁰ The press briefing made by Secretary Ridge on March 18, 2003 is available at <http://www.dhs.gov/dhspublic/display?content=525>.

⁶¹ Convention Relating to the Status of Refugees, Introductory Note; UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*, February 1999, Paragraph 5; International Covenant on Civil and Political Rights, Article 26.

⁶² The policy has been criticized by Amnesty International USA, Catholic Legal Immigration Network, the Episcopal Migration Ministries, the Ethiopian Community Development Council, the Hebrew Immigrant Aid Society, Human Rights Watch, the Lawyers Committee for Human Rights, the Lutheran Immigration and Refugee Service, the National Asian Pacific American Legal Consortium, the US Committee for Refugees, the US Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children.

⁶³ Statement of Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, Chairman, USCCB Committee on Migration, on Operation Liberty Shield, March 20, 2003.

⁶⁴ "UNHCR Appeals for Protection of Asylum-Seekers in the United States," March 20, 2003.

⁶⁵ See Stacey Stowe, "Holding Those Who Face Deportation," *New York Times*, September 17, 2003; Matt Apuzzo, "Illegal immigrants in Connecticut arrested before appeals as part of Homeland Security pilot program," *Associated Press*, September 16, 2003. See also Lawyers Committee for Human Rights, "Asylum Protection News 19: New DHS Initiatives Impact Asylum Seekers and Detention; Lawyers Committee Releases Report on US Law and Security," available at http://www.lchr.org/asylum/torchlight/newsletter/newslet_19.htm.

⁶⁶ "[O]ur nation's security demands that our immigration laws be enforced efficiently, fairly and without delay. In the wake of the September 11th occurrences of last year, such concerns rise to a new level of importance. Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process." Attorney General Transcript, "News Conference - Administrative Change to Board of Immigration Appeals," Department of Justice Conference Center, February 6, 2002, available at

<http://www.usdoj.gov/ag/speeches/2002/020602transcriptadministrativechangetobia.htm>.

⁶⁷ See 8 CFR §1003.1 (2003); see also Department of Justice Press Release, "Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures," August 23, 2002, available at http://www.usdoj.gov/opa/pr/2002/August/02_eoir_489.htm.

⁶⁸ *Id.*

⁶⁹ These decisions, along with other information obtained by the law firm pursuant to a FOIA request, will be the subject of a forthcoming report about the due process effects of the streamlining regulations on asylum seekers in the United States.

⁷⁰ See American Bar Association Commission on Immigration Policy, Practice & Pro Bono, "Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms," available at <http://www.abanet.org/immigration/bia.pdf>.

⁷¹ Information received from the Executive Office for Immigration Review in the summer of 2003 through a Freedom of Information Act request filed by the law firm Jones Day on December 19, 2002. For confidentiality reasons, the name of the asylum seeker was not provided.

⁷² A November 2001 INS memorandum concerning several matters including parole stated that "[d]uring the nation's heightened security alert and until further notice, District Director (or other specified) approval is required in order to parole aliens or take certain other actions." The memorandum states that: "discretion should be applied only in cases where inadmissibility is technical in nature (i.e., documentary or paperwork deficiencies), or where the national interest, law enforcement interests, or compelling humanitarian circumstances require the subject's entry in the United States...." However, the memorandum also explicitly states that the guidance does not change existing statutory and regulatory standards for parole. Memorandum from INS Executive Associate Commissioner Michael D. Cronin, "Deferred Inspection, Parole and Waivers of Documentary Requirements," November 14, 2001, reprinted in *Interpreter Releases*, no. 79, vol. 49, January 7, 2002.

⁷³ For instance, the number of asylum seekers referred for credible fear interviews during fiscal year 2003 is only 6,000 as opposed to 10,000 the year before. The number of affirmative (non-detained) asylum seekers has declined to 43,339 in fiscal year 2003 from 58,439 during the prior fiscal year. See note 7, *supra*; Department of Homeland Security, "Asylum Applications Filed with the US Citizenship and Immigration Services, FY 2003," November 10, 2003, on file with the Lawyers Committee for Human Rights. (Note that the statistics provided regarding affirmative asylum applications include people arriving from Mexico.)

