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# UNITED STATES OF AMERICA

## Lost in the labyrinth: detention of asylum-seekers

### CHAPTER 1: SUMMARY

#### Unfair and unworkable

*"As we now criticize Macedonia and others for not living up to international norms on the treatment of refugees, it is time we recognize that our law is unfair and unworkable. Under our law, if Kosovar refugees reach our shores to escape persecution, they would quite possibly find themselves on the next plane home, wherever home is. They could be expelled summarily without a hearing, if they come here without proper documents, which the 1996 law made conditional for admissions. How many Kosovar refugees have a valid visa or passport? We have watched on CNN as Serbian police have systematically confiscated and destroyed the ethnic Albanians' identification papers. How likely would it be for Kosovar refugees, not fluent in English and distrustful of authority, to utter the magic words, 'political asylum' upon their first meeting with American immigration authorities?"*  
US Senator Patrick Leahy, May 1999

Everyone has the right to seek and to enjoy asylum if they are forced to flee their country to escape persecution. The USA accepts this principle -- it was one of the main architects of the international system of refugee protection. Yet although the USA has agreed to be bound by international standards to protect refugees,<sup>1</sup> US authorities violate the fundamental human rights of asylum-seekers.

Asylum-seekers who arrive without proper documents are held behind bars in the USA. They are often detained indefinitely on grounds beyond those allowed by international standards. Many are confined with criminal prisoners, but unlike criminal suspects, are frequently denied any opportunity of parole (release). They are held in conditions that are sometimes inhuman and degrading. Asylum-seekers detained in the USA have often been treated like criminals: stripped and searched; shackled and chained; sometimes verbally or physically abused. Many are denied access to their families, lawyers and non-governmental organizations (NGOs) who could help them.

International standards provide that no one should be returned to a country

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<sup>1</sup>The USA acceded to the 1967 Protocol to the 1951 UN Convention relating to the Status of Refugees (1951 Refugee Convention), by which it undertook to apply Articles 2 to 34 of the 1951 Refugee Convention, in 1968. In 1980 Congress amended the Immigration and Nationality Act, which governs immigration and refugee issues, to bring it into line with the 1967 Protocol. However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) significantly revised the Immigration and Nationality Act.

where they would be at risk of serious human rights abuses. They require that the detention of asylum-seekers should normally be avoided. If detention is necessary, this should be demonstrated by means of a prompt, fair individual hearing before a judicial or similar authority. The decision to detain should be reviewed regularly by an independent body. Asylum-seekers should be advised of the reasons for their detention, of their rights and release options, and of access to assistance. They should be distinguished from other detainees and held only in conditions appropriate to their status as people seeking international protection. US laws, policies and practices consistently fail to meet these standards.

Over the last several years Amnesty International has visited dozens of jails, Immigration and Naturalization Service (INS)<sup>2</sup> facilities and detention centres run by private corporations. The organization has interviewed or corresponded with scores of government officials and NGO personnel who seek to assist asylum-seekers. This report also draws on information provided to Amnesty International by asylum-seekers in thousands of requests for assistance sent to Amnesty International USA's Refugee Office. Amnesty International has also received information from several INS personnel, other government officials and some local jail officials.

Amnesty International has concluded that the structure, rules and apparent priorities of the INS fail to meet the needs of people who seek protection from persecution in other countries.

The INS detention system is seriously flawed. Until and unless key US officials recognize their country's obligations under international law and take steps to change that system radically, abuses such as those which Amnesty International has outlined in this report will inevitably continue.

### **Just another statistic: asylum-seekers in detention**

The INS, part of the Department of Justice, is responsible for the detention of thousands of people in detention centres and jails throughout the USA. Among them are an unknown number of asylum-seekers.

Faced with a US court order to inform asylum-seekers from El Salvador about their rights to seek asylum, an INS official asked to give information to people of other nationalities refused, saying that "to do that would be a sign of weakness".<sup>3</sup>

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<sup>2</sup>The INS forms part of the Department of Justice, a division of the Executive Branch of the US government. Its duties include enforcing US immigration laws, patrolling US borders, and making asylum determinations.

<sup>3</sup>Conversation between former INS District Director in Miami and Nicholas J. Rizza of Amnesty International USA, 23 May 1989.

This comment aptly characterizes the INS's record in dealing with asylum-seekers: its weakness in protecting the rights of refugees. The INS detention system remains ignorant of, or indifferent to, asylum-seekers' rights. The INS is unable to set, let alone enforce, meaningful detention standards which reflect its stated national policy towards asylum-seekers. The INS does not equip its own officials to distinguish the agency's legitimate enforcement duties from its obligations towards refugees. It is a deeply disturbing "sign of weakness" that INS personnel might consider explaining rights to asylum-seekers as a courtesy rather than as an obligation rooted in international law.

The INS has more recently permitted non-governmental organizations (NGOs) to make "know your rights" presentations to detainees in some of its facilities. In one reported instance, the INS has funded such presentations. There have been gestures of reform to the detention system and guidelines have been issued, but nothing has essentially changed for asylum-seekers caught in the INS detention system.

Amnesty International's concerns about US detention practices cover both the circumstances in which the INS decides to detain asylum-seekers and the conditions under which it holds them.

Many INS officials, particularly those in its leadership, *are* concerned with the needs of asylum-seekers who face detention after reaching the USA. But they appear hampered by an enforcement culture in the agency which represents asylum as a ploy used dishonestly by people trying to gain access to the country. The problem of "mixed flows" of asylum-seekers and other immigrants exists in many parts of the world, with an increase in abuse of asylum programs by would-be immigrants. Few countries, however, seek to resolve this problem by locking people up for great lengths of time, with no effective manner of gaining release from detention.

The problem remains stubbornly consistent: there are no national, enforceable standards controlling the actions of government officials who control the lives of thousands of men, women and children who have the right to access a system which can offer them needed protection from human rights abuses in other countries. Asylum-seekers are all too often held in ignorance and isolation, with people who have been convicted of crimes, and under arbitrary, confusing and changing rules.

There is no coherent national data provided by the INS on asylum-seekers in its custody. Basic information such as country of origin, gender, length of detention, reasons for release and, most importantly, transfer records are not available. There is no effective system for tracking the whereabouts of asylum-seekers in detention and

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refugee advocates have reported that their clients were “lost” in the system.

Asylum-seekers are shunted from one facility to another, across state lines, without any explanation other than that their bed space is needed. There is no effort to keep them near their families or their legal representatives. There is also some evidence that “troublesome” detainees are taken from INS facilities and put into local or county jails as a form of punishment.

### **The INS detention labyrinth**

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) makes the detention of asylum-seekers who arrive without proper documents mandatory until they have established a credible fear of persecution. Since the introduction of the IIRIRA, the number of those detained under the authority of the INS has risen sharply, and it is estimated that currently there are approximately 13,500 INS detainees, among whom are an unknown number of asylum-seekers.

The IIRIRA includes expedited removal provisions to summarily return at ports of entry those seeking to enter the USA without documents or with visas believed to be false or obtained on the basis of misrepresentations. The expedited removal provisions of the IIRIRA fundamentally weaken the rights previously enjoyed by those seeking to enter the USA. Even those refugees who manage to convince an inspecting officer at a port of entry that they fear returning to their country face mandatory detention. The use of expedited removal procedures and detention because a refugee uses false documents is ironic, since the use of restrictive measures such as visa requirements and carrier sanctions by industrialized states has effectively forced refugees to use such means in order to reach a place of safety.

If asylum-seekers establish a “credible fear” of persecution, and are therefore not subject to the expedited removal procedures, they still find themselves forced to navigate the INS detention system. The USA gives almost absolute authority to detain asylum-seekers to INS District Directors.

INS memoranda and the agency’s Commissioner have stated that the agency wishes to avoid the “needless detention of asylum-seekers” and that such people are a low detention priority. Nevertheless, District Directors are apparently not required to give written reasons for keeping asylum-seekers in detention and can ignore the above directives at will. They may not respond at all to requests for parole from asylum-seekers or their attorneys.

There are limited circumstances in which international standards provide that

asylum-seekers may be detained. But as the US system stands now, one official can keep a person who has committed no crime (save to flee for their life) in jail for months or years. The discretion allowed single individuals in effect to try, judge and sentence a person to jail can never produce a system that respects asylum-seekers' rights. Amnesty International knows of no other instance in US law or procedure where one man or woman has the power to imprison another with no effective review of his or her decision.

R. B. a young man who attempted suicide while spending 10 months in an INS detention facility in Texas, expressed profound dismay at his incarceration. He spent his first 10 days in the USA in a county jail and was handcuffed while being transferred to the INS facility. He was not allowed the assistance of a lawyer when he appeared before an Immigration Judge, was verbally threatened and was forced to stand for hours when he refused to sign a travel document because it was "better to be in jail here than to go to Liberia".

When Amnesty International interviewed him after his release from detention, he was perplexed: "I thought that when you came to a country, that if you told them you were a refugee and surrendered, that you would be okay. I don't understand why they did this to me." He kept asking why he had been detained in a country where he believed people's rights were respected.

Those in charge of facilities in the INS detention system rarely know how many aliens<sup>4</sup> in their custody are asylum-seekers. They do not receive information from the INS as to how asylum-seekers should be treated under international standards.

When asked about a jail's refusal in 1998 to allow an asylum-seeker to receive human rights information through the mail, an INS official responded "I don't know, sometimes I have to walk mail over there myself". The asylum-seeker was unrepresented by counsel and his only apparent source of assistance was an Amnesty International member who sent him the packet of information, which included the Universal Declaration of Human Rights. The man was denied asylum and deported.

Some detained asylum-seekers receive information about their rights and have adequate access to the outside world, with those who wish to help them allowed opportunities to visit. Most often, however, the INS holds asylum-seekers in isolation, sometimes in conditions designed for the most dangerous of criminal offenders. Advocates have little, if any, effective access to them. The INS may keep

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<sup>4</sup>US legislation uses the term "alien" to denote various types of non-citizens, including asylum-seekers. Amnesty International describes those who claim asylum as asylum-seekers, and those who have been granted recognition as refugees.

them in a prison-like setting despite mental or physical illness, with no consideration of the circumstances that prompted their flight to seek protection.

Many asylum-seekers find themselves held under these conditions for months before their asylum claim is heard, with rules governing their behavior changing each time they are transferred to a new facility, and *no* rules covering the frequency of their transfers nor how far away they are sent. The INS may jail them for months (in one case recorded in this report for over a year) *after* they are granted asylum, while INS attorneys (from the same jurisdiction that jails them) appeal against the granting of asylum. INS officials may refuse to release asylum-seekers even though an Immigration Judge has determined that they meet the definition of a refugee, a person the USA is bound by treaty to protect.<sup>5</sup>

The INS has recently issued guidelines setting out standards for conditions of detention of all aliens. These are weak, limited in application -- they exclude jails -- and are not enforceable. They represent something positive only to the extent that they have created opportunities for dialogue with local and national INS officials. But opening dialogue with NGOs and publication of unenforceable standards do not suffice to meet US treaty commitments. The US government, rather than NGOs, bears the obligation to ensure that asylum-seekers' rights are respected. When a person is deprived of their liberty, a fundamental human right is suspended. In these circumstances, reform through such dialogue is no substitute for the establishment of judicial review and enforceable regulations.

### **International standards flouted**

*"We can't charge the [New Orleans] sheriff with protecting asylum-seekers' rights"*  
-- Acting District Director of New Orleans INS District, 1998, speaking of problems for asylum-seekers jailed in the Orleans Parish Prison.

When dealing with asylum-seekers, the USA appears prepared to disregard domestically basic human rights which it purports to defend internationally.

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<sup>5</sup>"...the Service [the INS] is **only** bound **not** to remove the alien to the country that the alien claimed threatened his or her life or freedom." Letter to Amnesty International from an INS District Director, 12 February 1999 [emphasis his]. Two people who had been granted "withholding of removal" status by an Immigration Judge, in recognition of the fact that they faced serious danger if returned, remained in INS detention. The District Director's response to Amnesty International was to suggest that he could hold them indefinitely. The only obligation the District Director admitted was not to send them to the countries designated by the Judge, although he did not indicate how he could send them elsewhere nor when, if ever, they would be released. People granted "withholding" status can work in the USA and reside there until it is safe for them to return to their country of origin.  
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Sources of international law relating to the detention of asylum-seekers and to the deprivation of liberty include the 1951 UN Convention relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child. In addition, detailed safeguards for the rights of those in detention and the duties of governments are found in non-treaty standards adopted by consensus by UN member states. These include the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules); the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Measuring US detention law and practices against the fundamental human rights of asylum-seekers reveals that the USA does not respect the spirit of agreed international norms for the detention of refugees and, in particular instances, violates the letter of these standards. As a general principle asylum-seekers should not be detained. The use of detention by the USA is a disproportionate and harsh measure in the pursuit of its immigration control objectives.

Freedom from arbitrary detention is a fundamental human right. In the USA the decision to continue the detention of an asylum-seeker is sometimes arbitrary. It may rest on factors such as the availability of detention places and the attitude of the official involved, rather than on an objective assessment of whether detention is actually necessary and justified in the individual case. US law does not provide for a real review of the decision to continue detention. Decisions on parole are delegated to District Directors and are not subject to any effective review.

Under international standards, detained asylum-seekers have the right to contact legal counsel, relatives and others. Yet in the USA detained asylum-seekers face problems with all forms of access, including access to legal counsel, access to other visitors, phone calls, ability to send and receive correspondence, access to newspapers and television, access by NGOs and by other caregivers. Many asylum-seekers in detention are cut off from their families, legal representation and the support of NGOs. The net result is that they are denied access to justice.

Amnesty International is also concerned about the lack of accountability of the INS and the Department of Justice in an administrative structure which delegates authority without any central or independent oversight. Even if there was a regular program of inspection of detention facilities, the INS does not honour the internationally recognized requirement that there be a separation between the authority which inspects facilities and that which is in charge of running the facility. The INS essentially inspects itself with regard to its own facilities, and fails to hold local and county jails to appropriate standards for the detention of asylum-seekers on the grounds that INS detainees are "guests" there.

Asylum-seekers and refugees are not only deprived of their liberty, they are sometimes held in conditions that amount to cruel, inhuman or degrading treatment. In some facilities detainees rarely see natural daylight and the food provided violates deeply held religious beliefs. Asylum-seekers are frequently detained in shoddy temporary shelters or in centres run by private companies that may be less well regulated by the authorities than jails. Detained asylum-seekers do not know how long they will be held and are in fear that they may be sent back to their persecutors. Torture victims in particular may suffer further trauma through the psychological stress of detention.

Much remains to be done if the USA is to meet its treaty commitments towards asylum-seekers. The duty on the US government is particularly high: many other asylum host countries look to it for leadership and it is highly influential in the international forums where refugee standards are set. This report sets out a series of recommendations aimed at bringing US policy and practice into line with international standards.

## CHAPTER 2: THE RECENT DEVELOPMENT OF THE SYSTEM

### Introduction

*“Expectations among governments are lowered when the traditional leaders in setting standards of due process and generosity lower their own standards... the international community (consequently) has begun to acquiesce in a new solidarity. Not a solidarity based on burden sharing and equity, but one that takes on more the character of an alliance against a common enemy: refugees and asylum-seekers.”*<sup>6</sup>

The USA was one of the principal architects of the international system of refugee protection and is still a country whose government and public have contributed generously to humanitarian assistance funds to refugees outside its borders.<sup>7</sup> Its record was sullied by actions towards Central American and Caribbean refugees during the 1980s and 1990s, however, when the USA denied asylum to tens of thousands of asylum-seekers from Guatemala and El Salvador, Cuba and Haiti. US actions towards Central America, Haiti and Cuba are rooted in geographical proximity and generations of conflict, intervention, and migration between the USA and those countries. But during the 1990s the USA's message to asylum-seekers from *any* country, supported by changes to its asylum and immigration laws, has become “do not seek protection here, as months or years of detention await you”.

In the past few years the number of those detained under the authority of the INS has increased dramatically.<sup>8</sup> At present it is estimated that there are approximately 13,500 INS detainees and it is not possible to ascertain what percentage are asylum-seekers. In a report issued by the INS it is projected that by the year 2001 there will be a need for bed space for 24,000 INS detainees.<sup>9</sup> In brief, detention of those within the remit of immigration legislation is a growth industry, and certain communities appear to benefit considerably from the influx of federal funds to pay for detaining INS prisoners.

There appears to be no political will to reverse the trend towards increased detention and the projections for the demand for bed space are worrying. The demand for INS detention spaces outstrips supply and there will be continued and even increased reliance on local and county jails for housing asylum-seekers. The expectation is that more asylum-seekers will be detained, for longer periods of time

<sup>6</sup>William Frelick, “The Year in Review,” *World Refugee Survey 1997*, US Committee for Refugees, p. 14.

<sup>7</sup>The USA was the top donor with funds totalling US\$352.9 million in 1997 to the three key international agencies assisting refugees. However, on a per capita basis it ranked tenth, contributing US\$1.32 per capita compared with the top donor, Norway, at US\$12.46 per capita.

<sup>8</sup>There are four types of detention facilities used to incarcerate asylum-seekers in the USA: county and regional county jails; INS “Service Processing Centers”; private facilities contracted by the INS; and US Bureau of Prisons (BOP) facilities. There are also a variety of juvenile detention facilities used to accommodate children and unaccompanied minors.

<sup>9</sup>US Department of Justice, “Federal Detention Plan”, May 1997.  
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and under prison-like conditions.

The following case illustrates a variety of the problems faced by people who flee their country because of persecution and seek asylum in the USA.

This is the story Mohamed Mustafa Hassan<sup>10</sup> tells: On 28 December 1990 armed men kicked in the door and entered his home in Mogadishu, Somalia. They asked his father which clan the family belonged to, and when he told them, took the family outside, tied them up and shot them with machine-guns. Mohamed Hassan's father, two of his sisters and two of his brothers died, but he survived the attack although he was shot in the hip. Clergy from the local mosque helped Mohamed Hassan, who was then just 14 years old, and he spent the next few years with members of his religious group in different parts of Somalia. After years of living in fear, Mohamed Hassan fled his country. On 28 October 1994, at the age of 18, he arrived at JFK airport in New York.

The INS detained Mohamed Hassan at JFK airport for arriving without proper documents. The agency then placed him at the Esmor detention facility in Elizabeth, New Jersey. The INS moved him back and forth between Esmor and Lehigh County Jail in Allentown, Pennsylvania, twice within a five-month period, and then to the Dorchester Detention Center in Baltimore, Maryland, where he stayed for one month. At 4 am one day in September 1995, Mohamed Hassan states that immigration officials took him out of bed and drove him to the Orleans Parish Prison in New Orleans, Louisiana. He says that the INS officers did not allow him to collect any of his belongings, so all of his asylum application papers were left behind.

Due to his frequent transfers, his inability to speak English when he arrived in the USA, and the difficulty in contacting organizations and attorneys who would not accept collect calls, Mohamed Hassan was unable to obtain an attorney during the first year of his detention. On 9 May 1995 Mohamed Hassan appeared without an attorney before an Immigration Judge in Elizabeth, New Jersey, and was found credible. The Immigration Judge believed his story but denied him asylum, on the grounds that there were places in Somalia where he would be reasonably safe. Mohamed Hassan appealed against this decision, filing a handwritten notice to the Board of Immigration Appeals (BIA) in May 1995. He remained in jail in Maryland and then in Louisiana.

In Louisiana he finally obtained an attorney with the help of Amnesty International USA. According to Mohamed Hassan, the conditions in the Orleans Parish Prison were poor. In a letter written to the Amnesty International USA's Refugee office he wrote, "life in the jail is very difficult with regard to the feeding

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<sup>10</sup>Amnesty International has used the full names of asylum-seekers in this report only when it has previously publicized the case and permission has been obtained.  
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and all the poor conditions that I find myself. For how long will I continue to be in this situation when I don't know what is happening to me?"

After she took up the case, Mohamed Hassan's attorney submitted a motion to admit new evidence in January 1996. She argued that the Immigration Judge did not consider his age, his inability to speak English or to adequately understand the proceedings, and his inability to communicate with or obtain a lawyer despite his stated desire to do so. The INS opposed the motion. In its original response to the motion the INS claimed that Mohamed Hassan *did* have an attorney in his earlier proceedings. Later, the INS admitted that they had confused Mohamed Hassan's case with that of another asylum-seeker.

In November 1996, an Amnesty International delegation (which included Mohamed Hassan's attorney) visited the Orleans Parish Prison to contact him and other detainees who had asked the organization for assistance. Officials at the prison denied the delegation access to the detainees and refused to allow Mohamed Hassan's attorney to see her client.

Mohamed Hassan finally received asylum in December 1996 - after two years, six jail transfers and time spent in four different jails.

