

UNITED STATES OF AMERICA
RIGHTS FOR ALL

LOST IN THE LABYRINTH: DETENTION OF ASYLUM SEEKERS

UNITED STATES OF AMERICA

Lost in the labyrinth: detention of asylum seekers

-- Summary --

AI: Index: AMR 51/115/99 September 1999
Distribution: SC/CC/REF/CO

CAMPAIGNING FOR RIGHTS FOR *ALL* IN THE USA

This is one of a series of reports issued by Amnesty International as part of a worldwide campaign against human rights violations in the USA, in which the organization is adding its voice to the continuing efforts of the US human rights community.

The year-long campaign was launched in October 1998 with the 150-page report, *Right for All* (AI Index: AMR 51/35/98). This report reveals a persistent and widespread pattern of human rights violations in the USA. It points to entrenched and nationwide police brutality. It highlights the physical and sexual abuse of prisoners, many of whom are held in inhuman and degrading conditions. People who have fled to the USA in search of safety are treated as criminals and held behind bars. The number of people executed each year is rising relentlessly, and more than 3,500 condemned prisoners are on on death row. Racism and discrimination contribute to the denial of the fundamental rights of countless men, women and children.

Other reports issued so far during the USA campaign include:

On the Wrong Side of History: Children and the Death Penalty in the USA (AI Index: AMR 51/58/98, October 1998).

Betraying the Young: Human Rights Violations against Children in the US Justice System (AI Index: AMR 51/57/98, November 1998)

Fatal Flaws: Innocence and the Death Penalty (AI Index: AMR 51/69/98, November 1998).

"Not Part of my Sentence": Violations of the Human Rights of Women in Custody (AI Index: AMR 51/01/99, March 1999)

The findings of a visit to Valley State Prison for Women (AI Index: AMR 51/53/99, April 1999).

Killing with Prejudice: Racism and the Death Penalty in the USA (AI Index: AMR 51/52/99, May 1999)

Cruelty in Control? The Stun Belt and other Electro-shock Equipment in Law Enforcement (AI Index: AMR 51/54/99, June 1999)

Time for Humanitarian Intervention: The Imminent Execution of Larry Robison (AI Index: AMR 51/107/99, July 1999)

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UNITED STATES OF AMERICA

Lost in the labyrinth: Detention of Asylum-Seekers

--- Summary ---

This document is a summary of a 93-page document of the same title (AI Index: AMR 51/51/1999) This summary highlights Amnesty International's main concerns regarding the detention of asylum-seekers in the USA and outlines some individual

cases. More detailed background information, analysis and cases can be found in the full-length report.

1. Introduction

E.A., an asylum-seeker from Sri Lanka, collapsed in the jail where he was detained in Lehigh, Pennsylvania, in May 1996. He died soon afterwards. He had been held in various US detention facilities for more than a year. E. A. had asked for parole, on the grounds that he had a serious heart condition, and that his wife lived in Canada and had hired a lawyer to help him apply for asylum there. The request was turned down, and E. A. died without ever seeing his wife again. The US government apparently paid for his body to be shipped to Canada, but failed to tell his lawyer that he had died.

Asylum-seekers are people who have fled from their countries to escape persecution and who are trying to find protection in another country. Some have fled in the face of an immediate threat, others after a long period of mounting anxiety. This is a basic right: everyone has the right to seek refuge if they have been forced to leave their homeland because of threats to their life or liberty. The USA accepts this principle -- it was one of the main architects of the international system of refugee protection. Yet US authorities violate the fundamental human rights of asylum-seekers.

Thousands of asylum-seekers are detained in US detention centres and jails: no one knows exactly how many, but the number may have risen sharply in recent years. Asylum-seekers who arrive in the USA without proper documents are automatically locked up. But most refugees can only escape from their countries by travelling without documents or with false papers. Asylum-seekers are not criminals and they should not be treated like criminals. International refugee law explicitly states that asylum-seekers escaping danger should not be penalized for entering a country illegally.