⁷⁴ This information was provided to the Lawyers Committee by Heartland Alliance's Midwest Immigrant & Human Rights Center, which assisted the asylum seeker.

⁷⁵ Correspondence and Memorandum from Heartland Alliance's Midwest Immigrant & Human Rights Center to Lawyers Committee for Human Rights, November 2003.

⁷⁶ Correspondence from Freedom House to Lawyers Committee for Human Rights, October 29, 2003, and September 24, 2003.

⁷⁷ Correspondence from Minnesota Advocates for Human Rights to Lawyers Committee for Human Rights, October 7, 2003.

⁷⁸ Correspondence from Florida Immigrant Advocacy Center to Lawyers Committee for Human Rights, November and December, 2003.

⁷⁹ Correspondence from Lawyers Committee for Civil Rights to Lawyers Committee for Human Rights, December 3, 2003.

⁸⁰ Correspondence and discussions with Women's Commission for Refugee Women and Children and Lawyers Committee for Human Rights, December 2003.

⁸¹ Interview with Volunteer Lawyers Project by Lawyers Committee for Human Rights, December 17, 2003.

⁸² Correspondence between YMCA International Services, Houston, Texas, and Lawyers Committee for Human Rights, June 23, 2003; updated by conversation with lawyer at the Immigration Clinic of the University of Houston Law Center, December 17, 2003.

⁸³ For confidentiality reasons, "Peter" is not the real name of this asylee. He is represented by Jeffrey Martins through the Lawyers Committee for Civil Rights of the San Francisco Bay Area's *pro bono* representation program.

⁸⁴ Letter from Catholic Legal Immigration Network, American Friends Service Committee, Hebrew Immigrant Aid Society, and Lawyers Committee for Human Rights to John Carbone, Field Office Director of DHS/ICE for New Jersey, dated December 4, 2003.

⁸⁵ See Lawyers Committee for Human Rights, "Asylum Protection News 20: Asylum Seekers Protest Detention with Hunger-Strike: Complaints Included Length of Detention, Unfair DHS Parole Policies, and Jail-like Conditions," available at

http://www.lchr.org/asylum/torchlight/newsletter/newslet_20.htm; Elizabeth Cady Brown, "Detainees Hold Hunger Strike," *Newsday*, October 25, 2003; Elizabeth Cady Brown, "Hunger Strike in Second Week," *Newsday*, October 29, 2003.

⁸⁶ Correspondence and Memorandum from Heartland Alliance's Midwest Immigrant & Human Rights Center, Chicago, Illinois, to Lawyers Committee for Human Rights, November 2003.

⁸⁷ Marisa Taylor, "Background Check for asylum seekers," *San Diego Union-Tribune*, Aug. 15, 2002

⁸⁸ *Id.*

⁸⁹ Department of Homeland Security, *2002 Yearbook of Immigration Statistics: Enforcement*, 2003, available at <http://uscis.gov/graphics/shared/aboutus/statistics/ENF2002.pdf>.

⁹⁰ 8 U.S.C. 1377 §§ 903-904; *Frederick N. Tulsky, Asylum Seekers Face Tougher U.S. Laws, Attitudes* (INS lacks precise data on detained asylum seekers; regarding failure to comply with statute requiring that INS report data: "An INS spokesman said that complying with the law would drain resources from other mandated responsibilities.").

⁹¹ See note 6, *supra*.

⁹² Michele R. Pistone and Philip G. Schrag, "The New Asylum Rule: Improved but Still Unfair," 16 *Georgetown Immigration Law Journal* 1 (Fall 2001): 49, n. 272 & n. 273 (citing numerous medical reports, including, Neal R. Holtan, *Survivors of Torture*, 114 *Pub. Health Rep.* 489 (1999); Derrick Silove, et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations With Pre-Migration Trauma and Post-Migration Stressors*, 170 *British J. Psychiatry* 351, 351-57 (1997); Hans Thulesium and Anders Hakansson, *Brief Report: Screening for Post-Traumatic Stress Disorder Symptoms Among Bosnian Refugees*, 12 *J. Traumatic Stress* 167, 171-73 (1999)).