### **Recent history of detention in immigration and refugee law in the USA**

*"The US introduced the detention of aliens along with immigration control measures in the late nineteenth and early twentieth centuries. Detention was integral to the immigration inspection process; it facilitated departure in those instances where an alien was denied admission into the US. After falling into administrative disuse in the 1950s, government officials revived alien detention as a policy in the 1980s in response to the influx of Cubans and Haitians who were seeking political asylum in the US.*

*"However, the US designed the new detention policy to do more than facilitate deportation; it was also to deter other aliens from coming to the US. The prospect of incarceration, sometimes for a prolonged period, was supposed to discourage further arrivals. A few other countries also elected to pursue a policy of 'humane deterrence' by confining refugees for the purposes of deterring others. To officials who enacted these policies, however, it was of no moment that this form of deterrence was at odds with international and domestic law."<sup>11</sup>*

In March 1980 President Jimmy Carter established a process for refugees to seek asylum in the USA when he signed the Refugee Act into law. Since the early 1980s, there have been three ways of applying for asylum. First, a person within the USA may approach the INS with an "affirmative application" which is then subject to a non-adversarial proceeding. Second, those whom the INS apprehends while "out of status", including those who have entered the country without inspection by the INS or who have overstayed visas, may apply for asylum as a "defence against

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<sup>11</sup>Arthur C. Helton, "Legality of Detaining Refugees in the US", New York University Review of Law and Social Change, 1986 Vol. XIV, No. 2, p. 353.  
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removal” from the USA. Third, those who arrive without proper documents or with no documents and who express a fear of persecution may also apply for asylum as a defence against removal. Since 1 April 1997, this last category of people must first undergo an interview to establish that they have a credible fear of persecution, as part of “expedited removal” procedures.

Amnesty International’s principal concerns cover the treatment of arriving asylum-seekers, who, unlike those discovered while “out of status” within the USA, do not have a bond set for them and are not guaranteed any review of their detention. Both categories, however, suffer from the shortcomings of the INS detention system, described below in Chapter 4.

The events which followed the signing into law of the Refugee Act of 1980 apparently caused the USA to suspend a policy of releasing asylum-seekers that it had followed for several years. Beginning in May 1981, the US authorities detained large numbers of Haitians who arrived in southern Florida without proper documents. Advocates challenged this practice and the court ruled in *Louis v. Nelson*<sup>12</sup> that the INS had violated procedures established by law for public comment on new regulations. The INS then published rules which formalized the policy of detaining all aliens who arrived without proper documents. Parole (release) was possible only for “emergent reasons”, for example, a serious medical condition or when a grant of parole would be “strictly in the public interest”. Before the rule was formally adopted, the UN High Commissioner for Refugees (UNHCR) -- the international body with the statutory responsibility for refugees -- maintained that it violated the UN Protocol relating to the Status of Refugees.

The rule requiring people arriving at US borders without proper documents to be detained exists in much the same form today as it did when established almost 20 years ago.<sup>13</sup> The INS regularly uses this rule as justification for denying release to asylum-seekers, even those with the most compelling cases.

The authority of the US Attorney General (who heads the Department of Justice) to parole individuals is devolved through the INS Commissioner to the agency’s District Directors, who oversee INS activities in 33 districts in the USA. Their decisions regarding the detention, transfer and parole of individuals are in practice not subject to review.<sup>14</sup>

During the 1980s, the treatment of Salvadoran asylum-seekers was the

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12544 F. Supp. 973 (S.D. Fla. 1982) as footnoted in Helton, id.

13Title 8, Code of Federal Regulations (8 CFR) contains INS regulations on “Aliens and Nationality”.

14Amnesty International knows of no other instance where a single authority in the US had the power to jail individuals for many years without a judicial or quasi-judicial proceeding. Limited research suggested that the only similar example of such detention is the detention of the insane. If a person is deemed to be a danger to him/herself or others, he or she may be detained until a proper process can be held. The burden of proof in that process falls on the detaining authority.

subject of the *Orantes*<sup>15</sup> legal challenge. This decision revealed extensive information on INS operations and the “enforcement mentality” in many sectors of the agency which seemingly persists and still inhibits reform. During the 1980s hundreds of thousands fled the war and massive human rights abuses in El Salvador and sought refuge in Central and North America. Many who fled across the southern border of the USA were held by the INS in its own facilities or in private or public facilities under contract with the INS. They were not released until they could post a bond or secure release on their own recognizance.<sup>16</sup>

Advocates filed a class action lawsuit alleging that INS officials pressured detained Salvadorans to return to their country voluntarily. In the decision in *Orantes*,<sup>17</sup> the federal court found that “INS agents directed, intimidated or otherwise coerced” Salvadorans not to file asylum claims and to sign “voluntary departure” forms.<sup>18</sup> Evidence indicated that INS officials misrepresented the asylum process and used the threat of prolonged detention or transfer to remote locations to discourage asylum claims by detained Salvadorans. The court also found that the INS was aware of the practice by its agents and took no corrective action. The court’s order directed that the INS refrain from the practices mentioned and placed a duty on the INS to inform detained Salvadorans of their right to assistance by an attorney, to a deportation hearing, and the right to apply for asylum.

Unfortunately, the *Orantes* decision applied only to Salvadorans. Despite evidence presented during the lawsuit that “know-your-rights” presentations would be in the interest of the INS, some facilities refused to permit them for non-Salvadorans in detention.

### ***Reforms to the asylum system***

Throughout the 1980s, INS policies and practices continued to exhibit indifference to

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<sup>15</sup>*Orantes-Hernandez v Meese*, 685 F. Supp. 1448 (C.D. Cal. 1988) (Orantes II).

<sup>16</sup>Until 1996 there was a clear distinction between aliens referred to as “deportable” and those known as “excludable”. The former included people apprehended after entering US territory or who had overstayed their permission to remain in the USA. They could post bond for their subsequent appearance in court in deportation proceedings. “Excludables”, on the other hand, were subject to “exclusion proceedings” as they were deemed not to have entered into the USA, no matter how long they had lived there. “Excludables” included Haitians or Cubans who arrived by sea and were apprehended by the INS before landing or as they landed. Also “excludable” were those who arrived by air and failed to pass immigration inspection at the airport. Since the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 went into effect, aliens are placed in “removal” proceedings, but the distinction between those who have the possibility of posting bond when brought before an Immigration Judge and those who do not continues.

<sup>17</sup>*Orantes-Hernandez v Meese*, 685 F. Supp. 1448 (C.D. Cal. 1988) (Orantes II). The permanent injunction in this case, issued in 1988, was upheld in 1990 by the US Court of Appeals for the 9th Circuit. [*Orantes-Hernandez v Thornburgh*, 919 F. 2d 549 (9th Cir. 1990)].

<sup>18</sup>*Orantes-Hernandez v Meese*, US District Court, Central District of California: CV 82-1107, Findings of Fact and Conclusions of Law; Permanent Injunction, paragraphs 32-33, 29 April 1988, David V. Kenyon, US District Judge.

or ignorance of international standards for the protection of refugees. This occurred in both asylum adjudication and in the detention of refugees. These abuses produced numerous lawsuits and eventually led to some reform in asylum decision-making. There were also some attempts at reform in the INS detention system affecting asylum-seekers.

→ Asylum decision-making

In 1991 the INS instituted the first comprehensive reform of the system of asylum decision-making following years of criticism and the settlement of a lawsuit in which the INS agreed to reopen thousands of asylum decisions affecting Guatemalans and Salvadorans. It established a professional corps of Asylum Officers, who replaced District Directors as officials charged with granting or denying asylum.<sup>19</sup>

→ Attempts at reform in parole decisions

Reforms in asylum decision-making did not greatly affect detained asylum-seekers, however. They were still not distinguished from other aliens in INS custody and their asylum claims continued to be adjudicated in adversarial proceedings, with no financial support provided to those who could not afford to hire legal representation.<sup>20</sup> The USA still did not give asylum-seekers detained upon arrival the opportunity to post bond.<sup>21</sup> District Directors had almost absolute power to keep these people jailed indefinitely with no requirement that they justify their decisions.

NGO representatives from the Lawyers Committee for Human Rights (LCHR) and others worked with INS officials in an attempt to remedy this situation. In May 1990, the INS undertook a "Pilot Parole Project" to determine whether refugees were detained unnecessarily in the USA. The project allowed detainees to be released who were otherwise ineligible for parole, provided they could give assurances that they would not abscond during immigration proceedings. Two hundred detainees were involved in New York, Miami, Los Angeles and San Francisco. The findings were that:

*“[A] well conceived and carefully administered release program that works*

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<sup>19</sup>The District Director system for asylum decisions was widely criticized as unduly influenced by US Department of State opinions on human rights conditions in countries of origin, which were often seen to reflect US foreign policy positions.

<sup>20</sup>Detained asylum-seekers are brought before Immigration Court, where an asylum claim is viewed as a "defence" against removal from the USA. An Immigration Judge, who hears all types of immigration cases, presides and renders the decision granting or denying asylum. An INS trial attorney may argue against the granting of asylum and/or withholding of removal although he or she is not obliged to do so and may stipulate for a grant of asylum. Proceedings are interpreted for asylum-seekers and are tape recorded, but no written decision is provided nor is a transcript prepared unless there is an appeal.

<sup>21</sup>Asylum-seekers apprehended while "out of status" (having entered the USA without inspection or having overstayed their permission to remain in the country) have a bail set and can request redetermination of the amount at a subsequent hearing.

*closely with the community can address the government's interests in preventing absconding while targeting for attention those who pose danger to the community as well as avoiding the unnecessary detention of refugees".<sup>22</sup>*

On 20 April 1992, then INS Commissioner Gene McNary issued a memorandum which established what became known as the Asylum Pre-Screening Officer Program (APSO). Asylum Officers or INS inspectors or other officers trained in asylum law and appropriate interviewing techniques were to make parole recommendations following interviews with asylum-seekers and reviews of their cases. While still falling short of international standards, this program enabled the INS to base decisions on detention on factors other than the availability of detention space, at times the only criterion used.

The LCHR, Amnesty International, and other advocates urged that the APSO program be codified into regulation so that it would become regular INS practice. Observers had noted patchy compliance and inconsistent or non-existent participation in the project by some INS districts. For example, data showed that the New York INS District failed to follow APSO recommendations to parole four times as often as any other INS district.<sup>23</sup> Amnesty International discovered that despite the APSO guidelines, asylum-seekers in the New York District with strong asylum claims were detained, people who had relatives or churches willing to care for them were detained, people offered shelter in US communities were detained, and in more than one case, even refugees who had been *granted* asylum were detained. The following were among the examples presented to the district, which did not respond to Amnesty International's letter.<sup>24</sup>

E. L., a Nigerian national, arrived in the USA on 10 October 1992, carrying a false passport. He had escaped a Nigerian prison where he claimed he been tortured for protesting against the death sentence imposed on his father following an unfair trial. A physician examined him and found physical scars consistent with his allegations of

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<sup>22</sup>Letter from Arthur Helton to INS Commissioner Gene McNary, September 9, 1991; see also Lawyers' Committee for Human Rights, *Detention of Refugees: Problems in Implementation of the Asylum Pre-Screening Officer Program*, September 1994. Some INS officials had felt that the system did not produce the positive results NGOs credited it with. Subsequent review suggested that greater success in the program occurred when the asylum-seekers were released with the assistance of community groups.

<sup>23</sup>Memorandum from Paul Virtue, Acting General Counsel, Office of the INS General Counsel, "Asylum Pre-Screening: May 1993 – December, 1993", 10 February 1994, as footnoted in *Detention of Refugees: Problems in Implementation of the Asylum Pre-Screening Officer Program*, September 1994.

<sup>24</sup>Letter dated 13 July 1994 from Amnesty International USA to INS officials in the New York District.

torture. He was detained until he was granted asylum in March 1993.<sup>25</sup> E.L. stated that he voluntarily told INS officials at JFK airport that he was not the person named on his papers, although they had not discovered it. In granting him asylum, the Immigration Judge reportedly indicated how impressed he was with E.L.'s credibility and the strength of his asylum claim. Yet despite the strength of his claim, the physician's analysis of his condition, and his agreement to abide by conditions of parole, the INS had denied E.L.'s parole request, stating that he represented a "substantial risk to abscond". He had been detained for five months.

L. S., a Peruvian, arrived in the USA in November 1992 and was held for well over a year in detention. Amnesty International's information was that the INS did not consider releasing him even after the 2nd Circuit Court of Appeals affirmed that he should have been granted asylum. In fact, attorneys for the INS New York District argued against a petition for his release. In addition to his strong asylum claim, L.S.'s cousin, a lawful permanent resident, was willing to care for him pending adjudication of his case.

G. D. from Togo was granted asylum in May 1994. The INS had detained him at New York City's "Wackenhut"<sup>26</sup> facility following his arrival at JFK in December 1993. To Amnesty International's knowledge, G.D. was given no APSO interview. His body bore marks of the mistreatment that he received while detained in Togo, and he said he needed treatment for some medical and psychological conditions. A physician with expertise in examining torture survivors assessed that G.D. was suffering severe mental hardship as a direct result of his continued detention and the conditions in detention. G.D. told Amnesty International representatives that the lack of natural light, fresh air and exercise at Wackenhut increased his distress and brought back memories of his imprisonment in Togo. He noted that he had made his condition clear to personnel at Wackenhut. Nevertheless, the INS detained him for six months until an Immigration Judge granted him asylum.

Despite some negative reports about INS performance under the APSO process, and despite criticism of the APSO system from some quarters within the INS, the opinion of many advocates and some within the INS was that the program "served legitimate public and INS interests and should be strengthened".<sup>27</sup> Unlike the

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<sup>25</sup>Many of the cases described in this report ended with the asylum-seeker granted protection, although often after considerable time in INS custody. These asylum-seekers succeeded because they came to the attention of advocates and human rights organizations. They represent other, perhaps equally compelling cases of people who remain in the INS detention system or whom the INS has returned to danger in their home countries.

<sup>26</sup>This was not the same Wackenhut facility currently in use in Queens, New York.

<sup>27</sup>Offices of General Counsel, "Asylum Pre-Screening Program Evaluation", Memorandum to Commissioner Doris Meissner, 13 June 1996, p. 2.

reforms that established Asylum Officers however, the APSO procedure never became part of INS regulations. In the years following its apparently successful pilot project, the APSO authority to grant release was largely neglected. It was accepted by some INS District Directors and ignored or resisted by others.<sup>28</sup> According to one expert in US asylum law, “INS detention and release practices have been inconsistent to the point of whimsy”.<sup>29</sup>

### **Changing attitudes**

It is commonly acknowledged that the US public has traditionally been generous and sympathetic to refugees and their plight.<sup>30</sup> Only a small percentage of undocumented immigrants coming to the USA have sought asylum and the term “asylum-seeker” remains unknown to many US citizens, who often assume that any refugee can apply for permission to come to the USA from abroad. In recent years, however, the US public and politicians have expressed increased concern about undocumented migrants *per se*, failing to distinguish between asylum-seekers and those who migrate for economic reasons.

In March 1993, the popular US news program *60 Minutes* broadcast a segment called “How Did He Get Here?” This program, seen by millions of people in the USA, suggested that any foreign national could enter and pass through airports into US communities by saying the “magic words: political asylum”. The program referred to the bombing of the World Trade Center building in New York City and how one of the (then) suspects in the bombing had applied for asylum when his legal status to remain in the USA was withdrawn. The impression given was that people posing a danger to the US could pass by immigration officials who were seemingly helpless to stop them.

The *60 Minutes* program made no mention of the abuses which asylum-seekers flee or of the USA’s international obligation to protect them;<sup>31</sup> it did not include interviews with asylum-seekers or refugee advocates.<sup>32</sup> Though misleading, the *60 Minutes* report contributed to framing the asylum debate in Congress as a

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<sup>28</sup>Arthur C. Helton, “A Rational Release Policy for Refugees: Reinvigorating the APSO Program,” Interpreter Releases, 18 May 1998. Mr. Helton and others helped formulate the APSO system with INS officials.

<sup>29</sup>Ibid.

<sup>30</sup>Dozens of US religious communities risked prosecution in the 1980s by openly sheltering undocumented Guatemalans and Salvadorans unlikely to be granted asylum by the INS/Justice Department under President Ronald Reagan’s administration. Communities in Florida mobilized *en masse* to assist people wishing to leave Cuba during the “Mariel boat lift” in 1980.

<sup>31</sup>An INS District Director shown in the segment suggested that asylum-seekers were somehow protected by the US Constitution. He did not mention US treaty obligations, which require it to give asylum-seekers the opportunity to seek protection within the US or at its borders.

<sup>32</sup>The program featured an official of the Federation for American Immigration Reform (FAIR), who provided the opinion that only 1 or 2 per cent of the asylum-seekers depicted were fleeing persecution. FAIR is an organization that advocates limiting immigration to the US. Amnesty International September 1999 AI Index: AMR 51/51/99

system out of control.<sup>33</sup>

In 1995, a second reform of the asylum system increased the number of Asylum Officers. This reform introduced regulations which meant that work authorizations were not granted until after asylum was granted or until an asylum application had been on file for 180 days, thus eliminating what was perceived as the magnet drawing unfounded asylum claimants to the USA. Asylum applications declined significantly (from 123,500 in 1994 to less than 50,000 in 1996, the year after the regulations took effect) and the approval rate for claims filed after the 1995 reforms took effect increased from 15 per cent in 1994 to 26 per cent in 1996.<sup>34</sup>

Despite the effect of these reforms, continuing concerns about unregulated immigration helped influence Congress to pass the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which includes accelerated asylum procedures as part of its drastic measures to remove those arriving without documents quickly.

### **The Illegal Immigration Reform and Immigrant Responsibility Act**

The introduction of the IIRIRA in 1996 marked an important shift in the USA's attitude to the protection of refugees. The current view of asylum-seekers is reflected in the following statement by a senior INS official:

*"... many, if not most of the asylum-seekers who arrive at our borders do so with false identities, sometimes part of criminal conspiracies with smuggling syndicates, and may well present criminal and other safety risks themselves given the total absence of information we have about them."*<sup>35</sup>

Many provisions of the IIRIRA serve to seal and control the USA's borders. The IIRIRA introduced increased border patrol agents, the installation and construction of physical barriers at some borders, the purchase of land, and "interdiction equipment" such as aircraft, helicopters, night-vision goggles, scopes and sensor units.

The IIRIRA provides for pre-inspection at foreign airports<sup>36</sup> to check for fraudulent documents, with the proviso that the country in which the pre-inspection station is established maintains practices and procedures in accordance with the 1951

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<sup>33</sup>Michele R. Pistone, "New Asylum Laws: Undermining an American Ideal," Policy Analysis, 24 March 1998, p. 7, Cato Institute.

<sup>34</sup>Ibid. p. 8.

<sup>35</sup>Letter to Amnesty International dated 24 November 1998 from former INS District Director, San Francisco.

<sup>36</sup>Section 235A calls for the establishment by 31 October 1998 of five pre-inspection stations in at least five of the foreign airports that are among the 10 airports identified by the Attorney General as sending the greatest numbers of inadmissible aliens to US ports of entry. Amnesty International September 1999 AI Index: AMR 51/51/99

Refugee Convention and its 1967 Protocol, or that an alien in that country otherwise has recourse to protection from return to persecution. This specific direction to ensure that refugees are given due protection is welcome, but it remains unclear how such protection would be made available in practice.

### ***The expedited removals program***

Those who manage to reach the USA face the “expedited removal” program, which provides for the summary return of people who seek to enter the USA with no documents or fraudulent documents, unless they express a fear of persecution or an intention to apply for asylum.

The expedited removal provisions of the IIRIRA fundamentally weaken the rights previously enjoyed by those seeking to enter the USA. The purpose of these provisions is to prevent the abuse of immigration processes while identifying individuals seeking asylum. The “abuse” of immigration processes identified is the use of false documents or visas that were obtained on the basis of misrepresentations about the purpose of travelling to the USA. Yet the very essence of being a refugee means fleeing for safety in a world where borders are sealed and where documents, however obtained, are a lifeline.

Inspecting officers (who are not Asylum Officers) at ports of entry are given important decision-making powers about whether or not to admit a person. There is no administrative hearing or any administrative or judicial review of their decisions. Approval by an inspecting officer’s supervisor suffices for a person to be summarily removed. At this “secondary inspection stage” an asylum-seeker has no representative, no right to counsel and no right to use a telephone to contact family, friends or other assistance. There are no specific provisions made for foreign language interpretation.

If a person indicates a fear of return or an intent to apply for asylum then they are to be referred to Asylum Officers for a “credible fear” interview. Many are handcuffed and some have their legs shackled while they are waiting in holding rooms at airports to be transferred, or when they are transferred to local or county jails.

At the credible fear interview, the Asylum Officer decides whether the asylum-seeker has the essential elements of a claim which might lead to the granting of asylum. If so, then the person will be referred to the normal asylum adjudication process for full consideration of their asylum claim. If they fail to meet that standard, they have only limited appeal options before removal from the USA.