In the USA asylum-seekers are often detained indefinitely, not knowing when or if they will be released. Some are held 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 stripped and searched, shackled and chained; some have been 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 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, asylum-seekers should be distinguished from other detainees and held only in conditions appropriate to their status as people seeking international protection. The decision on whether or not to detain should be reviewed regularly by an independent body. US laws, policies and practices consistently fail to meet these standards.

AI Index: AMR 51/115/99 Amnest International September 1999

The Immigration and Naturalization Service (INS), the US government agency which deals with claims for asylum, controls the lives of thousands of men, women and children needing asylum. The INS gives extraordinary power to its District Directors to imprison asylum-seekers indefinitely. There is no other procedure in US criminal or civil law whereby a single government official can jail another person for years with no review of that decision. The INS does not have national, enforceable standards to govern the actions of its officials, nor does it provide coherent national data on asylum-seekers in its custody.

R. B. a young man from Liberia, attempted suicide while spending 10 months in an INS detention facility in Texas. 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.

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.

The INS holds many asylum-seekers in maximum security jails, in isolation and ignorance of their rights. Many asylum-seekers find themselves held under these conditions for months before their asylum claim is heard, with rules governing their behaviour 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. 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 no effective system for tracking the whereabouts of asylum-seekers in detention and refugee advocates have reported that their clients were "lost" in the system.

An asylum-seeker from Sri Lanka, who did not have a lawyer, was denied asylum and deported after Orleans Parish Prison (Louisiana) staff twice refused to allow him to receive mail containing the Universal Declaration of Human Rights and Amnesty International reports on Sri Lanka.

2. Victims of the System

Every asylum-seeker has a story to tell of fear and suffering, of being uprooted from home, family and friends. Every asylum-seeker held behind bars in the USA has another story to tell, of uncertainty, delay and stress. The following case

illustrates a variety of the problems faced by people who seek asylum in the USA.

This is the story of Mohamed Mustafa Hassan: On 28 December 1990 armed men kicked in the door of 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. He was just 14 years old.

Clergy from the local mosque helped Mohamed Hassan and he spent the next few years with members of his religious group in different parts of Somalia. After living in perpetual fear, Mohamed Hassan fled his country. In October 1994, at the age of 18, he arrived at JFK airport in New York.

The INS detained Mohamed Hassan at the airport for arriving without proper documents, and took him to Esmor detention centre in New Jersey. The INS moved him back and forth between Esmor and Lehigh County Jail in Pennsylvania and then transferred him to Baltimore, Maryland, where he stayed for one month. At 4 am one day in September 1995, immigration officials took him out of bed and drove him to the Orleans Parish Prison in New Orleans, Louisiana. Mohamed Hassan 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 the outside world, Mohamed Hassan was unable to obtain an attorney during the first year of his detention. In May 1995 Mohamed Hassan appeared without an attorney before an Immigration Judge in Elizabeth, New Jersey. 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, and remained in jail.

In Louisiana he finally obtained an attorney with the help of Amnesty International USA. Mohamed Hassan wrote to Amnesty International, "life in the jail is very difficult with regard to the feeding 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 and his failure to obtain a lawyer. The INS opposed the motion, but later 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, but prison officials 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.

2.1 The Illegal Immigration Reform and Immigrant Responsibility Act

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) makes the detention of asylum-seekers who arrive without proper documents mandatory. Since the introduction of the IIRIRA, the number of INS detainees is estimated to have reached approximately 13,500, among whom are an unknown number of asylum-seekers.

The introduction of the IIRIRA marked an important shift in the USA's attitude to the protection of refugees. Many provisions of the IIRIRA serve to seal and control the USA's borders; others fundamentally weaken the rights previously enjoyed by those seeking to enter the USA.

INS officials at ports of entry (ports, airports and border crossings) are given important decision-making powers about whether or not to admit a person. There is no administrative or judicial review of their decisions.

An "expedited removal" program provides that people who seek to enter the USA without proper documents will be summarily returned unless they apply for asylum. Amnesty International, among other organizations, has been denied access to observe how the expedited removal process works in practice.