⁹³ Elizabeth Llorente, "Dreams Turn to Despair," *The Bergen County Record*, May 24, 1999 (quoting Dr. Beverly Pincus, director of Cross-Cultural Counseling Center at the International Institute of New Jersey).

⁹⁴ Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers," June 2002.

⁹⁵ Department of Homeland Security, "Detention Operations Manual," 2001, available at <http://uscis.gov/graphics/lawsregs/guidance.htm>.

⁹⁶ Letter to Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs Carl Levin from Governmental Affairs Office Director Carl Levin dated November 13, 2001, available at <http://www.abanet.org/poladv/letters/107th/immigration111301.html>.

⁹⁷ Jean Pierre Kamwa was represented by the asylum law clinic of New York University Law School through the pro bono representation program of the Lawyers Committee for Human Rights. This information was provided to Lawyers Committee for Human Rights by Mr. Kamwa.

⁹⁸ See note 84, *supra*.

⁹⁹ Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers," June 2002.

¹⁰⁰ Women's Commission for Refugee Women and Children, *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center*, October 2000, at 1.

¹⁰¹ Alfonso Chady, "Activists Accused the INS of Mistreating Female Refugees at the TGK Center," *The Miami Herald*, February 8, 2001; Women's Commission for Refugee Women and Children, *Innocents in Jail: INS Moves Refugee Women from Krome to Turner Guilford Knight Correction Center*, June 2001, at 2.

¹⁰² Statement taken from interview of Ugandan Pastor detained at Elizabeth Detention Center in New Jersey on December 16, 2003. The Pastor is represented by the law firm Paul Weiss Rifkind Wharton & Garrison LLP through the pro bono representation program of the Lawyers Committee for Human Rights.

¹⁰³ Lawyers Committee for Human Rights, *Refugee Women at Risk*, September 2002.

¹⁰⁴ Brian Donohue, "Immigration Guard Held in Sex Attack," *Star Ledger*, August 21, 2003.

¹⁰⁵ See note 105, *supra*.

¹⁰⁶ Alan Elsner, "Congressmen Protest INS Treatment of Retarded Boy," *Reuters*, March 27, 2002.

¹⁰⁷ See Amnesty International, "Why am I Here?: Children In Detention," June 2003, at p. 1, on file with Lawyers Committee for Human Rights, citing to U.S. Department of Justice and Naturalization Service, INS Office of Juvenile Affairs Fact Sheet, August 1, 2001.

¹⁰⁸ Alan Elsner, "New York Dentists Can Settle Fate of Migrants," *Reuters*, Jan 11, 2002; Chris Hedges, "Crucial INS Gatekeeper: The Airport Dentist," *The New York Times*, July 22, 2001.

¹⁰⁹ *Ibid* p. 21 n. 86.

¹¹⁰ *Ibid*.

¹¹¹ Jarno has been represented *pro bono* by Latham & Watkins LLP, Holland & Knight LLP, and Jones Day, which have donated thousands of hours in his complex case. Information provided by his *pro bono* attorneys. For more information on children in detention see Amnesty International, "Why am I Here?": *Children In Detention*, June 2003 at p. 7, available at http://www.amnestyusa.org/refugee/children_detention.html.

¹¹² See Christopher Nugent and Steven Schulman, *Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children*, 78 No. 39 Interpreter Releases 1569 (2001); Jacqueline Bhabha and Wendy A. Young, *Through A Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 No. 21 Interpreter Releases 757 (1998); Remarks of Robert E. Hirshon, President of the American Bar Association made at the Immigration Judges Conference, San Juan, Puerto Rico, June 6, 2002 available at <http://www.hrw.org/reports98/ins2/index.htm#TopOfPage>.