At the credible fear screening stage, the asylum-seeker may consult a person of their choice before interview, provided the process is not delayed. The role of a representative at the credible fear interview and any subsequent review is limited. Such consultation is exceptionally difficult to achieve in practice, given the circumstances of an arriving asylum-seeker and the barriers to access to the outside world that they face. Detention is mandatory from arrival through the life of this process.

There is no transparency in how the expedited removal process works. Amnesty International, among other organizations, has been denied access to observe the process at airports and ports of entry. The INS has failed to provide information about who is being screened out or summarily removed. UNHCR is not able to monitor comprehensively or to report on what is happening at border points.

Once a person has established a fear of persecution during a credible fear interview they are not subject to expedited removal procedures but to the normal "asylum adjudication process". The INS may detain them for the entire asylum application process, which could take months or even years. They should be eligible for parole, but early reports are that only a minority of those who have established a credible fear have been released.

The expedited removals procedure, which has been running since April 1997, is hard to evaluate given the denial of access to ports of entry and the uneven access to INS detainees. There is no meaningful data released by the INS regarding this program and studies by the US government's General Accounting Office are based on very small samples.

### **CHAPTER 3: DECISIONS ON DETENTION AND RELEASE**

US legislation and policy under the IIRIRA mandate the detention of asylum-seekers before the credible fear interview. The discretion to release an asylum-seeker who has established a credible fear resides with the INS District Director. The decision is based on a paper review (if any is done at all) of the detainee's file. There is no regular review of the asylum-seeker's detention and no formal mechanism for reviewing a denial of parole. Parole decisions are to be made on a case by case basis for urgent humanitarian reasons or for significant public benefit and where there is no security risk or risk of absconding.

The discretionary nature of the parole decision-making process leads to uneven results, with decisions dependent on the interpretation of the individual Director. With such important rights at stake -- the right to liberty and the right to freedom of movement -- there should be a well articulated standard and a frequent

and regular opportunity for a detainee to bring forward reasons for their release. There is no provision for such review in US law or regulation, and the INS' freedom to transfer detainees from one facility to another, even across state lines, can make such review even less likely.

The basis for detaining asylum-seekers in the USA lies in Title 8, Code of Federal Regulations (CFR), Section 235.3(c). This states:

*“[a]ny arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the Act shall be detained in accordance with section 235 (b) of the Act. Parole of such alien shall only be considered in accordance with section 212.5(a) of this chapter.”*

Amended section 212(d)(5)(a) of the INA provides that the Attorney General may grant parole: “Parole should only be given on a case by case basis for specific urgent humanitarian reasons, such as life threatening humanitarian medical emergencies, or for specific public interest reasons, such as assisting the government in a law enforcement activity.”<sup>37</sup>

A typical argument used by a District Director in denying a request for parole is that section 235(b) of the INA severely limits their discretion. They do not usually provide detailed reasons for decisions not to release asylum-seekers. They tend simply to show that the person arrived in the USA in a manner which brings them into the category of those who will be detained, and to confirm that they are in removal proceedings.

A.H., a Somali asylum-seeker whose father was killed and who was himself severely burned in an attack by the Somalia National Alliance, asked for parole to pursue therapy to try to overcome the trauma he had suffered in Somalia. He reported that he could not get the images of the violence he had witnessed out of his mind and that these insistent images interrupted his sleep. He also claimed that problems with his vision were not being addressed by the medical unit at the detention centre.

He had already established a credible fear of persecution, his identity had been determined, the INS had possession of his passport, and he had agreed to appear wherever and whenever required. The Asylum Officer had found that he had a significant possibility of establishing eligibility for asylum, that he was not subject to any bars to asylum and that he had community ties. A.H. had a US citizen relative willing to give him a place to live and to support him.

His request for parole was turned down by the District Director:

*“Since the statutory rule is one of detention, the use of parole authority is an exception to that rule. It is Service **policy** that such authority be carefully and narrowly exercised to be in conformity with statutory purpose and legislative intent. I have carefully considered the reasons set forth in your request for*

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*parole, and have denied your request.*”<sup>38</sup> [emphasis added]

The District Director did not address the substantive issues raised by A.H.’s counsel as reasons compelling release, with the exception of the problem with his eyes, nor the factors militating against his absconding. Simply stated, the overall concern of the District Director was that A.H. had arrived at the airport with another person’s passport and did not immediately ask for asylum but tried to convince the inspector that he was in fact the Canadian in the passport. Also, the District Director noted that A.H. had been to seven other countries since he left Somalia in 1995, although stated INS policy is that this reason should *not* be considered when making parole determinations. He stated that A.H.’s vision had been tested twice by medical staff at the detention centre and that they had found his vision to be unimpaired.

The District Director ignored the Asylum Officer’s findings, yet a fair procedure requires not only decisions but also reasons for decisions that address the substantive issues raised. A.H. was not freed until December 1998, after at least five months’ detention, when an Immigration Judge granted him asylum.

The INS detention system ignores or shows indifference to fundamental human rights standards. It concentrates extraordinary power in the hands of single individuals acting as decision-makers, and lacks effective oversight or review. Amnesty International believes that the cases mentioned in this report establish a pattern of abuse of asylum-seekers’ rights which is inevitable unless there is meaningful reform of the INS detention system.

Many asylum-seekers attempt to transit through the USA to apply for protection in Canada. An attorney in New York City who represented several Sri Lankan asylum applicants claims that before late 1995 the Philadelphia, Pennsylvania District permitted individuals to move to Buffalo, New York near the Canadian border for the purpose of seeking asylum in Canada. An NGO there would apparently house them and facilitate the process. The attorney stated that he withdrew appeals against asylum denials<sup>39</sup> for several clients based on verbal assurances that this transfer to Canada would be possible for them. After the attorney withdrew appeals for his clients, the INS either changed its policy or abrogated its agreement. He then had to file complex motions to reopen the cases.

Amnesty International’s request for verification of this series of events was not answered by the INS. However, an official had previously told the organization that, in general, the INS feared a negative response from Canadian authorities if it released people to transit to the Canadian border to seek asylum. While acknowledging that the INS concern may reflect a legitimate state interest, Amnesty

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<sup>38</sup>Letter dated 27 October 1998 from New York District Director denying a request for parole.

<sup>39</sup>Many asylum claims for Sri Lankans have been denied by Immigration Judges who have acknowledged that people face or have experienced torture in that country. The judges apply the dubious logic that the torture is part of an investigative procedure which is not motivated at all by the asylum applicants’ political beliefs or another of the five grounds upon which someone can claim refugee protection. Many of these cases are overturned on appeal, but this strange logic persists in the US Justice Department and is frequently used to deny asylum.

International believes that continued imprisonment of asylum-seekers is a response completely out of proportion to that interest. Any potential complaint from another country should be dealt with in manner that does not punish asylum-seekers for seeking protection. Adding to the confusion in discerning what makes up US policy are reports that some INS districts *do* grant parole to asylum-seekers for application for entry into Canada.

The apparently inflexible policy applied in Pennsylvania had tragic results for E.A. of Sri Lanka. In early May 1996, E.A. collapsed in the jail where he was detained in Lehigh, Pennsylvania and died shortly thereafter. E. A. had requested parole in April 1995, while detained by New Jersey INS authorities, mentioning a serious heart condition as a reason and including information about a friend who might provide him room and board while he awaited a decision on his case. He made a second request for parole several months later, while detained in the Philadelphia District. This time the immediate basis for the request was E. A.'s hope to apply for asylum in Canada where his wife resided. The parole request specifically stated that his wife had immigrant status in Canada and had retained counsel there to assist him with his asylum claim.<sup>40</sup>

According to E. A.'s attorney, INS officials neglected to inform him of his client's death. He learned of this and of the transfer of his client's body to Canada from the man's family there. The US government apparently paid for the shipment of the body.

In raising this case with the INS, Amnesty International stated that it saw no valid purpose served by the continued detention in the USA of a man who had a wife waiting in Canada, legal counsel to pursue his asylum claim there, the ability to pay for his own transportation to the border, and a heart condition. The organization received no response. Ironically, by November 1998 all but one of the Sri Lankans who had requested parole to seek asylum in Canada (where they would probably not have been detained) had been granted asylum by the US and released.<sup>41</sup> The INS kept all but one of them<sup>42</sup> in detention until each received asylum. Some of them had spent years in prison, at great financial cost to the US government -- and at an incalculable personal cost to them.

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<sup>40</sup>This request is apparently one of those that resulted in the alleged verbal understanding for the INS to release asylum-seekers for transit to Canada -- later rescinded.

<sup>41</sup>One abandoned his claim and returned to Sri Lanka. There are no firm reports of his situation, according to his attorney.

<sup>42</sup>The INS released one person when the 3<sup>rd</sup> Circuit Court of Appeals remanded his case back to the Board of Immigration Appeals, according to the attorney handling many of these cases. Amnesty International September 1999 AI Index: AMR 51/51/99

### **Circular Logic: Parole and 'Catch 22'**

District Directors have denied parole for the sole reason that the asylum-seeker attempted entry to the USA without proper documents.<sup>43</sup> This renders the parole mechanism nonsensical, as it was the fact that they did not have proper documents that led to their detention in the first place.

The INS New York district detained B.C., a Chinese national, from June 1993 to May 1994. He had applied for parole in August 1993 and his request went unanswered. He brought a habeas corpus petition before the US District Court. A denial of parole was then issued by the INS, apparently on the eve of the habeas corpus hearing. An Immigration Judge granted asylum to B.C. in April 1994 yet despite this, he was kept in detention. A letter from an INS official to his attorney stated that to grant parole to BC would be to "condone" his means of attempting to enter the USA. The INS eventually released him without explanation in May 1994 as a second habeas corpus petition -- based on the fact that he had already been granted asylum but still remained in detention -- was to go forward.

One US federal court recognized this gap in reasoning. In 1996, in *Diaz v Schiltgen*,<sup>44</sup> the court in the Northern District of California ordered an alien released. It determined that the District Director must make individualized determinations and must not decide parole applications on the basis of broad, non-individualized policies. The court noted that the parole regulations displayed no preference for either detention or parole, leaving the matter to the discretion of the US Attorney General. Thus the reasons for denial of parole to Mr. Diaz were:

*"...illegitimate because they are inconsistent with the INS's own regulations, which specifically make parole available to aliens who have attempted entry into the US by fraud....The fact that an alien has been detained means that he or she has committed some unlawful act, and under the District Director's reasoning that very act mandates a denial of parole in every instance in the interest of deterring and punishing the unlawful conduct. This 'Catch-22' conclusion is mandated neither by the parole statute and accompanying regulations nor by existing case law".<sup>45</sup>*

Amnesty International believes that each detention and parole decision should be an individualized one, based on facts other than attempted entry with false or no documents. While the USA may have an interest in deterring travellers' use of improper documents, it must take into account the special circumstances and status of asylum-seekers, who often have to use false documents or carry no documents in their flight to seek safety.

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<sup>43</sup>Article 31 of the 1951 Refugee Convention exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided that they present themselves without delay to the authorities and show good cause.

<sup>44</sup>4946 F. Supp. 762, US District Court, (N.D. Cal. 1996).

<sup>45</sup>Ibid.

**Wasting taxpayers' money: 'We won't release you now but will not object later'**

The following cases came to Amnesty International in 1996 from attorneys who represented asylum-seekers in the INS District that covers the state of Pennsylvania. In each case, asylum-seekers spent months in detention before the same INS that detained them agreed that they should be granted asylum.

A Bangladeshi applicant was detained for four months at York County Prison. He was denied parole despite presenting evidence that his brother in New York City would house and support him. His attorney claimed that in Bangladesh he was at risk. He also suffered from peptic ulcers. INS trial counsel agreed to a grant of asylum at the hearing to determine the merits of his case.

A Bangladeshi, apparently a victim of torture in his country who possessed documentation that he was being prosecuted for his political activities, had a cousin willing to accept financial responsibility for him if he were paroled. Although the INS denied his parole request, at the beginning of his merits hearing the INS trial attorney agreed to the grant of asylum.

Another Bangladeshi fled his country after arrest and torture by the police due to his political activities. He apparently had two US citizen brothers who volunteered to accept financial responsibility for him if paroled. The INS detained him for six months. INS trial counsel agreed to a grant of asylum at his merits hearing.

A Ghanaian asylum-seeker was detained for over six months before a grant of asylum was stipulated by the INS counsel trial attorney. He apparently had many family members who would have posted bond and provided for him.

An asylum-seeker from the Ivory Coast had apparently been tortured horribly for his political activities. He was detained for six months and granted asylum after stipulation by the INS trial attorney.

The INS has a duty to review regularly the status of those it detains to ensure that the period of detention is as brief as possible. In 1996 Amnesty International asked the INS why it ignored the parole option available to it and continued to detain asylum-seekers, (adding further grief to those already traumatized by their experiences), when ultimately it would not contest the merits of their asylum claims months later. The INS did not respond.<sup>46</sup>

**Detained despite an Act of Congress**

On 6 June 1993, approximately 280 Chinese men and women approached New York harbor in the ship Golden Venture. The majority of the ship's occupants were taken into custody by the INS and held in local jails in Pennsylvania. Many were

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<sup>46</sup>Reports from Pennsylvania in late 1998 stated that the INS district now releases some asylum-seekers on bond.

transferred to facilities in other parts of the country. By 1995, many of the Chinese had been deported or had their cases resolved in other ways.<sup>47</sup>

Some of the Chinese were granted asylum by US officials. Those who alleged that they had fled because of their fear or experiences of forced population control (including forced sterilization, insertion of contraceptive devices, forced abortions, fines or imprisonment) were denied asylum based on court decisions that they were ineligible for protection as refugees.

Congress seemed to resolve this situation through inclusion of a special clause (Sec. 601) in the 1996 IIRIRA. This provision declared that people fleeing various forms of coercive family planning could be considered as refugees and granted political asylum.

Despite this positive development in the law, several Chinese asylum applicants whom the government had determined did have valid fears of persecution due to their opposition to forced family planning remained in detention. Others, though found not credible<sup>48</sup> and denied asylum, may have had their ability to present a case and their credibility impaired by the conditions under which they were imprisoned.<sup>49</sup>

In February 1997, President Clinton issued an order freeing the "Golden Venture Chinese" who remained in detention. Amnesty International's concern is that before the President's order, even an act of Congress making these asylum-seekers eligible for asylum did not cause the various INS District Directors to re-examine their continued detention.<sup>50</sup> Moreover, the President's order did not apply to non-Golden Venture Chinese who were detained and who had similar asylum claims.

### **Recent INS attempts at reform**

There have been some positive indications from INS Headquarters concerning the detention of asylum-seekers. In Congressional testimony in 1998, INS Commissioner

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<sup>47</sup>The offices of the Vatican's envoy to the UN apparently helped some of them obtain settlement in Ecuador.

<sup>48</sup>The terms "found not credible" or "found credible" here and elsewhere in this report mean that the person deciding an asylum-seeker's claim has not/has found their testimony believable. This is based on, among other factors, their demeanor and the consistency of their stories, not on objective conditions in their country of origin.

<sup>49</sup>In Amnesty International's view this may have been particularly true of many female detainees who were separated from the main group of Golden Venture detainees held in Pennsylvania.

<sup>50</sup>In an analogous situation, in April 1997 Amnesty International discovered a Liberian national in a jail in Virginia who was eligible for release. The Attorney General had declared that Liberians who had arrived by 1 June 1996 could enjoy temporary protection from deportation to Liberia due to the conflict there. The INS itself had issued a memorandum to release all eligible detained Liberians. Yet apparently this case was not reviewed until Amnesty International raised the issue with INS officials.

Doris Meissner stated:

*“INS has long been committed to the idea that the government should seek to avoid the needless detention of asylum-seekers.”*<sup>51</sup>

The only system that the INS has instituted to deal with the apparent arbitrariness of its detention practices has been the Asylum Pre-Screening Officer (APSO) system which allowed District Directors to consider paroling asylum-seekers (see above). However, the US authorities have still not codified into law or regulation the APSO process.

The 1996 IIRIRA mandates the detention of arriving asylum-seekers, but INS headquarters has indicated that such people should be considered eligible for parole after the initial stages of the process. For example:

- ↪ On 30 December 1997, the INS Office of Field Operations issued instructions concerning the expedited removal process. These instructions state that “parole consideration for detainees who meet the credible fear standard ... [is] critical to the success of the expedited removal program”, and that “(p)arole is a viable option and should be considered for aliens who meet the credible fear standard, can establish identity and community ties, and are not subject to any possible bars to asylum”.
- ↪ An additional memorandum from the INS Office of Field Operations dated 7 October 1998 states that asylum-seekers who have passed the credible fear test are a “low priority” for detention. The memo states further that although parole is ultimately left to the discretion of the District Director, it “is INS policy to favour 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”.<sup>52</sup>

It is therefore clear that the IIRIRA, which came into force on 1 April 1997 and allows arriving aliens to be detained throughout the “credible fear” process, did not affect the ability of INS District Directors to use APSO interviews or other examinations to parole asylum-seekers once credible fear was established.<sup>53</sup> The memoranda referred to above indicate that the INS headquarters is, on paper at least, committed to a policy which takes into account asylum-seekers’ special circumstances.

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<sup>51</sup>Doris Meissner, Commissioner, INS, Department of Justice, “Testimony Before the Subcommittee on Immigration, Committee on the Judiciary, US Senate, Concerning INS Reform: Detention Issues,” p.7.

<sup>52</sup>“Memorandum to Regional Directors Regarding Detention Guidelines Effective October 9, 1998,” Michael A Pearson, Executive Associate Commissioner, Office of Field Operations, 7 October 1998

<sup>53</sup>The INS also refers to the “credible fear” interviews that the 1996 IIRIRA set up as part of the expedited removal process as “APSO interviews”. But these interviews are mainly to determine whether or not to put an asylum-seeker on a fast track to removal from the USA. They do not now apparently serve the purpose for which the INS originally instituted the APSO program, that is, to review the detention of asylum-seekers awaiting adjudication of their claims.

However, decisions in individual INS districts continue to be inconsistent. According to the INS Office of Field Operations in October 1998:

*“At its weakest, it [APSO] can be inefficient, inconsistent from district to district, and operated without full information about whether the asylum claim is successful in immigration court or even what the District Director determines in response to the APSO recommendation”.*<sup>54</sup>

The mixture of legislation and policy, combined with the largely unaccountable interpretations of individual decision-makers, result in striking inconsistencies in parole decisions between different INS districts. For example, it was well known in the advocacy community that it was far more difficult to get a detainee paroled in New York during 1998 than in New Jersey. The INS detainee population in New York was not noticeably different from that in New Jersey; those involved in advocacy work at these facilities believed that the main difference was the interpretation of law and policy by the different District Directors.<sup>55</sup>

Unfortunately, the INS district system, which gives virtually total power to its District Directors over the lives of asylum-seekers and other aliens, appears to frustrate that agency's attempts to liberalize policy and practice. Recent examples of serious violations of asylum-seekers' rights fit the pattern of those recorded in the years before the IIRIRA.

D. N. was detained for more than 20 months, despite his illness and even though in January 1998 an Immigration Judge had decided that he should not be returned to Liberia, granting him “withholding of removal”<sup>56</sup> status. He had arrived in the USA as a stowaway in September 1997. A grant of “withholding of removal” requires the finding of a higher likelihood of persecution than does asylum status, so the Immigration Judge in his case undoubtedly found that D.N. met the definition of a refugee, and that his life or freedom would be in danger in Liberia. However, the Judge believed that D.N. could safely return to Côte d'Ivoire, where he had spent considerable time before coming to the USA.

D.N.'s attorneys appealed against the Immigration Judge's decision denying asylum. The appeal failed, reportedly because he could not demonstrate that he had filed it in a timely manner. D.N. remained in detention while he pursued a motion to reopen his asylum case and a request for protection under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)

In November 1998 D.N. was diagnosed as having *mystenia gravis*, a

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<sup>54</sup>See above, Offices of General Counsel “Memorandum to Commissioner Doris Meissner,” p.2.

<sup>55</sup>More recently, a greater number of asylum-seekers have remained in detention in New Jersey.

<sup>56</sup>The US uses a grant of “withholding of removal” (previously referred to as “withholding of deportation”) status to fulfil its treaty obligations of *non-refoulement*. The status requires the finding of a higher likelihood of persecution than does asylum status. Immigration Judges may deny asylum as a matter of discretion and nevertheless grant the person withholding of removal to a particular country. People granted “withholding” are eligible to work in the USA.

neurological disorder. Medical records show that he spent time in hospital and also received treatment in the INS detention centre. His attorney submitted a request for parole based on his condition. The request, dated 9 April 1999, refers to the seriousness of the illness, the difficulties in taking his medication in detention, and allegations of ridicule or harassment of her client by detention centre staff. Included in the parole application was the hospital neurologist's recommendation that D.N. be released from detention due to his condition. (A church apparently offered to care for him.)