If a person establishes that they have a credible fear of persecution, 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 in practice many are kept jailed during the asylum process and few are released.

US legislation and policy under the IIRIRA mandate the detention of asylum-seekers before the credible fear interview. The discretion to parole 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. This system concentrates extraordinary power in the hands of single individuals acting as decision-makers, and lacks effective oversight or review.

2.2 Detention decisions ignore human rights

The INS detention system ignores or shows indifference to fundamental human rights standards. Too often, the INS has detained people for months or years even though they have compelling cases for release.

A Bangladeshi applicant who suffered from peptic ulcers 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. The INS agreed that he

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should be granted asylum when his case was finally heard.

L. S., a Peruvian, arrived in the USA in November 1992 and was held for well over a year in detention. The INS reportedly did not consider releasing him even after the 2nd Circuit Court of Appeals affirmed that he should have been granted asylum. 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 detained by the INS in New York following his arrival in December 1993. His body bore marks of the mistreatment that he received while detained in Togo, and a doctor with expertise in examining torture survivors assessed that G.D. was suffering severe mental hardship as a direct result of his continued detention. G.D. told Amnesty International that the lack of natural light, fresh air and exercise at Wackenhut (Queens, New York) increased his distress and brought back painful memories of his imprisonment in Togo. He said 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.

INS District Directors may release asylum-seekers who have established a credible fear of persecution. 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 frequent opportunities for a detainee to bring forward reasons for their release. There is no provision for such review in US law or regulation.

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. 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 and A.H. was not freed until December 1998, after at least five months' detention, when an Immigration Judge granted him asylum.

D. N. was detained for more than 20 months, despite being ill and even though in January 1998 an Immigration Judge had decided that he should not be returned to

Liberia. However, the Judge believed that D.N. could safely return to Cote d'Ivoire, where he had spent considerable time before coming to the USA. 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.

In November 1998 D.N. was diagnosed as having *mystenias gravis*, a neurological disorder. His attorney submitted a request for parole, including a 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 in April 1999 denying the request for parole. D. N. was released without explanation in May 1999.

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 demonstrated a significant possibility that she could establish eligibility for asylum.

Her attorney originally requested parole in 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.

2.3 Caught in the labyrinth

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 Headquarters have issued guidelines and made statements opposing the "needless detention of asylum-seekers". However, at the District level decisions remain arbitrary and inconsistent. In each of the INS' 33 districts, divided between three regions, District Directors make their own, unreviewed, decisions.

The INS did institute a system in 1992 -- the Asylum Pre-Screening Officer (APSO) system -- which allows District Directors to consider paroling asylum-seekers. However, the US authorities have still not codified into law or regulation the APSO process, and asylum-seekers' rights continue to be violated.

Over the last several years Amnesty International has visited dozens of INS facilities, local jails and privately-run detention centres where INS detainees are held. The organization has received information from scores of government officials including INS personnel and some local jail officials. It has also collaborated with NGO personnel and has received thousands of requests for assistance from individual asylum-seekers.

The problems facing asylum-seekers trying to pursue their asylum claims include:

- ↪ **Inconsistency** in policy and practice among the INS districts and even within districts;
- ↪ **Failure to distinguish** asylum-seekers from other detainees as required by international standards;
- ↪ **Inappropriate facilities**: prisons and jails designed for convicted or suspected criminals and run according to prison management philosophy are no place for asylum-seekers.

Access to Legal Assistance

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 have faced recurrent problems in trying to gain access to INS facilities and to identify asylum-seekers in need of assistance.

Without access to legal assistance, asylum-seekers often turn to fellow inmates for help, with sadly predictable consequences. F.C., a Honduran asylum-seeker, lodged his first asylum claim while detained in a remote facility in the southwest USA where legal

assistance was not available. 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 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 threats and harassment from other detainees. 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. Fortunately, his attorney obtained a reconsideration of the case, and he was released.

Jails routinely provide access to inmates by local criminal attorneys and paralegals. 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. Furthermore, detainees in jails which Amnesty International visited in 1997 and 1998 expressed widespread concern about the lack of information on their cases.