¹¹³ See Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996). (Flores)

¹¹⁴ See Eliza Amon, "Access Denied, Children in INS Custody Have no Right to a Lawyer," *The National Law Journal*, April 12, 2001; Nalton F. Ferraro, Public Comment on Proposed Rule at 64 FR 39759 (INS No. 1906-98), sent to Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service March 12, 2002); Physicians for Human Rights and the NYU/Bellevue Center for Survivors of Torture, "From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers," June 2002, at Appendix A; C.F.A. Moores, E.A. Fanning, E.E. Hunt, Jr., *Age Variation of Formation Stages for Ten Permanent Teeth*, 42:6 Journal of Dental Research (November - December 1963), at 1490 (explaining the distinction between "dental age" and "chronological age").

¹¹⁵ See State Dept. Cable No. 98-State-096341 (May 29, 1998) reprinted in *Interpreter Releases* June 29, 1998 at 883)

¹¹⁶ Homeland Security Act of 2002, Pub. L. 107-296 (H.R. 5005), signed into law by President George W. Bush on November 25, 2002.

¹¹⁷ See http://www.bice.immigration.gov/graphics/about/contact/con_dro.htm#office, last accessed November 22, 2003.

¹¹⁸ Office of the Federal Detention Trustee. See <http://www.usdoj.gov/ofdt/statistics.htm>

¹¹⁹ Brent Walth, *Asylum Seekers Greeted with Jail*, THE OREGONIAN, Dec.10-15, 2001; Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* 66 (Vol I, August 2000).

¹²⁰ Asylum Representation, Summary Statistics, prepared by Dr. Andrew I. Schoenholtz, Director of Law and Policy Studies, Institute for the Study of International Migration, Georgetown University, May 2000.

¹²¹ See, e.g., Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States*, note 26, *supra*, at 63-68.

¹²² See “Brief of Amicus Curiae the Lawyers Committee for Human Rights in Support of Petitioners-Appellants and Reversal of the District Court’s Decision,” available at http://www.lchr.org/asylum/amicus/haitian_am_brief.pdf; see also Letter from UNHCR Regional Representative, to Senator Spencer Abraham, Senate Sub-Committee on Immigration, dated September 15, 1998.

¹²³ *Mulanga v. Ashcroft*, 349 F.3d 123, 136 (3rd Cir. 2003). (“It seems all the more unreasonable to require corroboration given that Mulanga had been away from her home for a four-year period before her hearing and she had been in INS detention since her arrival in New York in July 2001.”)

¹²⁴ Michele Pistone, “Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers,” *Harvard Human Rights Journal*, Vol. 12, Spring 1999, at 218. (“Being in detention frustrates asylum seekers’ ability to work efficiently with their representatives. Detained asylum seekers are not able to locate witnesses, gather evidence, or otherwise assist their attorneys in case preparation.”)

¹²⁵ *Ibid.*, at 219-20.

¹²⁶ Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume 1, August 2000, at 2.

¹²⁷ Vera Institute of Justice, *Testing Community Supervision for the INS*, at iii, 8, 27, 31; Christopher Stone, “Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project,” *Georgetown Immigration Law Journal*, Spring 2000 at 283, 285.

¹²⁸ Esther Ebrahimian, “The Ullin 22: Shelters and Legal Service Providers Offer Viable Alternatives to Detention,” *Detention Watch Network News*, August/September 2000, at #8.

¹²⁹ See Senate Appropriations Report, Report 107-42, “Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, 2002, P.L. 107-77, pg. 40.

¹³⁰ See Letter from Senator Leahy, Senator Hatch, Senator Kennedy and Senator Brownback to Attorney General Ashcroft, August 16, 2002, on file with LCHR.

¹³¹ See House Judiciary Committee Report, H.Rpt. 108-10, (report accompanying H.J. Res. 2, Omnibus Appropriations Bill of 2003), p. 626.

¹³² *Id.*



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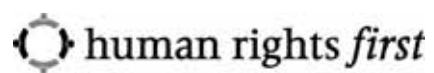
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