The INS District Director responded on 23 April 1999 denying the request for parole. The letter did not refer to medical records from the independent neurologist treating D.N., but only to the interpretation of that information by the US public health service, which cares for detainees at the facility. That interpretation apparently conflicts with the neurologist's statements and with D.N.'s medical records, which twice indicate "that his release should be expedited".

Amnesty International wrote to the INS District Director in February 1999 asking about the apparent District policy of detaining people granted "withholding of removal" status, as well as raising this case and another, similar one. The District Director's response did not address the possibility of indefinite detention of D.N., but did mention that an alien could be paroled if s/he had a "serious medical condition in which continued detention would not be appropriate". Amnesty International then wrote to INS headquarters about the two cases, asking about District practice and national policy. The only response received did not mention Amnesty International's concerns, and referred to the Immigration Judge's determination that one of the asylum-seekers had spent time in Côte d'Ivoire.

A government which wishes to return a person to a "safe third country" through which they have passed has specific obligations. The returning government must obtain assurances that the person will be admitted to the "safe third country" (in this case Côte d'Ivoire), will have access to a fair and satisfactory asylum procedure and that they will not be forcibly returned to the country of persecution (in this case Liberia). It is not clear if the INS makes efforts to seek anything other than travel documents to a "safe third country" for a prisoner such as D.N. In this case, it was unclear whether Côte d'Ivoire would accept him.

D. N. was released without explanation on or about 18 May 1999.

B. Z. arrived in the USA from China in March 1992 seeking asylum. He was allowed to enter the USA in Hawaii, pending a hearing and a decision on his claim. He travelled to the eastern USA and found work there. He failed to appear at his hearing in Hawaii in June 1992, claiming that he did not have funds to travel and that he assumed he required an attorney to pursue an asylum claim. A deportation order was issued in his absence. He contacted the INS in an attempt to clear up his status and was detained in 1994. He was held in five different detention facilities or jails.

B.Z. committed no crime and never had the merits of his asylum claim considered. (He claimed that he fled forced family planning in China, and his wife is reportedly in Switzerland.) Yet he stayed in jail for over four years. Amnesty International raised his continued detention in September 1998 but received no response. B.Z.'s case had already received significant media attention and Amnesty International USA subsequently highlighted it during a "holiday greetings" campaign

in December 1998. US newspaper reports suggested that his wife had filed divorce papers while he was detained, apparently to regularize her own status in Switzerland.<sup>57</sup> B.Z. was finally released in early 1999.

The following case illustrates the arbitrariness of detention, that is, the failure to consider international standards which suggest that asylum-seekers should not be detained, and the failure to consider the individual circumstances of the asylum-seeker.

S. J. arrived from China at San Francisco airport in March 1997. The INS detained her on arrival at a jail in Lerdo, California near Bakersfield, four to five hours by car from her attorney in San Francisco. An Immigration Judge granted her asylum on 22 August 1997. Nevertheless, the INS District Director kept S. J. in detention during an appeal against the granting of asylum. Amnesty International asked its members to write to the District Director on her behalf.

The Board of Immigration Appeals (BIA) referred the case back to the Immigration Judge for reconsideration. In October 1998 the Immigration Judge reaffirmed his original decision granting asylum to S. J. He stated that new information she revealed at her hearing in 1997 was in response to inquiries by the court itself, and that it was consistent with some of her previous statements. The Judge also added that:

*“It is understandable to the Court that the Applicant was not able to obtain corroborating evidence of her membership in her church considering her circumstances. Her family could not help since both of her birth parents have passed away... Her stepfather will not likely help in light of her escaped [sic] from his physical abuse of her. Moreover, the fact that the Applicant is in Service [INS] custody makes communication with her friends in China clearly difficult...”*

*“The Court also notes that the Applicant has been in Service custody since March of 1997. Although she has met with her counsel on three occasions face-to-face, the interpreter provided spoke Mandarin whereas she is only fluent in Foochou.”<sup>58</sup>*

Despite the Judge’s reaffirmation of his decision, S. J.’s attorney informed Amnesty International that the INS planned to continue its opposition to a grant of asylum. This meant that S. J. would spend additional time in prison. About five weeks after the Immigration Judge’s second decision, S. J. told her attorney that she was deeply traumatized by her prison experience and that her menstrual periods had stopped. Amnesty International issued another bulletin on the case. Several days later the INS offered to release her on bond and she left prison in late 1998.

S. J. spent 17 months in jail after being granted asylum. Most of that time was spent in the Kern County Jail near Bakersfield, under conditions that are reportedly harsh, possibly harming her health.

The INS District Director in San Francisco responded to various requests by

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<sup>57</sup>*Dallas Morning News*, 16 August 1998, Dan Malone, “Legal tangle splits family of immigrant”.

<sup>58</sup>“Decision of the Immigration Judge,” US Department of Justice, Executive Office for Immigration Review, Immigration Court, San Francisco, California, October 14, 1998, pp. 5-6. Amnesty International September 1999 AI Index: AMR 51/51/99

Amnesty International members and others concerning S. J.'s continued detention. His communications pointed out alleged inconsistencies in her case (inconsistencies the Immigration Judge was able to resolve) and generally focused on the requirement that "immigrants" arriving without documents be detained. There was no reference to international standards.

Communications from INS officials concerning decisions to detain appear to reflect ignorance of international standards or indifference to the circumstances that cause refugees to flee their countries and the difficulties they may have in so doing. Some INS District Offices do not even respond to release requests.

Ms. G. fled from Afghanistan after being beaten and traumatized. She said she had been beaten and threatened by members of the Taliban because of her work secretly educating girls, her family's Christian beliefs, and her family's connection with the previous Afghan government. Ms. G. had a US citizen sister and brother-in-law (who worked for the US government), who had promised to house and support her, and she had established her identity. She was found by an Asylum Officer to have provided specific and detailed testimony consistent with known country conditions in Afghanistan and to have demonstrated a significant possibility that she could establish eligibility for asylum.

Her attorney originally requested parole on 26 October 1998 and followed it up with repeated telephone calls. In a conversation with an INS official she pointed out that her client met the criteria for parole set out by the INS nationally.

According to the attorney, the official responded that the District Director is not obligated to follow the INS guidelines, and that parole was entirely within his discretion. In the official's view, the *de facto* criteria used by the district for granting parole from detention at the Wackenhut (Queens, New York) facility were "being Cuban, pregnant, accompanied by small children, a witness or otherwise useful to the US government, and/or having a health condition which the facility could not address". The official said that unless he learned that the woman was seriously ill, he would recommend that her parole be denied.

The attorney eventually received a response in mid-December 1998 denying the request for parole but in early January 1999 the INS apparently reversed its decision and released Ms. G. without explanation. She later received asylum.

G.N., a Tamil from northern Sri Lanka, came to the USA in March 1997. He claims that he fled his country after Sri Lankan police in Colombo, the capital, tortured him. He arrived in the USA without proper documents and was taken into custody at San Francisco's airport. At the airport he appears to have signed an affidavit in English which reflected his answers to questions posed to him by an immigration official -- questions which were translated through an interpreter linked by telephone. A few days later, an INS inspector apparently questioned him. This time an interpreter was present, but G. N. maintains that the statement in English that reflected his answers to questions was not translated for him before he signed it.

There are some apparent inconsistencies between the statements taken at the

airport and in the subsequent interview and G.N.'s later testimony at his asylum hearing. An Immigration Judge denied asylum because of those inconsistencies. The Judge found that Sri Lankan officials who allegedly tortured G.N. did not harm him on account of one of the five reasons that would qualify him for refugee status, but in order to gather information on the activities of the armed opposition in Sri Lanka.

As of December 1998, G.N. had a claim pending under the Convention Against Torture, which would prohibit his forcible return to Sri Lanka if he can show that he faces torture there. Amnesty International believes that his story of persecution is credible and conforms with reports of conditions in Sri Lanka at the time he left.<sup>59</sup> The issues that led to denial of his claim have been appealed successfully in other cases. He is isolated in a jail in a remote area and his attorney is concerned about his emotional state. She told Amnesty International that he is afraid of his fellow inmates who he says have threatened him with sexual assault.

The attorney informed Amnesty International that her five requests for parole for her client have gone unanswered. The INS has also not responded to Amnesty International's inquiry about the case.

INS action on these cases illustrates that local INS officials are indifferent to or ignorant of both international standards and the agency's own attempts to impose some national standards on decisions to detain or parole asylum-seekers. Even individuals who have been granted asylum or have met the higher burden of proof required for "withholding of removal" status can remain detained indefinitely. INS District Counsels can appeal against decisions granting protection. INS District Directors can keep people in detention indefinitely, putting pressure on detainees to abandon their claims. The agency's headquarters appears unwilling or unable to enforce even the minimal standards it issues.

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<sup>59</sup>See *Amnesty International Urgent Action Bulletin*, Torture, Sri Lanka/Senegal: Thambirajah Kamalathanan, (AI Index ASA 37/19/98) The bulletin describes the torture of a young man returned to Sri Lanka by Senegalese authorities. The bulletin notes that young Tamil men from the north and east are especially at risk of being subjected to torture. Amnesty International September 1999 AI Index: AMR 51/51/99

## **CHAPTER 4: TRIAL BY ORDEAL-- DETENTION CONDITIONS<sup>60</sup>**

Once asylum-seekers are caught in the labyrinth of the INS detention system, its complexity and almost complete disregard of the needs of refugees create a "trial by ordeal" from which only the most persistent, courageous or lucky emerge unscathed.

### **INS structure**

The INS is divided into three regions and 33 districts. It negotiates contracts for detention of asylum-seekers with public and private institutions, while its districts run INS-owned facilities.

The INS uses four kinds of facilities to detain aliens. It operates a total of nine of its own facilities in the states of California, New York, Texas, Florida, Arizona, and Puerto Rico, known as Service Processing Centres (SPCs). A facility in Batavia, New York is operated by the INS but holds US Marshall's service detainees as well. The US Bureau of Prisons operates three facilities. The INS uses six privately contracted facilities in Colorado, New York, New Jersey, Washington state, and Texas (two). About 475 local jails (county, city or regional -- covering several counties in a state) are contracted with the INS to hold alien detainees. (The INS also uses an unknown number of facilities under Intergovernmental Service Agreements which the US Marshall's service negotiates.)<sup>61</sup>

A private contract facility will probably have an INS official who is in charge of immigration questions and procedures at the facility. Some jails have an INS liaison official on hand but most do not. Some jails that hold INS detainees may contract with private security firms for guards, as may the INS facilities themselves.

Amnesty International believes that if the INS sub-contracts its responsibility

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<sup>60</sup>The physical conditions of detention for any person deprived of their liberty are governed by international standards including most importantly article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibition against cruel, inhuman or degrading treatment; and, article 10.1 of the ICCPR which requires ensuring the humane treatment of detainees which is respectful of their dignity. The minimum requirements for "humanity" and "dignity" in detention have been set out by the UN Human Rights Committee in its General Comments and in the UN Standard Minimum Rules for the Treatment of Prisoners (SMRTP) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles). The latter two are referred to in chapter 5 of this report and detail minimum standards that should be in place in order to avoid violations of ICCPR article 7 and to ensure compliance with ICCPR article 10.1. For example, standards such as sleeping accommodation, lighting, sanitation and other basic physical conditions to be provided to detainees are specifically addressed.

<sup>61</sup>INS, Detention and Deportation Staff, Office of Field Operations "Questions and Answers Regarding INS Detention Facilities," (data compiled 2 October 1998).  
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for detaining asylum-seekers to other facilities, then the INS still has the duty to ensure that the facilities are appropriate in every regard for asylum-seekers. In turn, if other authorities accept the responsibility and income for detaining asylum-seekers, they have the obligation to ensure that their facility is appropriate for the detention of asylum-seekers.

Given that according to international standards asylum-seekers should not be detained for more than the briefest period and given that they are not criminals, there are very few facilities that would be appropriate for detaining them. The INS does not have the bed space in “appropriate” detention facilities for asylum-seekers, and is currently placing asylum-seekers wherever there is room. Facilities have an interest in keeping their bed spaces full, and are not likely to refuse to accept INS asylum-seeker detainees. As many wardens and officers in charge of detention facilities have said to Amnesty International: “asylum-seekers make good inmates - they are not criminals and are very well behaved”.

The structure and lines of authority in the INS detention system are confusing. Even though the INS has the power to order detention, the vast majority of INS detainees are subject to the rules and regulations of the facility they are in. Asylum-seekers are often disturbed because of what they have suffered, and many do not understand the language. Many are traumatized by their lengthy imprisonment. The INS sub-contracts its responsibility for the actual detention of people to other authorities, who are generally unaccountable and who do not know, because they do not have to know, the special needs of asylum-seekers.

The decentralization of authority also leads to innumerable practical problems for asylum-seekers and their advocates. For example, it is not clear to whom a complaint or concern is to be directed. Despite some effort to standardize conditions in certain INS facilities, each type of facility has its own standards, methods and philosophy of prison management.

### **Problems facing asylum-seekers in detention**

Amnesty International has received many complaints about problems facing asylum-seekers trying to prepare for and pursue their asylum claims while in detention. During visits to a variety of detention facilities in five INS districts in 1997, asylum-seekers told Amnesty International of the following problems:

- Ignorance about the legal process and inadequate access to legal materials;
- Inability to maintain contact with the outside world, with inadequate access to phones a consistent problem;

- A sense of isolation, aggravated when the INS moves them to remote rural communities or otherwise cuts off contact with the outside world;
- Fear at being detained with convicted criminals or criminal suspects;
- Disorientation at frequent, unannounced transfers;
- Lack of access to legal assistance.

The following conclusions about US policies and practices with respect to the detention of asylum-seekers arose from Amnesty International's 1997 visit to the USA, as well as from years of work by Amnesty International examining and documenting detention practices before and since 1997.

- **Inconsistency:** there is extraordinary inconsistency in policy and practice among the INS districts and even within districts;
- Failure to distinguish asylum-seekers: asylum-seekers are not distinguished from other alien detainees as required by international standards. This works to their great disadvantage;
- Inappropriate facilities: prisons and jails designed for convicted or suspected criminals and run according to prison management philosophy are no place for asylum-seekers;
- Women: although they are a minority of those detained, women appear to suffer disproportionately due to INS detention practices. Special attention should be given to their circumstances.

Amnesty International presented these findings to several national INS officials at the end of its 1997 visit. The organization has found little major disagreement with these observations and conclusions from many within the INS, but has noted only tepid attempts to correct matters. The INS took steps in 1997 to improve its detention practices by issuing standards to apply to its own facilities and private contract facilities. However, there are a number of problems with the scope and application of these standards. First,<sup>62</sup> they are "standards," not regulations, which means that they are not strictly enforceable. Second, these standards do not apply to the facilities where the majority of INS detainees are held (county jails and

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<sup>62</sup>The APSO guidelines mentioned earlier were never made into regulations despite the success of the pilot program, nor were gender "considerations" for the adjudication of asylum claims, which the INS published in 1995. By contrast, more restrictive "New Rules Regarding Procedures for Asylum and Withholding of Removal" published for comment in 1998, were intended for codification. Restrictive provisions thus seem almost mandatory, whereas more open ones are weaker in form, optional or unenforceable. The exception are recent proposed guidelines for the detention of minors, which are not the subject of this report but do contain several positive provisions, many of which Amnesty International believes the INS should apply to asylum-seekers. Unfortunately, even the detention rules for minors did not in their proposed form require asylum-seekers to be distinguished from other minor aliens.

other non-INS facilities). Third, there appears to be no effective, independent national authority authorized to monitor and enforce compliance with these standards. It has largely fallen to advocates to raise concerns about standards.

### **Inconsistency**

At any time, asylum-seekers may be found in any one of hundreds of facilities spread over many different INS districts. Asylum-seekers and those who seek to assist them must conform to the rules of each facility. Amnesty International has found little consistency in the operation of facilities, even those run by the INS. For example, in April 1997, the Miami INS District office denied Amnesty International representatives any general access to asylum-seekers detained at the Krome SPC near Miami. Yet officials from the same district facilitated complete access to asylum-seekers held in jails elsewhere in the district. Subsequently, the El Paso District office granted complete access to detainees at its El Paso SPC. Yet INS officials had considerable difficulty in securing permission for Amnesty International representatives to visit the El Paso jail.

The variety of responses to Amnesty International's requests for access reflects the arbitrariness and inconsistency which asylum-seekers and their advocates face. Advocates reported to Amnesty International in 1997 that the Miami District would grant parole to some asylum-seekers detained at Krome. Yet those detained by the same district in Florida's jails outside Miami apparently had little chance of having their cases examined for parole purposes. The Miami District reportedly paroled people to apply for asylum into Canada, while the Philadelphia District generally did not. Legal workers have access to asylum-seekers detained by the Philadelphia district in various jails in Pennsylvania. The same types of legal workers apparently have no hope of similar access in Louisiana jails to asylum-seekers detained by the New Orleans District.

When officials are replaced or detainees are assigned to different facilities, advocates often have to begin the arduous and time-consuming process of working out relationships with new INS officials or new jailers to obtain access to their clients. Many advocates tell Amnesty International that they become reluctant to criticize openly even the most abusive procedures at a facility lest they place at risk the informal "space" they have carved out for representing their clients.

### **Failure to distinguish asylum-seekers from others in detention**

Officials do not know how many asylum-seekers are being held in INS detention facilities, whether owned and operated by the INS, or whether a privately owned or a

contracted facility such as a county or local jail.<sup>63</sup> When asked, many officials have answered that they are in the business of running secure detention facilities, that inmates are classified according to the security threat they might present and that there is no specific classification for asylum-seekers. Concerned about this, in 1996 Amnesty International filed a request under the Freedom of Information Act with the INS to find out the number of asylum-seekers in detention nationally at a date of the agency's choosing. The response from the agency was that the INS does not keep such records.<sup>64</sup>

International standards require that governments distinguish asylum-seekers from other detained aliens.<sup>65</sup> The INS should not simply "warehouse" asylum-seekers with other prisoners, whether they be other aliens, convicted criminals or criminal suspects. Yet in many facilities which Amnesty International has visited, jailers do not know the nature of their immigrant population. This works to the extreme disadvantage of asylum-seekers. They are isolated by the conditions and location of detention facilities and jailers often hamper advocates' efforts to assist them. In at least one jurisdiction they are isolated even during their court hearings, which are conducted long-distance through the use of video cameras. They have no private access to their legal representatives (who are in the courtroom sometimes up to a four-hour drive away) and thus no opportunity to confer with their counsel about their case. Those who need the assistance of an interpreter must do without interpretation of the full proceeding.

Yudaya Nanyonga, an asylum-seeker from Uganda, was transferred in June 1998 to the York County Prison from the Wackenhut (Queens, New York) facility without explanation and without adequate notice. Once at York, she became distraught when she learned that she had been assigned to the maximum-security section of the prison, and began crying uncontrollably. Prison officials apparently responded by stripping her naked, injecting her with sedatives and placing her in a four-point restraint. Yudaya Nanyonga states that she regained consciousness two days later with no memory of how she had been removed from the restraints, nor any memory of how and when her underwear had been put back on. During her interview with Amnesty International, Yudaya Nanyonga appeared deeply troubled over her loss of memory. She has more recently told her attorney that she experiences frequent

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<sup>63</sup>The exception might be New York's Wackenhut facility, which apparently detains only asylum-seekers.

<sup>64</sup>In 1997, an Amnesty International USA member secured information through her Congressperson about the immigrant population of the jail used by the INS near Bakersfield, California. The letter from the Congressperson revealed that at that moment 49 of the 202 INS detainees (24 per cent) were "asylum cases". (Source: 20 May 1997 letter from Zoe Lofgren, Member of Congress, to Anne J. Rosenzweig.)

<sup>65</sup>Conclusion 44 (XXXVII) (d) of the Executive Committee of UNHCR.  
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nightmares about the incident.

A York prison official explained that Yudaya Nanyonga was assigned to the prison's maximum-security section due to concerns that she might have been convicted of a crime. The INS contract facility from which she was transferred, however, does not detain so-called "criminal aliens". It appears that the jail was given no information regarding her status as an asylum-seeker, and Yudaya Nanyonga told Amnesty International representatives that a prison official disregarded her attempts to explain that status.

The York prison official confirmed several details of Yudaya Nanyonga's story. He disclosed that she had been stripped, injected with some sort of sedative, and placed in four-point restraints due to her "suicidal behaviour". He stated that all actions were part of normal operating procedures and that "if this happened again, we would have pretty much the same recourse". He explained that these measures were taken for Yudaya Nanyonga's own safety, as she kept saying that she wanted to kill herself. Yudaya Nanyonga told Amnesty International that she was crying out of fear and said, "I wish I am dead...I did not say I would kill myself... I cannot kill myself".