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. 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.

Asylum-seekers will have to learn new rules and face new language problems in each facility, often with no explanation provided.

3. Conditions in jails

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 officer in charge or of the jurisdiction that they serve.

The INS uses different kinds of facilities to detain aliens. It operates a total

of nine of its own detention centres, uses six privately contracted facilities, and has contracts with several prisons and hundreds of local jails. 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 prisoners warrant 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.

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.

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, the officer in charge stated that there was no constitutional right to recreation and 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.

3.1 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 meal 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.

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.

3.2 Women detainees

The INS estimates that seven per cent of its detainees are female. 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.

The INS does not instruct jailers to meet the specific needs of female asylum-seekers. Women asylum-seekers may have suffered experiences that could make their subsequent jail experience more difficult for them than for men.

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 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 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 that Yudaya Nanyonga had been stripped, injected with some sort of sedative, and placed in four-point restraints. 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

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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".

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". The INS released Yudaya Nanyonga in early April 1999, and she was granted asylum in August 1999.

4. International Standards

"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 is based on the understanding that human rights are universal, and are an international responsibility transcending the sovereignty of individual states. International human rights 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.

There are clear international standards which set out the limited circumstances and conditions in which states may detain asylum-seekers. The USA's policy and practice violates many of these standards and the fundamental rights of asylum-seekers. Asylum-seekers are treated as people who are a threat, people who cheat, and people who will disappear once they gain access to the USA, rather than people in need of international protection.

While states are entitled to control immigration to their territory, Article 14 of the Universal Declaration on Human Rights provides that the right to seek and to enjoy asylum is a basic human right. The way in which asylum-seekers are detained in the USA may deter people from pursuing asylum claims, or induce them to abandon claims.

The basic general principle, derived from international standards, is that asylum-seekers should not be detained, and that their detention is "inherently undesirable". This principle is flouted by the US authorities.

Sources of international law relating to the detention of asylum-seekers

include the 1951 Convention relating to the Status of Refugees (Refugee Convention), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and the Convention on the Rights of the Child.

In addition, there are key non-treaty standards which have been adopted by consensus by UN member states in bodies such as the UN General Assembly and which offer protection to asylum-seekers. As well as the Universal Declaration of Human Rights, 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.

4.1 International refugee standards

International refugee standards are based on the 1951 Refugee Convention and its 1967 Protocol. Article 25 of the Convention requires states to give freedom of movement and choice of residence to refugees lawfully in their territory. Under Article 31, states may not impose penalties for illegal entry or presence on refugees who enter the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The UN High Commissioner for Refugees (UNHCR) is the international body with the statutory responsibility for refugees. The 1999 UNHCR Guidelines on applicable Criteria and Standards relating to the Detention of Asylum-Seekers (Guidelines on Detention) point out that many asylum-seekers can only claim their right to seek asylum by arriving at, or entering, a territory illegally. There is a fundamental difference between the position of asylum-seekers and that of other immigrants. States should take this into account, as well as the fact that asylum-seekers have often had traumatic experiences.

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. In its Conclusion No. 44, adopted in 1986, EXCOM stated that the detention of asylum-seekers "should normally be avoided". It is allowed on a strictly limited basis, only if necessary, if it is lawful and not arbitrary, and if it is for one of the following reasons: to verify identity"; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases of deliberate fraud; or to

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protect national security or public order.

In contrast to these conditions set out in international standards, in the USA asylum-seekers arriving without proper documents are automatically detained until their credible fear interview. 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.

4.2 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is the principal international treaty setting out fundamental civil and political rights. Article 2 requires that governments ensure the rights recognized in the ICCPR to every person within their jurisdiction. Article 9 provides that everyone has the right to liberty and security of the person; no one may be arbitrarily arrested or detained; anyone deprived of their liberty is entitled to a court hearing on whether or not the detention is lawful. This article is of particular importance to detained asylum-seekers.

Arbitrary detention

Freedom from arbitrary arrest or detention is a basic human right, which applies to everyone, including asylum-seekers. It 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.