When Yudaya Nanyonga was returned to maximum security after three days, she was told by other inmates that "they heard [that the way she was treated] . . . was a lesson for others". Another NGO representative reported to Amnesty International that a York prison official commented that "Yudaya was being disciplined . . . [and] being made an example of, so other asylum-seekers would know what would happen to them should they act as she did".<sup>66</sup> According to her attorney, the INS released Yudaya Nanyonga in early April 1999. Yudaya Nanyonga won her asylum case in August 1999.

The INS, as a contracting party that makes substantial payments to local authorities, should insist that those authorities respect asylum-seekers' rights and that they are sensitive to their special circumstances. Yet Amnesty International's review of dozens of agreements between the INS and local jails has found no mention of any consideration of asylum-seekers' special circumstances or the obligations which spring from the internationally recognized right to seek asylum.

When confronted with this information, individuals at various levels of the INS have responded that the agency is a "guest of the local prison" and cannot dictate terms or conditions for the treatment of detainees. As a result, there is an almost complete breakdown in accountability and oversight with respect to the rights of asylum-seekers, whose status should be of special concern to US authorities. The fact that jails often cannot or will not detain asylum-seekers in a manner which

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<sup>66</sup>Joan Maruskin, People of the Golden Vision (NGO), in an interview with Amnesty International, August 1998.

ensures respect for their rights is one reason that -- with rare exceptions -- the INS should not place asylum-seekers in jails.

### **Access**

Since asylum-seekers are not provided with legal representation, the only hope for many of them lies in pro-bono or low cost legal assistance from NGOs. Over the years attorneys and NGOs with scarce resources have faced problems in trying to gain access to INS facilities and to discover which detainees in which facilities are asylum-seekers in need of assistance. It appears to be in the interest of the INS to facilitate such a process. For years the Florence Asylum Project located in Florence, Arizona, has made almost daily presentations to INS detainees, explaining their legal options. Many of the detainees at Florence are aliens who have been convicted of crimes in the USA and who are likely to be deported. Others are asylum-seekers who need accurate information on how they can request protection. Immigration Judges supported this program and have consistently praised its utility.

Such a system would appear to benefit all parties involved, as well as acting as an antidote to possible abuses. However, it took until 1997 for the INS to suggest a nationwide system of "know your rights" presentations and it remains incumbent on NGOs to make the presentations: "Upon written request, the INS shall permit Attorneys, accredited representatives, and their legal assistants to make presentations to detainees"<sup>67</sup> Amnesty International believes that in order for the USA to comply with its obligations to refugees, the government must go much further than simply allowing NGOs to explain asylum-seekers' rights to them. The duty on the government in this regard is particularly high given that US law explicitly prohibits the provision of legal assistance to asylum-seekers. In 1998, the Executive Office of Immigration Review (EOIR), a branch of the US Justice Department, launched a pilot program where NGOs were paid for conducting "know your rights" presentations at three sites. Amnesty International urges the US authorities to establish similar programs, on a permanent basis, for all detained asylum-seekers.

Other practices in the INS detention system hinder asylum-seekers' access to information and assistance and thus can severely limit their ability to file and pursue their claims. When Amnesty International visited the jail in Virginia Beach, Virginia in April 1997, INS authorities told the organization that its distance (more than four hours' drive from Washington DC, where NGO assistance was available) did not impede representation since the Virginia Beach jail generally housed people who

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<sup>67</sup>INS Detention Management Branch, "Detention Standard: Group Legal Rights Presentation," Detention Operations Policy Manual, Section 26. As mentioned earlier, this standard is not enforceable.

were appealing against denial of asylum. The INS said that it held those detainees facing an asylum hearing closer to Washington and available legal services.<sup>68</sup> Subsequent to the organization's 1997 visit, however, the INS began to use the Virginia Beach jail as the principal place for detainees awaiting hearings. Amnesty International takes issue with the apparent failure of the INS to take due account of the extreme difficulties it causes asylum-seekers and those who seek to assist them, by detaining asylum-seekers in a facility so far removed from legal or other assistance. Such difficulties may well result in those deserving international protection not obtaining it.

Some hearings are conducted by video conferencing between Virginia Beach and the Immigration Court in Arlington, Virginia. Amnesty International representatives observed video-conference "master calendar" hearings (where immigration detainees "plead" and future merits hearings are set). Advocates report that this procedure is also used by the Immigration Court to conduct full merits hearings, including asylum hearings. Amnesty International believes that the INS should not use video-conference hearings as a substitute for a proceeding where an asylum-seeker can confer privately with their attorney and the Immigration Judge who will decide his or her fate. The procedure is depersonalized and in the hearings observed by Amnesty International raised serious questions about the fairness of the procedure. These concerns included: inadequate opportunity for the asylum-seeker to communicate fully and participate fully in the procedure; inadequate interpretation (while interpreters translate testimony and the Immigration Judge's instructions and decisions, they do not interpret courtroom discussions for the detainee); and inadequate ability for the detainee to confer privately with their legal representative.

One NGO representative reported in late 1998 that when she arrived at the San Pedro SPC facility south of Los Angeles to find that her client had been transferred, detaining officials refused to tell her where the client had been moved. They told her to wait until her client wrote or called her (collect). Amnesty International raised this issue with an INS official who expressed concern about the matter. She told the organization that while officials are not required to inform attorneys of their clients' whereabouts, she assured Amnesty International that attorneys are generally informed if their clients were transferred and to where.

In another instance, an attorney needed to find a potential client held somewhere in the Los Angeles area, who had been moved by the INS since making

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<sup>68</sup>The suggestion here is that asylum-seekers awaiting hearings need assistance more than asylum-seekers waiting out their appeals. This ignores the needs of asylum-seekers unable to contact NGOs and other advocates until after hearings where they have been forced to represent themselves. It also disregards the needs of represented asylum-seekers to collaborate closely with their attorneys on their appeals.

contact. The attorney could not negotiate the parole bond for which the woman was eligible until the prisoner signed the necessary forms retaining her as her lawyer. And the INS had no obligation to provide the attorney with information on the woman since she did not yet represent her.

Without access to legal assistance, asylum-seekers often turn to fellow inmates for help, with sadly predictable consequences. Amnesty International received the following account from an attorney who assisted F.C., a Honduran asylum-seeker, during his second attempt to gain asylum.

The first time he lodged his asylum claim was while detained in a remote facility in the southwest USA where legal assistance was not available. He claims to have fled his country due to a fear of persecution on the basis of his family's political activities and because of his sexual orientation. The first time that he lodged his asylum claim, however, he did not reveal that he had been persecuted on the basis of his sexual orientation because he had to seek the assistance of a fellow INS detainee who spoke some English to fill out his asylum application. He claims that fear of revealing his homosexuality to a fellow inmate caused him to omit details of the physical abuse he endured in Honduras due to his sexual orientation. He attempted to submit documents in Spanish, which the Judge apparently rejected since they were not accompanied by a certified English translation. He appeared in immigration court unrepresented, was denied asylum and the INS deported him.

He re-entered the USA some time later and served a 10-day jail sentence for re-entering after deportation. The INS then transferred him to a detention centre in El Paso, Texas to be deported once again. His case came to the attention of Amnesty International after the INS placed him in segregation, apparently due to fears he expressed and threats and harassment from other detainees.

As an alternative to segregation in punishment cells at the INS facility, the agency offered to transfer him to a jail 200 miles away, according to his lawyer. She reports that the INS eventually agreed to keep him in segregation only at night. Despite the fact that the Asylum Officer who reviewed his case found his testimony credible and accepted his explanation for concealing his homosexuality during his first asylum claim, asylum was denied a second time. Current US law prohibits this man from raising his sexual orientation as a reason for seeking asylum if he could have raised it at the earlier proceedings.<sup>69</sup>

Fortunately for F.C., his attorney obtained a reconsideration of the case. The INS then recommended "withholding of removal" and released him. Had this man had access to an attorney's advice when his application was first heard, he might

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<sup>69</sup>Immigration and Nationality Act, Sec. 208 (a) (2) (C). This law apparently bars a second asylum claim even in cases when the applicant has not had a meaningful opportunity to file a claim previously, that is, when a person is unrepresented and unable to communicate in English. This imposes an unacceptable burden on asylum-seekers whom the INS jails and submits to an adversarial procedure involving complex legal issues in a foreign environment.

have been granted asylum, saved a second, mandatory period of detention, and spared the trauma of confinement.

Jails routinely provide access to inmates by local criminal attorneys and paralegals. Guards may know local legal workers and understand their role under US law and the US Constitution. However, Amnesty International has received numerous complaints from advocates working in the field of refugee law about the lack of access to INS detainees in these facilities. Immigration law, largely unknown to local jailers, permits lawyers from any state to represent someone in immigration proceedings. In addition, non-lawyers who are certified by the Board of Immigration Appeals (BIA) to practice in Immigration Court can represent people in asylum proceedings and in appeals of their cases. Yet none of the INS-jail contracts that Amnesty International has reviewed mentions these facts. In their ignorance of immigration procedures, jailers may thus deny advocates permission to speak to those asylum-seekers that the law specifically allows them to represent. Amnesty International has received reports that jails have denied "BIA-accredited" representatives access to clients or potential clients. In one jurisdiction this became so difficult that one representative, who reported being the only one offering services to INS detainees in a remote jail, gave up the effort.

In light of this and other reports, in 1997 Amnesty International filed a request under the Freedom of Information Act asking the INS to inform the organization how it communicated the role of BIA-accredited representatives to the jails with which it contracted. The INS did not answer the request directly but advised in its 1998 response that the proposed language of new Intergovernmental Service Agreements would address the question. The model language provided to Amnesty International states, however, that "(t)he Service Provider shall... afford INS detainees reasonable visitation with legal counsel, foreign consular officers, family members, and representatives of pro-bono organizations".<sup>70</sup> It provides no explicit information about the role of BIA-accredited representatives nor of out-of-state attorneys.<sup>71</sup> As it reads, the rule would allow jails to restrict access by pro-bono organizations (NGOs and others). For example it could limit visits to the times when prisoner family visits are allowed, which are totally inadequate for representation

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<sup>70</sup>INS, "Revised Inter-governmental Service Agreement", October 9, 1998, pp. 3-4.

<sup>71</sup>The closest the language comes is reference to access by "groups recognized by the INS", which is a misnomer as the BIA is part of the Executive Office of Immigration Review, not of the INS. When this was pointed out at a meeting with NGOs in November 1998, an INS representative gave verbal agreement to have the agency notify the jails it contracts with of the status of BIA-accredited representatives. When advocates asked about this at a similar meeting in January 1999, the INS reportedly responded that the new language took care of this problem. In the view of Amnesty International, it does not.

purposes.

The INS has informed Amnesty International that it will include provisions more protective of detainees' rights in contracts with new jails. In addition, it apparently hopes to incorporate these new provisions in existing agreements when they come up for renewal.<sup>72</sup> This may prove difficult, as many contracts do not have apparent expiry dates and the only opportunity to revise them may be when the jail requests an adjustment to the fees. Amnesty International believes that at a minimum, the INS should immediately review all contracts it holds with jails so as to incorporate the provisions of the INS detention standards which currently apply to INS facilities and private (corporate) contract facilities. Until and unless the INS agrees to refrain from placing asylum-seekers in jails, any agreements with such institutions must contain strict and enforceable standards that regulate asylum-seekers' treatment and that make reference to their special status under international law.

Reports received by Amnesty International are that plans to introduce model language for new jail contracts have been revised since October 1998. It is of concern that the INS now plans to "negotiate" with jail officials about the implementation of the standards. This suggests that the INS remains unwilling to insist on minimum enforceable standards for the conditions under which asylum-seekers and other INS detainees will be held. This is a critical failing of INS planning, particularly in terms of access to counsel. It also appears that the new contract language may exclude hundreds of jails that the US Marshall's service contracts with. Whatever the outcome of current (April 1999) INS plans in this area, neither the contract language Amnesty International has seen thus far nor the jails themselves provide for the needs of asylum-seekers.

### ***Case study: access in New Orleans***

Jail officials in New Orleans, Louisiana, have frustrated advocates' attempts to assist asylum-seekers for several years. In order to assist NGOs to identify which detainees most need assistance, Amnesty International members and others managed to visit some INS detainees at the Orleans Parish Prison through the arduous process – taking up to a month or more -- of getting on their visitor lists. (The INS transferred some detainees before permission was secured and a visit could take place.)

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<sup>72</sup>"Memorandum to Regional Directors Regarding Detention Guidelines Effective October 9, 1998," Michael A Pearson, Executive Associate Commissioner, Office of Field Operations, 7 October 1998.

Amnesty International's members report that they are unable to take writing materials to the visits to take notes on their cases. One volunteer attempted to mail Amnesty International human rights reports on Sri Lanka, relevant news articles, and a copy of the Universal Declaration of Human Rights to an unrepresented detainee. On two occasions in 1997 the Orleans Parish Criminal Sheriff's Office returned the material, with "rejected" stamped on the envelope. The detainee was denied asylum and deported.

At a meeting in May 1998, Amnesty International representatives questioned the acting INS District Director about these problems. The official commented that she herself had trouble getting mail delivered to the prison. When asked how asylum-seekers' rights were protected, she responded that she could not "charge the sheriff's office" with the responsibility of protecting the rights of asylum-seekers. Recent information received by Amnesty International indicates that asylum-seekers in the Orleans Parish Prison may now receive human rights information for their cases through the mail.

Other, similar problems persist, however. For example, an Amnesty International member visited two unrepresented Ethiopian asylum-seekers in September 1998. Jail officials apparently moved them to a different "tier" in the jail after one of her visits, with the result that she arrived on the wrong evening for that "tier" and could not see them. Guards would not tell her which day she could visit these men, telling her to write to the prisoners to find out. She then attempted to hand deliver human rights reports to the prisoners later that week, but she reported that after consulting with their supervisor, prison guards refused to allow the asylum-seekers to receive the information. Both Ethiopians were denied asylum and the Amnesty International member does not know what became of them.

Prison authorities for the Orleans Parish Prison have often refused access to NGOs wishing to observe conditions under which they hold asylum-seekers and other aliens. Amnesty International attempted to visit the prison without success in November 1996, following assurances received during weeks of letters, phone calls and faxes which discussed details of the visit.<sup>73</sup> After denying Amnesty International delegates access to detainees who had requested the organization's assistance, jail officials then refused to provide the name of the INS liaison officer to the facility. When the delegation asked for a copy of the contract between the INS and the jail, the response was that a "Public Records Act" request (under Louisiana law) would

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<sup>73</sup>The INS and the jail eventually allowed access by NGOs to the facility in mid-1998 as part of a tour of several facilities in the INS detention system put together by national officials. Amnesty International representatives were unable to attend this visit. Problems with gaining contact with asylum-seekers continued after that tour and have been brought to the attention of national INS officials.

produce the contract within a few days. That request was made on 8 November 1996. Amnesty International received no response.

In light of these concerns and following the May 1998 meeting with the acting District Director, Amnesty International wrote to the New Orleans District again in late May 1998. The letter once again requested a copy of the contract with the Orleans Parish Prison and any information or instruction the INS provided New Orleans officials concerning asylum-seekers and protection of their rights. As with previous correspondence and requests to the District, the INS did not respond.<sup>74</sup>

Amnesty International calls into particular question the INS's continued use of the New Orleans facility, and is concerned that the INS has identified Orleans Parish Prison as one of 13 jails nationally which hold large populations of INS detainees.<sup>75</sup> The organization urges the INS to review carefully the Orleans Parish Prison's practices and to take appropriate action to ensure that both the District and the prison respect the rights of asylum-seekers.

### **Isolation**

If NGOs find it extraordinarily difficult to get access to asylum-seekers, asylum-seekers often face a hopeless task in contacting the outside world.

I. H., of Cuba, who reported that she had spent time in five facilities in the first four months of her detention, was provided with names of attorneys and organizations which assist immigrants at her first place of detention. She wrote to some of them, but did not know if they answered since she was repeatedly moved and her mail was not forwarded. She had to place long-distance collect calls to others from the various jails that held her, calls that they would not accept.

Another Cuban, detained in a rural jail in Texas, could not get the long-distance collect calls he made to NGOs accepted. He succeeded in calling some friends in Mexico who accepted the charges. They then contacted an NGO in El Paso, Texas that took his case. He eventually obtained asylum.

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<sup>74</sup>In January 1998, a US Senator apparently sent to the INS a bundle of Amnesty International's correspondence with the INS and asked for an explanation of the concerns raised. In April 1999, the Senator's office forwarded a letter by the INS in reply to Amnesty International. The reply did not respond to all of the concerns raised and in addition it addressed the case of Mohamed Hassan (whose case had been resolved, see above). The INS letter did not reply to Amnesty International's concerns about access to prisoners or their ability to receive human rights information.

<sup>75</sup>See above, INS, "Questions and Answers Regarding INS Detention Facilities".  
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A review by an Amnesty International member of the list of legal services provided to asylum-seekers in Pennsylvania in 1996 revealed that of the 14 parties listed, one might represent an asylum-seeker. Two wanted their names taken off the list, other numbers did not work or were incorrect. (The list was corrected and has been accurate and updated since early 1998, according to the Amnesty International member.)

Detainees in jails which Amnesty International visited in 1997 and 1998 expressed widespread concern about the lack of information on their cases. Among the complaints were rare or non-existent contacts with their INS deportation officers: they tried the phone numbers the INS provided them and often found them useless. Two detainees who wrote to the INS showed Amnesty International form letters they received in response to their queries. The INS letters suggested that the detainees could not obtain their *own* records or information about their cases because they had not provided (according to these detainees, because they did not know) their alien numbers. Amnesty International approached the INS requesting it to send these detainees their alien numbers. During the phone conversation with Amnesty International, the INS representative accessed these detainees' files within seconds, using only their names.

Almost any advocate working with detained asylum-seekers will have similar examples of their clients' difficulties in contacting them or learning about their status. Amnesty International's greater concern is for cases that might not come to light, when asylum-seekers are deported either because they cannot establish contact, or, as with the example referred to above of the Ethiopians detained in the New Orleans jail, when advocates lose track of detainees.

## **Transfers**

The INS may transfer asylum-seekers without notifying them or their attorneys beforehand. Attorneys have reported to Amnesty International that the INS may not even notify them following the transfer of their clients. In 1996, the INS apparently returned an asylum-seeker to Ghana before her process was completed and without notifying her attorney. Her attorney learned that the INS had deported her, not from the agency itself, but from jail officials, despite a commitment from the INS made in open court that it would not deport her. The INS reportedly returned her from Africa only to jail her once again. An Immigration Judge eventually granted her asylum.

Since there are no apparent regulations regarding transfers, attorneys and asylum-seekers often interpret transfers as retaliation for their protests, for their

complaints about conditions or for other actions they have taken. For example, asylum-seekers at one jail used by the INS in Florida told Amnesty International in 1997 that immigration officials stressed the length of time an appeal would take and that they would remain in prison. These immigration officials allegedly told the detainees that the INS might transfer them to other jails pending their appeal, jails the detainees knew had far worse conditions. Some detainees told Amnesty International representatives that they then withdrew their appeals and showed them copies of their appeals and letters of withdrawal written a few days later.

### **Conditions in jails**

Amnesty International delegates interviewed a number of INS detainees held in Cell Block 2K, Virginia Beach, Virginia. Many had been held in several facilities, and unanimously declared that conditions at Virginia Beach were the worst that they had faced. They said that officers would taunt them with racist statements, and wake them late at night by dragging their keys against the cell bars. When the delegation visited mid-morning, several of the inmates were lying on their mattresses with their heads wrapped in their blankets in order to escape the fluorescent lights overhead. Several men were sleeping on mattresses on the floors in the common area outside of the cells as there were not enough beds. There was no corresponding increase in toilet facilities or in the number of personnel, raising health and safety concerns.

Most detainees reported that there was nothing to do all day except try to sleep to escape the monotony and the tension of so many in such a small space, or to watch the television mounted on the ceiling. Cell block 2K had little natural light and the stench of so many men in such little space was heavy. They reported that they had recreation time of 20 minutes approximately once every week. Some declined to go outside as they found it too difficult to come back in to such a depressing place. Officials disputed the infrequency of recreation and stated that they were within the standards recommended by the INS. However, when asked about the infrequency of the recreation periods, the officer in charge stated that “there was no constitutional right to recreation and that his facility passed inspection and was found to be in compliance”. Furthermore, he stated that “if the inmates want to get some exercise they could do push-ups and other exercises in the area outside their cells”.

The detainees had tried to fashion a set of chess pieces out of toilet paper moulded into shapes. The only information posted on the wall was a list of attorneys’ telephone numbers compiled by the inmates and stuck to the wall with tape pulled from meal trays.