The US practice of initially detaining asylum-seekers is contrary to the principles of international law. The decision to continue that detention is not subject to independent review, and is sometimes arbitrary, for example when the decision rests 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.

4.3 International standards which protect detainees

The UN Body of Principles set down minimum standards to protect anyone detained or imprisoned. The principles apply to all countries at all times.

Principle 4 provides a significant and fundamental guarantee: "Any form of detention or imprisonment... shall be ordered by, or be subject to the effective control of, a judicial or other authority". 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". Principle 11 also requires that there be some form of continual review: "A judicial or other authority shall be empowered to

review as appropriate the continuance of detention". Such a hearing must deal with issues of substance -- the authorities must provide specific, detailed and individualized reasons for detention, and the hearing must comprise a genuine and searching review aimed at determining whether there is sufficient evidence of the specific allegations to justify arrest and detention.

Access to legal advice

Prompt and regular access to legal counsel is a fundamental human right, because in many cases only a lawyer who has contact with the detainee can assess whether rights have been infringed and seek remedial action. Asylum-seekers are involved in a legal proceeding, so they require access to legal representation or advice. This right to counsel is central to the Body of Principles, and is also set out in the Standard Minimum Rules, Rule 93, and the ICCPR, Article 14.

Principle 17 of the Body of Principles provides that a detained person is entitled to the assistance of legal counsel and to reasonable facilities to exercise that right. Detainees are entitled to have counsel assigned free of charge if they cannot afford to pay.

Many detained asylum-seekers in the USA are effectively cut off from legal representation and the support of NGOs. The net result is that they are denied access to justice.

Access to family and other sources of support

Detained asylum-seekers in the USA face problems in gaining access to visitors, making phone calls or sending and receiving correspondence, and obtaining news from newspapers and television.

This isolation directly contradicts of Principle 16 of the Body of Principles and Rule 92 of the Standard Minimum Rules (the right to inform family of place of detention), Principle 19 of the Body of Principles (the right to visits and to communicate with the outside world) and Rule 37 of the Standard Minimum Rules (the right to visits at "regular intervals").

Access to a medical officer

Free, prompt and adequate medical care for detainees is guaranteed by Principle 24 of the Body of Principles.

Medical staff in US detention facilities do not as part of their regular
Amnesty International September 1999 *AI Index: AMR 51/115/99*

¹ *Lost in the labyrinth: detention of asylum-seekers*

screening of INS detainees ask if a person has been tortured. 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 may further victimize a person who has already suffered torture.

Complaints

The USA has no national complaints mechanism for the prompt and effective investigation of detainees' grievances. 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 should be displayed and made available in different languages.

Principle 33 of the Body of Principles requires that a system be available to investigate complaints of mistreatment, in particular torture or other cruel, inhuman or degrading treatment. Principle 33 also emphasizes that no complainant shall suffer prejudice for making a complaint.

Solitary confinement

Solitary confinement is used as a means of control in INS detention facilities and reportedly as a method of punishment for misbehaviour. Prolonged solitary confinement should not be used as a tool of control or discipline by the INS.

Principle 6 prohibits torture and other cruel, inhuman or degrading treatment or punishment. It explains 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".

Conditions of detention

According to international standards, in particular the ICCPR, conditions of detention for all detainees, including asylum-seekers, should be humane and should respect the inherent dignity of the person.

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 be screened 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.
- ↯ Asylum-seekers should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel.
- ↯ Asylum-seekers should receive appropriate medical treatment and psychological counselling.
- ↯ Asylum-seekers should have daily indoor and outdoor recreational activities.
- ↯ Asylum-seekers should be able to continue further education or vocational training.
- ↯ Asylum-seekers should be able to observe their religion and should receive a diet in keeping with their religion.
- ↯ Asylum-seekers should have access to basic necessities such as beds, shower facilities, basic toiletries, etc.

Detention policies and practices in the USA clearly fail to follow UNHCR Guidelines and violate fundamental standards of international human rights law.