Rules in jails are designed for people who have been convicted or who are suspected of having committed crimes. Conditions in jails may reflect the particular correctional philosophy of the warden or officer in charge or of the jurisdiction that

they serve. The number of jails involved in the INS detention system poses problems for asylum-seekers, as one jail may attempt to conform to national correctional standards; another nearby may not. A third may feel that accused and convicted criminals deserve only minimal public expense, with the provision of food, clothing and exercise opportunities reflecting that philosophy. A jail may treat all INS detainees as less dangerous than local criminal suspects or convicts. Yet a facility in California reportedly shackles all INS detainees hand and foot whenever they are moved in the compound, considering all of them as flight risks. Asylum-seekers, already traumatized by experiences in their countries of origin and new to the USA, may be held in several different jails. They will have to learn new rules and face new language problems in each facility, often with no explanation provided.

For example, in some US jurisdictions, jails charge their local prisoners for medical consultations. INS contracts with these jails generally state that the INS will pay for medical care. Jails may presumably instruct INS detainees about this, but understandably detainees may not grasp all the instructions conveyed to them verbally, in an unfamiliar language, at what may be the third or fourth institution where they have been held.

S.S., an asylum-seeker from Sri Lanka had just emerged from a two-week stay in isolation at Berks County jail in Pennsylvania, when Amnesty International spoke with him in 1996. The jail officials had imposed this punishment on him due to his alleged failure to cooperate with officials at the airport. He apparently feared torture in Sri Lanka and resisted INS attempts to deport him. The "sick call request" which he showed Amnesty International stated "YOU WILL BE CHARGED \$3.00 FOR THIS" in large capital letters at the top of the form. S.S. had been held in isolation for 22 to 23 hours per day when he received this disconcerting message. In his request for assistance for abdominal pain he wrote that he had "not enough money to make request".

S.S. told Amnesty International that he thought that he would not get medical treatment and that this was part of his punishment for resisting deportation. S.S. was released in 1998 after three and a half years in detention. He won his asylum case on appeal to the US Circuit Court of Appeals.

Some jails have an INS presence at the facility to explain, in theory at least, elements of the system asylum-seekers undergo. Most jails have no INS presence and their personnel know nothing about the status of the alien detainees sent them.

The person in charge of one jail asked an Amnesty International representative to intercede on behalf of an alien detainee, H.L., apparently a Vietnamese refugee who showed signs of mental illness. H.L. arrived at the jail from a mental institution without accompanying records. H.L. communicated incoherently to the Amnesty AI Index: AMR 51/51/99 Amnesty International September 1999

International representative while lying under his cot. He apparently asked to be placed in the isolation wing of the jail. An inspection of his file revealed no information on his background, not even his alien identification number.<sup>76</sup> Both the jailer and a health official felt that their facility was not the appropriate place for this man. An Amnesty International representative asked an INS district official to look into the matter in November 1998. There was no response as of April 1999.

Since Viet Nam may never agree to take him back, he faces what is in effect an "indefinite life sentence" without any appropriate treatment for his mental health problems. A health official stated that the jail was not a proper place for him as appropriate treatment would not be available to him and the jail could not provide special medical treatment without permission from the INS.

Amnesty International USA issued an appeal concerning this case in April 1999, expressing the concern that should Viet Nam agree to allow H.L. to return, he would be in no condition to contest his removal to Viet Nam. Similarly, due to his apparent disability he is unable to request access to or participate in the review procedures for indefinite detainees.

The INS detained G. D. for several months in 1994 at the Wackenhut Corporation's facility in Queens, New York.<sup>77</sup> He described an incident to Amnesty International where jail officials confined him to the solitary/disciplinary cell (known as the "cold room" to detainees) as a result of a disagreement with guards during his medical examination. As he related it, he objected to male guards observing him partially or completely naked while medical personnel examined him. The basis for his objections, he claims, was his experience of being sexually abused while in custody in Togo. G.D. was later granted asylum.

## **Food**

Food in a prison setting is deeply politicized. Much emphasis is put on food by detainees, it is frequently the source of complaints and through hunger-strikes it is used a tool to register grievances and to agitate for change. Food is used by those running facilities as a tool of control with feeding times set at hours that make little sense for those needing to eat, but perhaps are quite convenient for those who prepare and distribute meals. For example in some facilities, breakfast is served between 3:30 and 4 in the morning, lunch is at 11 in the morning and dinner is at 3 in the afternoon.

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<sup>76</sup>Jail officials at Piedmont Regional Jail in Farmville, Virginia, where H.L. was held, expressed concern to Amnesty International that files of several of the INS detainees had few details other than their name and alien registration number.

<sup>77</sup>This was a different building in Queens than the one currently used by the Wackenhut Corporation to hold INS detainees.

While in many facilities attention is paid to providing food in keeping with religious and dietary requirements, in others no attention is paid to this at all. In addition, many of those responsible for the custody of asylum-seekers interviewed by Amnesty International referred to “feedings” and “feeding times”, revealing a disturbing and depersonalized characterization of those who are detained.

### **Women detainees**

*“Conditions of confinement in our facilities, as well in local detention facilities, are another area of concern, especially as it affects women...”*

Commissioner Doris Meissner, 1998<sup>78</sup>

UNHCR issued authoritative guidelines on the treatment of asylum-seekers in detention in 1999<sup>79</sup>. Guideline 8 advises that:

- ↯ women asylum-seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom have special needs, should be avoided.
- ↯ where women asylum-seekers are detained they should be accommodated separately from male asylum-seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres the use of female staff is recommended.
- ↯ women asylum-seekers should receive the same access to legal and other services, without discrimination as to their gender, and specific services in response to their special needs. In particular they should have access to gynaecological and obstetrical services.

The INS estimates that seven per cent of its detainees are female.<sup>80</sup> Amnesty International has found that their smaller number can work to the disadvantage of women detainees, especially when they are assigned to local or county jails. Jailers may be more likely to confine them together with aliens who have been convicted of

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<sup>78</sup>See above, “Testimony Before the Subcommittee on Immigration, Committee on the Judiciary, US Senate, p. 9.

<sup>79</sup>UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 1999

<sup>80</sup>See above, INS, “Questions and Answers Regarding INS Detention Facilities”.  
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crimes or with common criminals from the local jurisdiction.<sup>81</sup>

The INS does not instruct jailers to meet the specific needs of female asylum-seekers. Amnesty International received testimony from one asylum-seeker that she was frequently threatened by her fellow inmates, was made to sleep on the floor for two months, and felt at risk of sexual assault by the other women in her cell block. Another asylum-seeker reported that all she wanted was to “get out” as she would rather take her risks back home than be locked up with criminals in jail. A Honduran woman interviewed by Amnesty International in 1997 at the El Paso city jail in Texas told the organization’s representatives that she hadn’t left her cell for weeks to take her hour per day exercise because she feared harm from the other inmates in her cell block whom she might encounter in the exercise area.

Women asylum-seekers may also have suffered experiences that could make their subsequent jail experience more difficult for them than for men. In 1997 Amnesty International took action on the cases of several Chinese nationals whom the INS had kept in jail for several years, and whom the 1996 IIRIRA may have made eligible for asylum, since many of them alleged that they had fled forced family planning in China.<sup>82</sup> One of them, Q.Y., had been airlifted from a ship discovered near the USA to a US hospital in July 1993 where she was apparently diagnosed with a tubular pregnancy. Surgery terminated her pregnancy. Several weeks later, she appeared before an Immigration Judge without counsel. She testified that she was still afraid to return to China despite the loss of her child, since she feared the Chinese government would penalize her for conceiving a child illegally and for leaving the country. The judge suggested that she fill out an asylum application. She subsequently contacted someone she thought was an attorney and spoke with him about her case over the phone. He apparently filled out an application and sent it to her in prison to sign. Since it was written in English and she had no translator in jail, she could not check “her” statements for accuracy. A few weeks later she was denied asylum. The judge found her not credible due to discrepancies in her testimony. The Immigration Judge also felt that her demeanor indicated that she was not an honest witness.

When Amnesty International encountered her case in the second half of 1997, the INS had detained Q. Y. for over four years. She spent significant portions of that time in a remote jail in California. In Amnesty International’s view, the length, place and circumstances of this woman’s detention clearly had a

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<sup>81</sup>Amnesty International has also observed that within Service Processing Centres owned and operated by the INS, there is a greater likelihood of women asylum-seekers being commingled with other INS detainees (who have committed crimes).

<sup>82</sup>Through a section of the IIRIRA, Congress amended US refugee law to address a court decision which found such persons not eligible for asylum under US law.  
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detrimental effect on her asylum claim. It appears that her isolation and lack of adequate representation before her hearing led to her producing a written asylum application that the judge found at odds with some of her oral testimony. People who interviewed Q.Y. some time after her hearing, including representatives of the Women's Commission for Refugee Women and Children, reported to Amnesty International that she exhibited signs of post traumatic stress disorder, including dreams about her dead child, intense fear, and expressions of feeling permanently injured.

In 1998 a former cellmate of Q.Y., (apparently a US convict), wrote to Amnesty International USA's Refugee Office and asked if the organization could assist Q.Y. Amnesty International's subsequent letter to Q.Y. was returned to the organization from the jail. It appears the INS may have transferred this woman once again.

In April 1997, Amnesty International interviewed I.H. of Cuba at a jail in Sarasota, Florida. She claimed that she arrived in the USA with her husband and others on a boat in December 1996. The INS first detained her at its Krome North Service Processing Center near Miami. In the four months prior to her asylum hearing, I. H. stated that she had been detained in five different facilities in the state of Florida, several of them hundreds of miles apart from each other: first in the Sarasota jail, then in the Citrus County jail, then in two facilities in Tampa, then in a jail in Panama City, and finally back to the jail in Sarasota. She was given some papers in Krome with names of attorneys and wrote to some of them. They either did not answer or their letters were not forwarded. She could only make collect calls to others from the various places of detention, calls they would not accept.

I.H. told Amnesty International that she left messages for her husband, who was also detained, through collect calls to a cousin in Florida who relayed messages between them. She estimates that she had only a few minutes together with her husband before their asylum hearing at the Immigration Court at the Bradenton, Florida jail. The Immigration Judge denied asylum to both.

I.H. stated that she had left Cuba because she wished to leave a communist youth organization, and because the government had penalized and threatened her for this and for a prior attempt to leave Cuba without permission. Amnesty International reviewed the couple's asylum application. It indicated that almost all the information the couple provided concerned her husband, A.B., who left Cuba (also without authorization) to accompany his wife in her flight. Of the two, I. H. clearly had the stronger case, but the couple did not know enough about asylum law to explain *her* circumstances to the Immigration Judge, who apparently suggested that they combine their claims. None of I.H.'s history appeared on their joint written asylum application, nor did they apparently discuss her experiences in

their oral testimony.

Amnesty International subsequently interviewed I. H.'s husband, A.B., at the Bradenton jail. He confirmed the details of his wife's story. This case illustrates how conditions of detention -- isolation, frequent and unannounced transfers, and inadequate telephone access -- can frustrate the proper adjudication of an asylum claim. Had the couple secured legal counsel or advice, they or their attorney surely would have conveyed I. H.'s history to the court. Had an attorney discovered their case post-hearing, he or she surely would have appealed. Had they remained at the INS Krome facility near Miami, the INS might have released them pending adjudication of their claim. Had the INS not moved I. H. so frequently, she might have secured help from Florida's large Cuban community.

As asylum-seekers, women may not articulate an individual claim of persecution if their husband or male kin do. In 1995, the INS issued "Considerations For Asylum Officers Adjudicating Asylum Claims From Women", for use by the Asylum Officers in interviewing and otherwise dealing with such claims. One of the Considerations fits the case of I. H. (above) perfectly:

*"When a husband does not appear to have an approvable claim, an Asylum Officer should routinely review the merits of the wife's case even though she may be listed merely as a derivative on her husband's application and may not have filed a separate Form I-589 asylum application."*<sup>83</sup>

Unfortunately, these instructions have not been codified into regulations, nor do they apply in Immigration Courts.

Women and members of other groups, such as lesbians and gay men and people with disabilities, face particular problems if they are detained when they seek asylum. If the USA insists on detaining asylum-seekers, it is clearly incumbent on US authorities to address the particular needs of groups who may be especially disadvantaged in detention. The greater obligation, of course, is for the USA to bring its policy and practice in line with international standards.

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<sup>83</sup> Memorandum From Phyllis Coven, Office of International Affairs, "Considerations For Asylum Officers Adjudicating Asylum Claims From Women", II, (f), 26 May 1995. Amnesty International September 1999 AI Index: AMR 51/51/99

## CHAPTER 5: INTERNATIONAL STANDARDS

*“They have finally broken me - even though I know I am a refugee - I cannot survive another year in this jail. I will take my chances in [Country X], as my plane stopped there on my way to America. Maybe they will understand why it is not safe for me to go home yet.”*

An Albanian asylum-seeker who went on a 45-day hunger strike to protest against the denial of his claim to asylum in the first instance and the prospect of another several months to a year in a detention centre while waiting for his appeal to be heard.<sup>84</sup>

The purpose of this chapter is to set US law, policy and practice in the context of agreed international standards for the protection of refugees. International standards set out the circumstances and conditions under which states have a limited right to detain asylum-seekers. In many regards the USA violates international standards; policy makers and advocates should use these international standards as the framework for pursuing justice for those they represent.

A useful departure point lies in the 1999 UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers. This authoritative document states:

*“Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based”.*

Amnesty International is concerned that the way in which asylum-seekers are detained in the USA may prevent or inhibit them from lodging or pursuing their claims. Detention may also have the effect, if not the intention, of inducing asylum-seekers to abandon their asylum claims. This is especially so when the detention is prolonged or conditions of detention are extremely poor. In addition,

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<sup>84</sup>It should be recalled that the UN Human Rights Committee in its General Comments on the interpretation of the ICCPR, Article 7, stated that it covers acts that cause physical pain and also acts that cause mental suffering to the victim. Practices that are deliberate and are known to cause emotional or mental distress on detainees, such as isolation (segregation), may breach the international prohibition on inhuman treatment of detainees. In this regard, the segregation of hunger strikers such as this Albanian asylum-seeker may breach the international prohibition on inhuman treatment of detainees. This asylum seeker and others in segregation reported to Amnesty International that they were verbally harassed while in segregation.

detention acts as a deterrent to those who might consider coming to the USA to seek protection.

While it is difficult to balance the interests of a state to control who is on their territory with the right of asylum-seekers to seek and enjoy asylum, international standards are clear. As a general principle asylum-seekers should not be detained. According to article 14 of the Universal Declaration on Human Rights, the right to seek and to enjoy asylum is a basic human right. It must be recognized that in an era of strict visa controls, carrier sanctions and other measures used to restrict access to borders, asylum-seekers are often forced to arrive at or enter a territory illegally in order to exercise their rights under article 14. When countries of asylum become fortresses, they should expect increased use of false documents and reliance on smugglers.

Amnesty International believes that in balancing state interests against asylum-seekers' rights, the use of detention by the USA is a disproportionate and harsh measure in the pursuit of immigration control objectives. Furthermore, the conditions of detention in which asylum-seekers are held are inhuman and do not respect the inherent dignity of the person. Finally, the decision to detain an asylum-seeker is not made in accordance with international standards and the procedures for obtaining release from detention do not respect international law.

### **Treating asylum-seekers as criminals**

The characterization of asylum-seekers as criminals is not new. However, in the USA it has had drastic consequences. This view of the asylum-seeker as criminal was behind recent legislative reforms and, in particular, the introduction of a detention scheme to support the IIRIRA. By characterizing asylum-seekers as criminal and borrowing from the language and logic of the criminal justice system, the result is a system that is punitive rather than protective. Asylum-seekers are transformed from people in need of international protection to people who are a threat, people who cheat, and people who will disappear once they gain access to the USA. As a result, asylum-seekers end up in behind bars as "custodies", "detainees" or "inmates".

"Mixed flows" of asylum-seekers and immigrants are a problem in many parts of the world. However, few countries seek to resolve this problem by locking people up for great lengths of time, with no effective way of gaining release. It is Amnesty International's view, supported by international law, that the USA is violating many of the most fundamental rights of asylum-seekers and, in some cases, those already found to be refugees.

*“No symbol stands in more stark contrast to the tradition of the United States as a haven to the tired, poor, and huddled masses than the detained immigrant. A language of euphemisms attempts to blur this starkness. The INS ‘detains’ newcomers, though many remain confined for extended periods. It places newcomers in ‘Service Processing Centres’ or other ‘facilities’, though virtually all find themselves in prisons... It seeks to deter document ‘fraud’ and ‘mass migrations’ which, in practice, provides it with license to imprison individual asylum-seekers. Removal proceedings themselves are deemed ‘civil’ in nature, though the result (separation from family and banishment to foreign, often perilous countries) and the means of enforcement (detention) can be every bit as severe as a criminal sanction. A linguistic sleight-of-hand cannot hide this reality.”*

### **International standards on refugees’ rights**

*“We have an obligation that we must meet, as members of organisations we helped build, to abide by rules we helped write, to further goals of law, peace and prosperity that Americans deeply support.”*

US Secretary of State Madeleine Albright, January 1998

The international system of human rights protection carefully constructed over the past 50 years is based on the understanding that human rights are universal and that they transcend the sovereignty of individual states. Human rights are an international responsibility and international standards set out the criteria against which the conduct of any nation should be measured. Despite the USA’s leading role in establishing the international human rights system, it has been reluctant to submit itself to international human rights law and to accept the same minimum standards for its own conduct that it demands from other countries. However, the USA is not alone in detaining asylum-seekers, as many states make strenuous efforts to deter and obstruct refugees from seeking asylum in their countries.

Any discussion of asylum-seekers’ rights needs to consider the following issues:

- ↪ has the state provided for the detention of asylum-seekers in its law, and if so, is this law in keeping with international standards?
- ↪ does such legislation adequately provide for the asylum-seeker to be released from detention?

- ▭ are there standards for the conditions under which asylum-seekers may be held that are subject to scrutiny?

Sources of international law relating to the detention of asylum-seekers and to the deprivation of liberty include Articles 25, 31, 33 and 35 of the 1951 Refugee Convention, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 37 of the Convention on the Rights of the Child. These instruments are binding on states parties.

In addition, there are key UN and regional instruments which offer protection to asylum-seekers. Article 3 of the Universal Declaration of Human Rights states that “[n]o one shall be subjected to arbitrary arrest, detention or exile”. This is a fundamental principle which all UN member states have agreed to respect. More detailed safeguards for the rights of those in detention and the duties of governments are found in non-treaty standards adopted by consensus by UN member states. These have the authoritative value and persuasive force of their adoption by political bodies such as the UN General Assembly, even though they do not technically have the power of treaties, except insofar as they reflect customary international law. These include the UN Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules); the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles); and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

Conditions of detention are addressed in Articles 7 and 10 of the ICCPR, which address the prohibition of torture, or cruel, inhuman and degrading treatment or punishment, and the humane treatment of all persons in detention respectively. Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) establishes the prohibition of cruel, inhuman or degrading treatment or punishment.

Measuring US detention law and practices against the fundamental human rights of asylum-seekers reveals that the USA does not respect the spirit of agreed international norms for the detention of refugees and, in particular instances, violates these standards. In general, the detention of asylum-seekers is “inherently undesirable” and as a general principle asylum-seekers should not be detained.<sup>85</sup>

Amnesty International calls on the US government to demonstrate legitimate reasons for any detention of asylum-seekers, in accordance with international standards and by means of a prompt, fair, individual hearing before a judicial or

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<sup>85</sup>UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 1999.

similar authority whose status and tenure afford the strongest possible guarantees of competence, impartiality and independence. Amnesty International opposes the practice of detaining asylum-seekers when adequate and effective safeguards do not exist or are not followed.

## **A right to detain?**

### ***International refugee law standards***

The provisions of the 1951 Refugee Convention and its 1967 Protocol relating to the detention of refugees are as follows:

- ↪ Article 25: Freedom of movement  
Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.
  
- ↪ Article 31: Refugees unlawfully in the country of refuge
  1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
  2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
  
- ↪ Article 33: Prohibition of expulsion or return ("*refoulement*")
  1. No Contracting Party shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
  2. The benefit of this provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the

community of that country.

- Article 35: Cooperation of the national authorities with the United Nations
  1. The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.
  2. In order to enable the Office of the High Commissioner... to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:
    - (a) the condition of refugees,
    - (b) the implementation of this Convention, and
    - (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

### ***EXCOM Conclusions***

The USA is a member of UNHCR's Executive Committee (EXCOM), an intergovernmental body of more than 50 states. EXCOM's conclusions, which are adopted by consensus, are regarded as authoritative in the field of refugee rights. EXCOM has stated that the detention of asylum-seekers "should normally be avoided".<sup>86</sup> Detention is allowed by international standards on a strictly limited basis<sup>87</sup> and the onus is on the detaining authorities to demonstrate why other measures short of detention are not sufficient. Detention is allowed by international standards only if it is necessary, and if it is lawful and not arbitrary, and if it is for one of the following reasons:

- (i) "to verify identity"<sup>88</sup>;
- (ii) "to determine the elements on which the claim to refugee status or asylum is based"<sup>89</sup>;
- (iii) "to deal with cases where refugees or asylum-seekers have destroyed their travel or identity documents or have used fraudulent documents in order to

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<sup>86</sup>EXCOM Conclusion 44

<sup>87</sup>EXCOM Conclusion 44 (b)

<sup>88</sup>This relates to cases where identity may be undetermined or in dispute.

<sup>89</sup>This means that the asylum-seeker may be detained exclusively for the purposes of a *preliminary interview* to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period. Amnesty International September 1999 AI Index: AMR 51/51/99

mislead the authorities of the State in which they intend to claim asylum”<sup>90</sup>;

(iv) “to protect national security or public order”.<sup>91</sup>

Moreover, even if an asylum-seeker is detained legitimately, detention should not continue for longer than is necessary. For example, detention “to verify identity” or “to determine the elements on which the claim to refugee status or asylum is based” should be permitted only until a preliminary interview can be carried out.<sup>92</sup> In most cases, this should not require more than one or two days.

In the USA asylum-seekers subject to expedited removal procedures are detained before they are interviewed by an Asylum Officer to determine if they have a credible fear of persecution. Even if they establish that they have a credible fear of persecution, they may be detained until their full asylum claim is settled. Release from detention (parole) is extremely limited and subject to the discretion of INS officials, not of independent judges.

### ***UNHCR Guidelines***

The 1999 UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers are based on the general principle that asylum-seekers should *not* be detained.<sup>93</sup> This principle flows from Article 14 of the Universal Declaration of Human Rights -- the right to seek and enjoy asylum -- which is recognized as a basic human right. UNHCR rightly points out that many asylum-seekers can only claim their right to seek asylum by arriving at, or entering, a territory illegally.

UNHCR notes the fundamental difference between the position of asylum-seekers and that of other immigrants. Essentially, asylum-seekers may not be in a position to comply with the legal formalities for entry as would ordinary immigrants. States are encouraged to take this into account, as well as the fact that asylum-

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<sup>90</sup>What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there **is an intention** to mislead, or a refusal to co-operate with the authorities. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

<sup>91</sup>This relates to cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he or she be allowed entry.

<sup>92</sup>A letter from UNHCR (signed by Ghassan Arnaout, Division of Refugee Law and Doctrine) to the European Consultation on Refugees and Exiles of 8 January 1987 states that this criterion “means that a person may, if necessary, be detained to undergo a preliminary interview. It does not justify the detention of a person for the entire duration of a prolonged asylum procedure.”

<sup>93</sup>Guideline 2.

seekers have often had traumatic experiences, in determining any restrictions on freedom of movement based on illegal entry or presence.

The UNHCR Guidelines conclude that:

- ↪ The detention of asylum-seekers is inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs.
- ↪ Freedom from arbitrary detention is a fundamental human right, and the use of detention is, in many instances, contrary to the norms and principles of international law.
- ↪ Article 31 of the 1951 Refugee Convention, which is often applied inappropriately by governments, exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.
- ↪ Consistent with Article 31 of the 1951 Refugee Convention, detention should only be resorted to in cases of necessity. The detention of asylum-seekers who come “directly” in an irregular manner should, therefore, not be automatic nor should it be unduly prolonged. This provision applies not only to recognized refugees but also to asylum-seekers pending determination of their status.
- ↪ The expression “coming directly” in Article 31(1) of the 1951 Refugee Convention covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his or her protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept “coming directly” and each case must be judged on its merits. Similarly, given the special problems faced by asylum-seekers, there is no time limit which can be mechanically applied to the expression “without delay”.

- ↪ Asylum-seekers are entitled to benefit from the protection afforded by various international and regional human rights instruments which set out the basic standards of treatment. Every state has a right to control those entering into their territory, but these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For the detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the 1951 Refugee Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, **with the possibility of release where no grounds for its continuance exist**.

Most importantly the UNHCR Guidelines stress that resort to detention of an asylum-seeker **must be seen as an exceptional measure and subject to strict limitations**.<sup>94</sup>

- ↪ Detention of asylum-seekers may exceptionally be resorted to for the reasons set out in EXCOM Conclusion 44 (see above) as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law.
- ↪ There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved their purpose.
- ↪ In assessing whether detention of asylum-seekers is necessary, account should be taken of whether the detention is reasonable and whether it is proportional to the objectives to be achieved. If judged necessary, it should be imposed only in a non-discriminatory manner for a minimal period.

UNHCR states emphatically that the reasons listed in EXCOM Conclusion 44 are the *only* ones to justify the detention of asylum-seekers. UNHCR explicitly

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<sup>94</sup>Guideline 3.

cautions against states using detention to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them. Such a policy would be contrary to the norms of refugee law.

In sum, the 1951 Refugee Convention, EXCOM Conclusions and the recently issued UNHCR Guidelines provide ample basis for arguing that asylum-seekers should not be detained and that detention is an exceptional measure, subject to severe limitations.

### **International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR is the principal international treaty setting out fundamental civil and political rights. As of October 1998, 140 states had ratified the ICCPR, agreeing to be legally bound by its provisions. On the detention of asylum-seekers, Article 9 is of particular importance:

“Article 9.1 Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

“Article 9.4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

“Article 9.5 Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.”

The USA became a party to the ICCPR in 1992 but it reserved the right to refrain from implementing certain provisions or to restrict their application.<sup>95</sup> The USA did not make a reservation to Article 9, however.

The Human Rights Committee, the expert body that monitors the implementation of the ICCPR, made clear in its General Comment on Article 9 that Article 9 applies to immigration control. The Committee has defined arbitrariness as not merely being against the law, but as including elements of inappropriateness, injustice and lack of predictability.

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<sup>95</sup>The USA has declared that it will apply the ICCPR only to the extent that domestic law allows, effectively rendering this international treaty meaningless as a means of strengthening human rights protection in the USA. In addition, the USA has not signed the First Optional Protocol to the ICCPR which allows individuals to bring complaints against a government for a violation of rights guaranteed by the ICCPR.

Governments are required to ensure to every person the rights recognized in the ICCPR without distinction of any kind (Article 2)<sup>96</sup> and everyone has the right to privacy without arbitrary interference (Article 17).

### ***Arbitrary detention***

It has been argued that the US practice of initially detaining asylum-seekers is contrary to the norms and principles of international law. The decision to continue that detention, after the initial stage of the asylum process, is sometimes arbitrary, especially when the grounds for the initial detention no longer exist. Furthermore, decisions to continue detention sometimes rest on factors such as the availability of detention places and the attitude of the official involved, rather than on an objective assessment of whether detention is actually necessary and justified in the individual case.

Freedom from arbitrary arrest or detention is a basic human right. Human rights law has developed a series of measures to ensure that all individuals, including refugees, are not arbitrarily or unlawfully deprived of their liberty. The right to personal liberty is violated if an arrest or detention is arbitrary and is not carried out in accordance with a procedure prescribed by law.

The UN Working Group on Arbitrary Detention, a body set up by the UN Commission on Human Rights, has declared: “[A]rticle 14 of the Universal Declaration of Human Rights guarantees the right to seek and to enjoy in other countries asylum from persecution. If detention in the asylum country results from exercising this right, such detention might be ‘arbitrary’”.

Freedom from arbitrary and unlawful detention includes the right to be brought promptly before a judicial authority; the right to review of detention within a reasonable time or to release; and the right to challenge detention before a competent authority. A human rights based assessment of the INS detention system shows that in some cases the detention of asylum-seekers under current US legislation and INS policy and practice *is* arbitrary, because of the lack of review and the lack of real parole options.

The detention of asylum-seekers in the USA should be assessed on the basis of a recent decision of the Human Rights Committee

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<sup>96</sup>“2.1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

in *A v Australia*.

In this case, the Human Rights Committee determined that the detention policy of Australia was not *per se* arbitrary within the meaning of Article 9(1)<sup>97</sup> of the ICCPR, but the Committee set limits on the power of a state. In particular, the Committee stated that “remand in custody could be considered

arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context”.

The Committee found that the detention for over four years of a Cambodian asylum-seeker was arbitrary:

*“[e]very decision to keep a person in detention should be open to **review periodically** so that the grounds justifying detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal...”*<sup>98</sup>  
[emphasis added]

The Committee determined that a state party may not justify indefinite and prolonged detention on the grounds that an asylum-seeker entered the country unlawfully, and that there would be a perceived incentive for the asylum-seeker to abscond if left in liberty. The form of review required is addressed by the Committee, whose findings are applicable to the USA.

*“In the Committee’s opinion, court review of the lawfulness of detention under article 9, paragraph 4, [of the ICCPR] which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purpose of article 9, paragraph 4, is that such review is, in its effects, **real and not merely formal**.”*<sup>99</sup> [emphasis added]

The Australian government’s argument in *A v Australia* that the person

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<sup>97</sup>“Everyone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

<sup>98</sup>Ibid. at para. 9.4.

<sup>99</sup>Ibid. at para. 9.5.

detained only has the right to take proceedings before a court for a review of the lawfulness of detention (where lawfulness is limited merely to compliance with domestic law) was firmly rejected by the Human Rights Committee. In the USA parole decisions appear to be based on whether the continued detention complies with domestic law, regardless of what the domestic law contains. Such an approach would allow any state to “pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right ... [under international human rights law].<sup>100</sup>

### **International standards governing detention**

In the mid-1970s, the UN recognized the need to compile detailed, practical safeguards aimed at protecting all detainees from abuses such as arbitrary detention, coercive interrogation, torture or other ill-treatment and “disappearance”. After more than a decade of drafting by various UN bodies, the UN General Assembly on 9 December 1988 adopted by consensus the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles).<sup>101</sup> These Principles stress the importance of detainees having access to the outside world and of independent supervision of detention conditions. The Body of Principles applies to anyone in any form of detention or imprisonment, including those held in administrative detention without charge or trial . The Body of Principles applies to all countries at all times. It is important to note that **the Principles are not merely exhortatory or advisory: they call upon governments to take definite steps to implement and enforce their provisions.**<sup>102</sup>

### ***Grounds for detention***

Principle 4 provides a significant and fundamental guarantee: “Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.” The term “judicial or other authority” is defined in the Body of Principles as a “judicial or other authority under the law whose status and tenure shall afford the strongest possible guarantees of competence, impartiality and independence”.

Principle 13 provides that people shall be informed of their rights and how to

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<sup>100</sup>Ibid. at Bhagwati, concurring opinion.

<sup>101</sup>UN General Assembly Resolution 43/173.

<sup>102</sup>Principle 7 provides: “States should prohibit by law any act contrary to the rights and duties contained in these Principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.”

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avail themselves of such rights “at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter”. If the authorities fail to do this, it would provide grounds for a complaint, which must be impartially investigated (Principle 7).

Principle 11 requires that “A person shall not be kept in detention without being given effective opportunity to be heard promptly by a judicial or other authority” and that “A judicial or other authority shall be empowered to review as appropriate the continuance of detention”. All detainees, including administrative detainees, must be brought promptly before a “judicial or other authority”. This contrasts with ICCPR Article 9(3) which provides that “anyone arrested or detained on a criminal charge” must be brought promptly before a judge or other officer authorized by law to exercise judicial power, but is silent in respect of administrative detainees. The approach of Principle 11, applying this requirement to all detainees, is consistent with a conclusion of the UN Special Rapporteur on torture: “Each arrested person should be handed over without delay to the competent judge, who should decide on the legality of his arrest immediately and allow him to see a lawyer.” As for the meaning of “promptly”, the Human Rights Committee’s authoritative General Comment on ICCPR 9(3) is instructive: “...in the view of the Committee, delays must not exceed a few days”.

In addition, the hearing must deal with issues of substance. To satisfy the elements of Principle 11 (prompt and full communication of reasons for detention, an effective opportunity to be heard, the detainee’s right to defend themselves), the authorities must provide specific, detailed and individualized reasons for detention, and the hearing must comprise a genuine and searching review. Such a review must involve the active participation of the detainee or the detainee’s counsel and should be aimed at determining whether there is sufficient evidence of the specific allegations to justify arrest and detention.

Principle 32 of the UN Body of Principles provides that at any time a detained person or his/her counsel shall be entitled to take proceedings “before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful”. The detaining authority “shall produce without unreasonable delay the detained person before the reviewing authority”. These proceedings must be “at no cost for detained persons without adequate means”. This right to challenge the lawfulness of detention is to be available at any time to any detainee (whether or not detained on a criminal charge) who chooses to exercise it.

These Principles, read in conjunction with the Guidelines issued by the UNHCR, add weight to Amnesty International’s concern that the USA is not abiding  
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by accepted norms of international law. US legislation and policy do not incorporate fully the following minimum procedural guarantees for detained asylum-seekers, who should have the right:<sup>103</sup>

- ↪ to receive prompt and full communication of any order of detention, together with the reasons for the order, and the rights in connection with the order, in a language and in terms they understand.
- ↪ to be informed of the right to legal counsel. Where possible, they should receive free legal assistance.
- ↪ to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuance of detention, which the asylum-seeker or his/her representative would have the right to attend.
- ↪ to challenge the necessity of the deprivation of liberty at the review hearing, either personally or through a representative, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain.
- ↪ to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Detention should in no way obstruct the asylum-seeker's pursuit of their asylum application in a fair and satisfactory asylum determination procedure.

### ***Access to assistance and support***

*“The remoteness of detention facilities ... contributes greatly to the paucity of counsel for immigrants in detention. According to the Executive Office of Immigration Review (EOIR), only 10.7 per cent of detained immigrants in 1996 received legal representation. This compares to a 51.5 per cent representation rate in non-detained cases. Lack of counsel, in turn, removes a crucial check on prison conditions and the treatment of immigrants while detained.”*<sup>104</sup>

The fact that the US authorities have not consistently ensured access to the outside world for detained asylum-seekers shows a remarkable failure to put in place basic guarantees for those whose liberty is denied.

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<sup>103</sup>Guideline 5.

<sup>104</sup>Kerwin, Donald, *Detention: Our Sad National Symbol*, at p. 130.

Detained asylum-seekers face problems with all forms of access, including visitor access, attorney access, phone calls, ability to send and receive correspondence, access to newspapers and television etc, access by NGOs and by other caregivers. Many asylum-seekers in detention are cut off from their families, legal representation and the support of NGOs (see chapter 4). The net result is that they are denied access to justice.

Asylum-seekers are involved in a legal proceeding, so they require access to legal representation or advice in order to pursue their case adequately. Furthermore, the distress of flight from their own country can only be exacerbated by isolation from their families and caregivers. There is, unsurprisingly, some evidence of suicide attempts and depression among asylum-seekers who are indefinitely detained with little or no contact with outside assistance.

Prompt and regular access to legal counsel is a fundamental human right, because in many cases only a counsel who has contact with the detainee can assess whether rights have been infringed and seek remedial action. This right is central to the Body of Principles, and is also set out in the Standard Minimum Rules, Rule 93, and the ICCPR, Articles 14(3)(b) and 14(3)(d). The Human Rights Committee's General Comment on ICCPR Article 14 (3) (b) notes: "Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter."

Principle 17 of the Body of Principles provides that a "detained person shall be entitled to have the assistance of legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." If the detainee "does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient funds to pay".

Principle 18 contains specific provisions aimed at ensuring prompt, adequate and regular access to legal counsel. For example, it provides that a detainee "has the right to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel". It also emphasizes that no suspension or restriction of access to a legal counsel may be allowed "save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order." However, Principle 15 requires that even in such an exceptional case, "communication with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days". Another provision of Principle

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18 states that “interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official” - a requirement also contained in Rule 93 of the Standard Minimum Rules with respect to detainees.

### ***Access to family***

Principle 16 of the Body of Principles provides that “promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment of the transfer and of the place where he is kept in custody”. Such notification shall be made “without delay”. Rule 92 of the Standard Minimum Rules provides that a detainee “shall be allowed to inform immediately his family of his detention”.

Principle 19 provides that a detained or imprisoned person “shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations”.

Principle 20 provides that “if a detained or imprisoned person so requests, he shall if possible be kept in a place of detention reasonably near his usual place of residence”. Rule 37 of the Standard Minimum Rules requires that visits by family and reputable friends be allowed at “regular intervals”.

### ***Access to a medical officer***

Principle 24 requires that a “proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission” to the place of custody and “thereafter medical care and treatment shall be provided whenever necessary.” This care and treatment “shall be provided free of charge”. Principle 25 provides the right to “petition a judicial or other authority for a second medical examination or opinion” and Principle 26 requires that written records of medical examinations be kept, and that access to such records be ensured. Rule 24 of the Standard Minimum Rules is more emphatic as it stipulates an automatic examination of every prisoner.

Medical staff in detention facilities do not as part of their regular screening of INS detainees specifically ask if a person has been tortured. This raises serious issues for asylum-seekers themselves and for the institutions charged with responsibility for  
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their care. Unless detaining officials know the history of their charges, they risk misconstruing the behaviour of those suffering the after-effects of torture. Behaviour ranging from depression to violence will be exacerbated if the asylum-seeker's trauma is not recognized and managed in light of their special circumstances. The use of solitary confinement to control those deemed to have behavioural problems is but one example of further victimizing a person who has already suffered torture.

The UNHCR Guidelines are of assistance on the appropriate standards for unaccompanied elderly persons, torture or trauma victims, and people with a mental or physical disability.<sup>105</sup> Due to the psychological damage caused by detention, active consideration of possible alternatives should precede any order to detain asylum-seekers who are particularly vulnerable. If vulnerable individuals are detained, this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being. In addition there must be regular follow up and support by a relevant skilled professional. Such detainees must also have access to medical services including hospitalization and counselling, should it become necessary.

In addition, the Guidelines emphasize that asylum-seekers should undergo an initial screening at the outset of detention to identify trauma or torture victims for treatment.<sup>106</sup>

### ***Accountability and oversight***

Record keeping is a vital element in ensuring that detainees' rights are respected. Principle 12 requires, among other things, that precise information concerning the place of custody be recorded and communicated to the detained person or his/her counsel.

There is no national system of accountability for the detention of asylum-seekers and their treatment. INS District Directors, Chief Border Patrol Agents, Wardens and Officers in Charge are delegated significant authority. For the many asylum-seekers detained in local or county jails, daily oversight falls to the jail officials.

The INS has admitted that management of the detention system is problematic and that at present there is not the necessary infrastructure or personnel to hold local and county jails accountable to the guidelines established by the INS.<sup>107</sup>

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<sup>105</sup>Guideline 7.

<sup>106</sup>Guideline 10.

<sup>107</sup>US Department of Justice, "Federal Detention Plan", May 1997.

The demand for detention spaces has apparently outstripped the capacity of the INS to oversee the facilities used to hold INS detainees. In the detention guidelines recently proposed by the INS, oversight of detention facilities is delegated to INS Officers in Charge -- the very people in charge of INS detention facilities.

The decentralized structure of the INS would seem, at least in theory, to offer sensitivity to local concerns. However, the delegation of authority to individual districts within the INS is not accompanied by the necessary compliance with national INS standards and policies, which are themselves not subject to challenge in law. The work done by refugee advocates varies greatly as a result. At some facilities advocates cultivate a partnership with the authorities whereas in others, advocates have had no choice but to file lawsuit after lawsuit in pursuit of just treatment for their clients. Those who delegate decision-making authority are responsible for ensuring that this authority is properly used. The best way to ensure this is to guarantee core rights, and ways of delivering those rights, under a legal standard that is subject to challenge before an independent body, preferably judicial in nature.

The tone of INS operations is greatly influenced by the management of the district or the individual detention facility. The detention philosophy of the person in charge can dramatically shift the rights that detainees and their advocates enjoy. For example, the officer in charge of a county jail where INS detainees are held told Amnesty International that it was his job to keep the facility running on the basis of meeting the minimum standards that were required and to spend taxpayers' money responsibly. But the minimum standards to which he referred were those set for the detention of criminal populations, which are inappropriate for the situation of asylum-seekers. The expertise needed to manage jails for criminals has little to do with the condition of asylum-seekers who need legal, social and sometimes medical assistance.

Principle 29 provides that "places of detention shall be visited regularly by qualified and experienced persons" in order to "supervise the strict observance of relevant laws and regulations". These prison inspectors are to be "appointed by and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment". Any detained or imprisoned person "shall have the right to communicate freely and in full confidentiality" with the prison inspectors.

Even if there was a regular program of inspection, the INS does not honour the requirement that there be a separation between the authority that inspects facilities and that which is in charge of running the facility. The INS essentially inspects itself with regard to its own facilities, and fails to hold local and county jails to appropriate standards for the detention of asylum-seekers on the grounds that INS

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detainees are “guests” there.