Accountability and oversight

In the USA 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 INS guidelines. In 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. This is not compatible with the notion of an independent, qualified and experienced inspectorate envisaged in Principle 29 of the Body of Principles.

Other refugee rights in detention

¹ *Lost in the labyrinth: detention of asylum-seekers*

In addition to the rights described above, under international standards asylum-seekers and refugees have the following rights if they are in detention:

- ⊣ 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;
- ⊣ refugee children should not be detained;
- ⊣ 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.

4.4 UNHCR Guidelines

The principles set out in international standards are reflected in the 1999 UNHCR Guidelines on Detention. These Guidelines are based on the general principle that asylum-seekers should *not* be detained (Guideline 2). Detention must be seen as an exceptional measure and subject to strict limitations (Guideline 3). The Guidelines state that:

- ⊣ The detention of asylum-seekers is inherently undesirable, in particular in the case of 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.
- ⊣ Detention should only be resorted to in cases of necessity, and for a minimal period.
- ⊣ Asylum-seekers are entitled to benefit from the protection afforded by international and regional human rights instruments.
- ⊣ For the detention of asylum-seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with international law and in particular Article 31 of the 1951 Refugee Convention. It must be exercised in a non-discriminatory manner and subject to judicial or administrative review.

UNHCR explicitly cautions against states using detention to deter future asylum-seekers, or to dissuade those who have lodged claims from pursuing them.

UNHCR's Guidelines reiterate the rights of detained asylum-seekers,

including the rights to:

- ↯ prompt and full communication of any order of detention, together with the reasons for the order, in a language and in terms the asylum-seeker understands;
- ↯ be informed of the right to legal counsel (where possible, asylum-seekers should receive free legal assistance);
- ↯ to have the decision to detain automatically reviewed before a judicial or administrative body independent of the detaining authorities, and regular periodic reviews of the necessity for the continuance of detention;
- ↯ the right to challenge the necessity for detention at the review hearing, either personally or through a representative;
- ↯ effective access to, and the means to contact, UNHCR and other appropriate agencies.

Detention policies and practices in the USA clearly fail to follow UNHCR Guidelines and violate fundamental standards of international human rights law.

Many asylum-seekers in the USA are held in jails together with convicted criminals and prisoners on remand. They are sometimes held in conditions that amount to cruel, inhuman or degrading treatment. 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, they 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.

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. It is Amnesty International's view, supported by international law, that the USA is violating many of the most fundamental rights of asylum-seekers, people who suffered persecution in their own countries and who fled to the USA in the hope that they would finally be free.

5. Recommendations

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 often inhuman. Amnesty International's most serious concern about the INS detention system is the

power the agency gives to its District Directors to detain asylum-seekers. 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. Amnesty International believes that the following recommendations represent minimum procedural guarantees the USA must put in place to be in accord with its international obligations.

Recommendations to the US government:

- ↯ The US government should revise its detention law and policy in the light of international law, which requires that the detention of asylum-seekers should normally be avoided.
- ↯ The discretion currently exercised by INS Directors to detain asylum-seekers must be subject to regular, independent review.
- ↯ Asylum-seekers should not be detained in local or county jails. In those limited circumstances where detention is justified, they should be detained in a facility appropriate to their status as asylum-seekers. Asylum-seekers should not be confined with criminal prisoners or suspects.
- ↯ The INS must identify asylum-seekers when they are detained, and treat them accordingly, in line with international standards. The special circumstances of asylum-seekers must be communicated to all staff involved in the detention of asylum-seekers.
- ↯ Access to counsel and to NGOs assisting detained asylum-seekers must be given at all stages of an asylum-seeker's detention.
- ↯ 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 such as shackling.
- ↯ Medical and mental health care must be available at no cost to asylum-seekers.
- ↯ Government authorities should pay increased attention to the needs of female asylum-seekers in detention; women detainees should have their particular health and hygiene needs met at no cost to them.
- ↯ 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.

Recommendations to the international community:

- ↯ UNHCR should monitor US compliance with the UNHCR Guidelines relating to the Detention of Asylum-Seekers 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.