### ***Complaints***

Principle 33 of the Body of Principles requires that a system be available to investigate complaints about mistreatment, in particular torture or other cruel, inhuman or degrading treatment. The UN Convention against Torture and the UN Declaration against Torture also require that complaints of torture or ill-treatment be investigated.

Principle 33 provides that a detained person or his counsel (or a family member) shall have the right to make such complaints to the authorities responsible for the place of detention and to higher authorities (and when necessary, to appropriate authorities vested with reviewing or remedial powers). Every complaint “shall be promptly dealt with and replied to without undue delay”. If the complaint is “rejected, or in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority”. Principle 33 also emphasizes that no complainant shall suffer prejudice for making a complaint.

Principle 30 requires that disciplinary offences be specified by law or lawful regulations and published. It also requires that detainees “shall have the right to be heard before disciplinary action is taken” and “shall have the right to bring such action to higher authorities for review”.

Inmates of a county jail, all INS detainees, filed an “In-house inmate grievance form” in late 1998.

“NATURE OF GRIEVANCE: This morning, [date withheld], we failed “cell inspection”. Deputy D. [name withheld] came a few feet into the block, then stated, “You guys can stay where you are.” In other words, we already had failed inspection. Our block is designed to hold 16 people. It has 24 at the present time; 8 on the floor. Deputy D. based her decision to fail us on the 8 people sleeping on the floor. They might not have been ready but they are not supposed to be on the floor in the first place. They came in the day before yesterday, they know they’re leaving very, very soon (Monday), so naturally “cell inspection” doesn’t mean anything to them. That’s not fair to those of us who have been here long and don’t know when we’re leaving. It is a very tension filled environment. The only two means of stress reduction we have are the telephones and the television. If you take that away, you unnecessarily add to the stress and tension. When we tried to explain this to Deputy D., she said the real reason for failing us was because she saw someone without their jump-suit on. If that is true, then why didn’t she go on and inspect the rest of the cells, which I think she would find that they were in proper order. Then she would have reason to lock-

down that one person for the day. By the time you get this, [this day] will be over, so we will lose automatically. This is not the first time Deputy D. has failed this block for some reason or other. I don't know if it's something personal she holds against this block or what? We deserve a little respect and then it will be easier to respect the deputies back. Thank you.

“ACTION TAKEN/REPLY: Gentlemen, I have spoken with the deputies in question and they have informed me that no one was prepared for cell inspection. If you would refer to section B, pages 3 and 4 of the rule book you will be aware of our standards. Next time be ready.”

### ***Solitary confinement***

Principle 6 repeats the internationally recognized prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Solitary confinement is used as a means of control in INS detention facilities and reportedly as a method of punishment for misbehaviour. Principle 6 elaborates that the term “cruel, inhuman or degrading treatment or punishment should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time”. Prolonged solitary confinement should not be used as a tool of control or discipline by the INS.

### ***Conditions of detention***

There is no consistency in how detained asylum-seekers are treated: some facilities provide regular exercise programs in state-of-the-art gyms and meals tailored to fit special dietary needs, in others detainees seldom see the light of day and “feedings” violate deeply held religious beliefs. While there are national standards (guidelines) regulating the conditions of detention of asylum-seekers, these standards are not enforceable and are not applicable to the vast majority of INS detainees as they do not apply to local and county jails.

According to international standards, conditions of detention for all detainees, including asylum-seekers, should be humane and should respect the inherent dignity of the person. They should be prescribed by law.<sup>108</sup> In the USA, however, the rules setting out the conditions of detention for asylum-seekers are found in various sources. INS Guidelines provide some standards, but these do not apply in non-INS facilities. Some facilities used to hold INS detainees are accredited by the American Correctional Association (ACA) while others are not. In any event, ACA standards

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<sup>108</sup>Guideline 10.

are not appropriate for asylum-seekers.

Article 7 of the ICCPR requires that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and Article 10 provides for the right of any detained person to be treated with humanity and with respect for the inherent dignity of the human person.<sup>109</sup>

Drawing on the UN Body of Principles, the UN Standard Minimum Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty, UNHCR Guideline 10 sets out agreed practices for detained asylum-seekers, in the limited circumstances in which such detention is justified:

- ↪ All asylum-seekers should undergo an initial screening at the outset of detention to identify trauma or torture victims, for treatment.
- ↪ Men should be segregated from women, and children from adults, except where they are part of a family group.
- ↪ Separate detention facilities should be used to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups.
- ↪ Asylum-seekers should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary.
- ↪ Asylum-seekers should have the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate.
- ↪ Asylum-seekers should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities.
- ↪ Asylum-seekers should have the possibility to continue further education or vocational training.
- ↪ Asylum-seekers should have the opportunity to exercise their religion in practice, worship and observance and to receive a diet in keeping with their religion.

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<sup>109</sup>Even though the USA became a party to the ICCPR in 1992 it considers itself bound by the prohibition of “cruel, inhuman and degrading treatment or punishment” in Article 7 only to the extent that it covers treatment that would be prohibited by the US Constitution. The USA was not willing to prohibit conduct that was not already prohibited by US law. The UN Human Rights Committee has stated that it considers the US reservation to Article 7 “incompatible with the object and purpose of the Covenant”.

- ↪ Asylum-seekers should have access to basic necessities such as beds, shower facilities, basic toiletries, etc.
- ↪ Asylum-seekers should have access to a complaints mechanism (grievance procedure), where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

Detention policies and practices in the USA clearly fail to follow UNHCR Guidelines and violate fundamental standards of international human rights law such as the ICCPR, the UN Body of Principles, the UN Standard Minimum Rules, and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Not only are asylum-seekers held in jails and prison-like conditions, they are also confined with convicted criminals and prisoners on remand.

Asylum-seekers and refugees are not only deprived of their liberty, but are sometimes held in conditions that amount to cruel, inhuman or degrading treatment. Sometimes the physical conditions of detention for asylum-seekers are worse than those for convicted criminals, yet those seeking asylum have not been convicted of any crime. Asylum-seekers are frequently moved from one detention centre to another, sometimes far from their families or legal representatives, or far from any major city with access to legal counsel. In addition, detained refugees suffer the psychological torment of not knowing for how long they will be held and the fear that they may be sent back to their persecutors. Torture victims in particular may suffer further trauma through the psychological stress of detention.

There is a recent history of abuse of detainees and inhumane treatment in the Esmor facility, in New Jersey, which has since been closed. An investigation revealed a litany of serious concerns about the conditions to which asylum-seekers were subjected. Such complaints were not confined to Esmor. Overcrowding, no regular access to recreation or outdoors, no access to daylight, and verbal and physical abuse by staff are but a few of the complaints received by Amnesty International in its recent visits to a range of facilities.

Asylum-seekers are people who suffered persecution in their own countries and who fled to the USA in the hope that they would finally be free. Far too many find themselves behind bars, in a cell block in a jail now housing double the number of inmates originally planned, but with no additional toilets, showers or sinks. They spend 24 hours a day for weeks on end in this room, crowded with other inmates, and without any access to the outdoors, except for tantalisingly brief exercise breaks at the discretion of the prison warden. The stench of so many people in such a confined

space with no fresh air and no natural light is the stuff of madness. There is no limit on how long the asylum-seeker will stay there -- the criminal inmates who share the cell know when they will be released as they have been sentenced for their crimes. The asylum-seeker's crime was seeking a safe haven in the USA, and for that the "sentence" is administrative detention with no idea of when it will end.

### **Other refugee rights in detention**

As well as the right not to be arbitrarily or unlawfully detained, under international standards asylum-seekers and refugees have the following rights if they are in detention:

- ↯ right of access to legal counsel;<sup>110</sup>
- ↯ right to notify their family of the fact and place of detention;<sup>111</sup>
- ↯ right to be visited by, and to correspond with, members of their family;<sup>112</sup>
- ↯ right to communicate with the outside world;<sup>113</sup>
- ↯ right to medical care;<sup>114</sup>
- ↯ right to humane conditions of detention, which take into account their special status as asylum-seekers; they should not be held in places where their physical safety is endangered and they should not be held with common criminals;<sup>115</sup>
- ↯ refugee children should not be detained;<sup>116</sup>
- ↯ families should not be separated.

In the USA many of these rights are not respected, depending on the type and location of facility used by the INS to detain asylum-seekers.

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110EXCOM Conclusion 44 (g) and 22.III

92. 111UN Body of Principles 16; UN Standard Minimum Rules for the Treatment of Prisoners

92. 112UN Body of Principles 19; UN Standard Minimum Rules for the Treatment of Prisoners

113UN Body of Principles 19.

114UN Body of Principles 24, 25 and 26.

115EXCOM Conclusion 44(f).

1161989 Convention on the Rights of the Child, Article 37.

## **CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS**

Amnesty International supports the position outlined by the US Commission on Immigration Reform in its 1997 report to Congress. The report states:

*“Refugee admissions, mass migration emergencies, and asylum constitute important components of US immigration policy that must be considered in the context of both their domestic and international ramifications...The leadership the US provides in responding to international crises is a key component of our refugee policy.”*<sup>117</sup>

Amnesty International has documented in this report some of the problems that the INS detention system poses to asylum-seekers and their advocates. The organization hopes that this report will serve as a challenge to the US government, especially to those INS officials who recognize that many current practices violate international standards, principles of efficiency and common sense. The recent creation of standards for detention, although weak, limited in application and unenforceable, has at least created opportunities for dialogue with INS officials, both local and national.

However, much more remains to be done if the USA is to meet its treaty commitments. The arbitrary deprivation of a person's liberty is a violation of fundamental human rights. Amnesty International's most serious concern about the INS detention system is the power the agency gives to its District Directors to imprison asylum-seekers. If single individuals have the discretion to determine whether or not an asylum-seeker should be held in jail, and for how long, the system cannot respect asylum-seekers' rights.

The INS leadership has recently expressed compassion towards asylum-seekers, but asylum-seekers' rights are not governed by sympathy, but by justice. The INS leadership should establish unequivocally throughout the agency that international treaty commitments require the USA to treat asylum-seekers differently from other aliens. The INS should not detain asylum-seekers in remote locations where they face huge obstacles in obtaining representation. INS officials should not ask NGOs to bear the burden of informing asylum-seekers of their rights. Governments, not NGOs, have accepted the legal responsibility for protecting refugees and therefore for respecting asylum-seekers' rights. In those limited circumstances where a state has the right to detain an asylum-seeker, their rights

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<sup>117</sup>US Commission on Immigration Reform, June 1997, *US Refugee Policy: Taking Leadership, A Report to Congress*. The Commission was mandated by the US Immigration Act of 1990 to examine and make recommendations regarding the impact of US immigration policy. AI Index: AMR 51/51/99 Amnesty International September 1999

must be addressed by an efficient and just detention system. The system the INS currently operates is neither.

The INS deserves praise for recognizing the flaws in its asylum adjudication system and for having set up the Asylum Officer Corps in 1991. The INS could now take the first step towards reform of its detention system by removing decisions to detain asylum-seekers from the exclusive authority of INS District Directors. Even before doing so, the INS should recognize and apply international standards, which require that, in general, governments should not detain asylum-seekers.

Detained asylum-seekers are simply asserting their right to seek and to enjoy asylum by availing themselves of the international protection that the USA has agreed to provide as a signatory to the 1951 Refugee Convention's 1967 Protocol and as a member of the Executive Committee of UNHCR. The duty on the US government is particularly high: many other asylum host countries look to it for leadership and it is highly influential in the international forums where refugee standards are set.

## **Recommendations**

Under article 14 of the Universal Declaration of Human Rights everyone has the right to seek and to enjoy asylum from persecution. EXCOM Conclusion 44, and more recently the 1999 UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers, require that the detention of asylum-seekers should normally be avoided. Both also require the authorities to distinguish between asylum-seekers and other detainees.

Amnesty International does not oppose the detention of asylum-seekers *per se*, but calls on governments to demonstrate reasons for doing so in accordance with international standards and by means of a prompt, fair individual hearing before a judicial or similar authority whose status and tenure afford the strongest possible guarantees of competence, impartiality and independence.

INS staff in charge of removal and detention should know which of the aliens in their care are asylum-seekers. This responsibility should extend to those with whom the INS contracts, be they prison authorities or private corporations, and to those who deal with the medical or spiritual needs of asylum-seekers in detention. The INS and its partners must take into account the special circumstances of asylum-seekers and make every effort to ensure that they are afforded the strongest possible guarantees that their detention is as brief as possible.

Amnesty International makes the following recommendations based largely on the information presented in this report, a compilation of data gathered over the past several years. The report is not exhaustive: it does not cover all the problems asylum-seekers may face while seeking protection in the USA, such as inadequate medical care, lack of adequate grievance procedures in the INS detention system and physical abuse in detention. Amnesty International believes that the following recommendations represent minimum procedural guarantees the USA must provide to be in accord with its treaty commitments.

### **To the US government**

#### Compliance with international standards:

- ↪ International law requires that the detention of asylum-seekers is the exception and that it should normally be avoided. The US government should revise its detention law and policy in the light of the requirements of international law.
- ↪ The initial decision to detain an asylum-seekers should be subject to review by Immigration Judges familiar with international standards.

#### Release from detention -- necessary safeguards:

- ↪ At the time of detention, detainees should be provided in writing, in a language they understand, the reasons for detention and the process for obtaining release from detention. Detainees should also be provided with a written explanation of all their rights under immigration law and how to exercise them.
- ↪ Asylum-seekers who have demonstrated a credible fear of persecution should not be detained unless there are exceptional and compelling reasons to keep them in detention.
- ↪ There must be frequent reviews of the decision to detain and adequate bail options. Asylum-seekers must be advised of the release options available to them and how to access them. The discretion currently exercised by the regional or District Directors to detain asylum-seekers must be subject to formal review by another judicial or quasi-judicial body.

- ↪ In the event that continued detention is authorized, detainees should have an automatic periodic review of the reasons for detention before Immigration Judges. There should be an opportunity to lodge an appeal against decisions by Immigration Judges.
- ↪ The filing of an INS appeal against an Immigration Judge's decision to grant asylum and/or "withholding of removal" status should not be used to justify continued detention of an asylum-seeker. Persons granted "withholding of removal" but denied asylum should be released promptly and allowed to enter US society until such status is withdrawn.
- ↪ Procedures such as the Asylum Pre-Screening Officer Program should be codified into regulation or law and implemented nationwide.
- ↪ Options for the early release (parole) of detainees should be explored by the INS with appropriate NGOs, with a view to identifying community-based release programs.

#### Place of detention:

- ↪ Alternatives to detention and non-custodial measures, such as half-way houses or monitored release with periodic reporting requirements, should always be considered before resorting to detention. The US government must take urgent and comprehensive action to identify alternatives to the detention of asylum-seekers and in particular, should identify ways to keep families together.
- ↪ Asylum-seekers should not be detained in local or county jails. In those limited circumstances where the government may detain an asylum-seeker, they should be detained in a facility appropriate to their status as asylum-seekers and which respects their family circumstances.
- ↪ The INS must specifically identify asylum-seekers when they are detained and asylum-seekers should not be confined with US residents held on criminal charges or serving criminal sentences, or with immigrant detainees facing removal from the USA after being convicted of a crime.

#### Keeping track of detainees:

- ↪ INS records should contain information which clearly identifies an alien detainee as an asylum-seeker. Such records should be kept from the time a

person has filed an asylum claim until there has been a final disposition of their claim, and, when applicable, their removal from the USA.

- ↪ National authorities should maintain, regularly update, and provide to the public detailed information on the number, location, country of origin, age, and gender of detained asylum-seekers as well as all relevant policies affecting their detention.

#### Transfers:

- ↪ Asylum-seekers should not be transferred to another facility without a proceeding to determine the legitimate reasons for any such transfer. No asylum-seeker should be transferred except in unusual or compelling circumstances such as when the safety of the asylum-seeker or others is threatened. As an interim measure the circumstances under which detainees may be transferred should be immediately defined, sensitive to the family circumstances of the detainee and their need to access legal counsel. In all cases, prior notification of any transfer must be given to family and legal representatives.
- ↪ Whenever an asylum-seeker is transferred he or she should be transferred with all legal papers and possessions that might be relevant to his or her asylum claim. All mail should be forwarded to the new facility. Asylum-seekers with legal representation should not be transferred without notice to their counsel, who should have the right to raise objections.

#### Access to the outside world and information:

- ↪ Access to counsel and NGOs assisting detained asylum-seekers must be given at all stages of an asylum-seeker's detention, commencing with any procedures at the port of entry. The detaining authority should have a positive duty to ensure that all asylum-seekers have been given a real opportunity to obtain assistance, including spiritual, psychological and cultural services.
- ↪ Detaining authorities should take all means to provide communication free of charge with advocates and others who might assist asylum-seekers in pursuing their claims for protection.
- ↪ Accurate lists of legal services must be provided in all facilities where asylum-seekers are detained. Stamps and writing material should be provided to asylum-seekers, and, if detained in remote locations, authorities should

provide the opportunity to send and receive documents via facsimile at no cost.

- ↯ Presentations by NGOs to groups of detainees must be allowed on a regular basis with adequate opportunity for a free exchange of information.
- ↯ Asylum-seekers should be provided with opportunities for no-cost telephone calls to offices of the United Nations High Commissioner for Refugees.
- ↯ Access to family members or others with whom the asylum-seeker wishes to maintain contact must be given in a manner that minimises the inconvenience to both parties.
- ↯ Detention facilities must provide conditions appropriate to the special circumstances of asylum-seekers, given that they have an outstanding legal case and require access to their counsel, NGOs, telephones, information on their case, to their personal papers, and access to libraries with related information. Their special needs include the need to communicate in their own language and to have access to information in their own language.
- ↯ Adequate law libraries should be maintained at every facility where asylum-seekers are detained. In cooperation with bar associations or other NGOs, the US authorities should establish national standards for content of and access to libraries.

#### Standards for detention conditions:

- ↯ The INS must put in place a national detainee grievance procedure for the prompt and effective investigation of detainee grievances brought forward by detainees or their representatives.
- ↯ Given the scale of concerns about current US asylum detention policies and practices, the US government should appoint an Ombudsperson or create a special office that can undertake an independent and comprehensive review of existing policies and practices. Such a review should include inspections of detention facilities and have confidential access to detainees and their representatives. The body conducting this review should be entirely independent of the INS.
- ↯ Any current guidelines or standards designed for the protection or benefit of detainees in INS-run facilities should be codified into enforceable

regulations. The INS should extend such rules to all facilities where it detains or plans to detain asylum-seekers, or it should not assign asylum-seekers to such places.

- ↪ Specific guidelines must be issued and adhered to by all institutions where asylum-seekers are detained, including procedures to ensure that detainees are not subject to cruel, inhuman or degrading treatment, including the use of shackling.
- ↪ The special circumstances of asylum-seekers must be communicated to all staff involved in the detention of asylum-seekers. In particular, they should be given training on who a refugee is and be made aware of the fact that many refugees may be seriously traumatized by their experience of persecution. Staff should be made aware of the requirements of cross cultural communications and of post traumatic stress disorder and the particular legal, cultural and psychological needs of asylum-seekers. This should include gender sensitivity training.
- ↪ Medical and mental health care must be available at no cost to asylum-seekers and they should be informed of the availability of such care at each facility where they are detained. Women detainees should have their particular health and hygiene needs met at no cost to them.
- ↪ Detention facilities must offer on a consistent basis and according to best practice at least one hour per day of access to indoor and outdoor recreational facilities.

Particularly vulnerable categories:

- ↪ In the spirit of the “Gender Considerations” established by the INS in 1995 for the adjudication of asylum claims, government authorities should pay increased attention to the needs of female asylum-seekers in detention. Under the current INS detention system, their smaller numbers may mean that they are more likely to be confined with criminal detainees and face more difficult conditions than their male counterparts. The authorities can not justify detention on the grounds that it is being used to protect females (or others) from smugglers or other alleged dangers in the US community.
- ↪ Authorities should take particular care to protect lesbians and gay men from sexual assault or harassment. Authorities should not use isolation within a facility or transfer to a more secure facility as a means of protection.

- ↪ Unaccompanied minors should only be detained as a last resort and in facilities appropriate to their status. Children should not be separated from their families and should be provided with legal counsel. If necessary, guardianship arrangements should be made to protect their interests.
- ↪ UNHCR must be allowed unhindered access to all places where asylum-seekers are detained, including transit zones at international ports and airports.

**To the international community:**

- ↪ The 1999 UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers are a welcome contribution to the standards governing the detention of asylum-seekers. UNHCR should monitor US compliance with the Guidelines and other international standards and report regularly and publicly on their findings relating to US detention practices and policies.
- ↪ The Working Group on Arbitrary Detention should investigate the US authorities' detention asylum-seekers and report its findings publicly.