

JAILED WITHOUT JUSTICE

Immigration Detention in the USA

AMNESTY
INTERNATIONAL





A Chinese asylum seeker at a jail in Virginia. ©Steven Rubin.

CONTENTS

1. Introduction	3
2. Immigrants' Rights are Human Rights	11
3. Right to Review of Detention and Options for Release	13
3.1 Immigrants and asylum seekers detained at the border	13
3.2 Immigrants and asylum seekers apprehended inside the United States	15
3.2.1 Immigration Judge Review	16
3.2.2 Exorbitant Bonds	17
3.3 Mandatory Detention	18
3.3.1 People Who Should Not Be in Detention at All But Are Subject to Mandatory Detention	20
3.4 Indefinite Detention	24
3.5 Right to Habeas Corpus Review	25
4. Alternatives to Detention	27
5. Conditions of Detention	29
5.1 Access to Assistance and Support: Safeguards Relating to Detention	30
5.1.1 Access to lawyers	30
5.1.2 Access to information and other forms of assistance in detention	32
5.1.3 Translation and Interpretation Services	34
5.1.4 Access to attorneys and relatives	34
5.1.5 Access to telephones	35
5.2 Conditions of Detention	37
5.2.1 Housing with Detainees Convicted of Crimes	37
5.2.2 Inappropriate and excessive use of restraints	37
5.2.3 Medical Treatment	39
5.2.4 Exercise	41
5.2.5 Physical and Verbal Abuse	42
6. Recommendations	44
Endnotes	47
Scope and Methodology, A Note on Terminology, List of Terms/Abbreviations	Inside back cover

After suffering torture and five years imprisonment in an Albanian concentration camp due to anti-communist activities, Mr. M was granted asylum and had been living in the United States for over 12 years when he was detained by immigration authorities and placed in mandatory detention. At the time of his detention in 2004, Mr. M had been a lawful permanent resident since 1992 and he was married with three US citizen children. Immigration and Customs Enforcement (ICE) charged Mr. M with being deportable from the US due to convictions related to purchasing a stolen vehicle and filing false information in a home loan application. He spent more than four years in detention fighting deportation by seeking protection under the Convention Against Torture, fearing that he would be tortured if returned.¹ Mr. M's wife and children lived in San Diego, California, hundreds of miles from where he was detained, so over four years they saw each other only four or five times. His wife told Amnesty International she was struggling to raise their children alone. Having lost the lease to their small business, she said she didn't know how they would survive, yet she could not bring herself to tell her husband because she did not want to further erode his spirit. At the time Amnesty International interviewed the family, Mr. M was considering giving up his case because he did not know if or when he would be released from detention. According to his attorney, Mr. M was finally released on bond in September 2008 and is extremely happy to be back with his family awaiting final determination of his case.²

Amnesty International interviews with Mr. M's wife and attorney (identities withheld), June 2008.³

1 INTRODUCTION

“WHETHER I’M DOCUMENTED OR NOT, I’M A HUMAN BEING. I USED TO THINK BIRDS IN A CAGE WERE SO PRETTY BUT NO ONE SHOULD BE DEPRIVED OF FREEDOM – NO ONE SHOULD BE CAGED.”

Amnesty International interview with former immigration detainee
(identity withheld), June 2008

Migration is a fact of life. Some people move to new countries to improve their economic situation or to pursue their education. Others leave their countries to escape armed conflict or violations of their human rights, such as torture, persecution, or extreme poverty. Many move for a combination of reasons. Governments have the right to exercise authority over their borders; however, they also have obligations under international law to protect the human rights of migrants, no matter what prompted an individual to leave his or her home country.

This report focuses on the human rights violations associated with the dramatic increase in the use of detention by the United States as an immigration enforcement mechanism. In just over a decade, immigration detention has tripled. In 1996, immigration authorities had a daily detention capacity of less than 10,000.⁴ Today more than 30,000 immigrants are detained each day,⁵ and this number is likely to increase even further in 2009.⁶

More than 300,000 men, women and children are detained by US immigration authorities each year.⁷ They include asylum seekers, torture survivors, victims of human trafficking, longtime lawful permanent residents, and the parents of US citizen children. The use of detention as a tool to combat unauthorized migration falls short of international human rights law, which contains a clear presumption against detention. Everyone has the right to liberty, freedom of movement, and the right not to be arbitrarily detained.

The dramatic increase in the use of immigration detention has forced US immigration authorities to contract with approximately 350 state and county criminal jails across the country to house individuals pending deportation proceedings. Approximately 67 percent of immigration detainees are held in these facilities, while the remaining individuals are held in facilities operated by immigration authorities and private contractors.⁸ The average cost of detaining a migrant is \$95 per person, per day.⁹ Alternatives to detention,

“IF YOU DON’T HAVE ENOUGH EVIDENCE TO CHARGE SOMEONE CRIMINALLY BUT YOU THINK HE’S ILLEGAL, WE [ICE] CAN MAKE HIM DISAPPEAR.”

James Pendergraph, Former Executive director of the ICE Office of State and Local Coordination, August 21, 2008¹⁹

which generally involve some form of reporting, are significantly cheaper, with some programs costing as little as \$12 per day.¹⁰ These alternatives to detention have been shown to be effective with an estimated 91 percent appearance rate before the immigration courts.¹¹ Despite the effectiveness of these less expensive and less restrictive alternatives to detention in ensuring compliance with immigration procedures, the use of immigration detention continues to rise at the expense of the United States’ human rights obligations.

Approximately 1.8 million people migrate to the United States every year.¹² The vast majority have official authorization to live and work in the United States. Less than a quarter do not have permission to enter the United States, and they live and work in the country as unauthorized immigrants.¹³ The US government estimates that as of January 2007, there were almost 12 million unauthorized immigrants living in the United States.¹⁴ They come from countries around the world—the top five countries of origin are Mexico, El Salvador, Guatemala, the Philippines, and China.¹⁵ Unauthorized immigrants often live in the shadows and are at heightened risk of exploitation, discrimination and abuse. They often work in degrading conditions¹⁶ and are frequently denied access to many forms of healthcare, housing, and other services.¹⁷ Individuals committing

abuses against immigrants know that they are unlikely to be held accountable, because unauthorized immigrants are often reluctant to turn to the authorities, fearing the possibility of arrest or deportation.

Politicians, public officials, and the media have a significant impact on the public’s perception of immigrants and their rights. Much of the public debate about migration in the United States, particularly in the wake of the attacks of September 11, is framed around issues of national security and the economy. One primetime host of a national news channel stated, “Illegal aliens...not only threaten our economy and security, but also our health and well-being....”¹⁸ Such comments contribute to a climate of fear and create the impression that immigrants do not—and should not—have any rights at all.

Entering or remaining in the United States without authorization is a civil violation, not a crime. The Department of Homeland Security (DHS) has broad discretion to apprehend individuals it suspects of immigration violations. Individuals may be apprehended at the border, during employment or household raids, as a result of traffic stops by local police, or after having been convicted of a criminal offense.

A 34-year-old Mexican mother of three told Amnesty International that she was arrested at her home in front of her 3-year-old autistic US citizen son by local police and jailed for 24 days. According to her attorney, she was arrested for failure to appear for a petty theft offense. She was taken to jail “handcuffed to other people on the way” and interrogated that evening by an ICE officer. She told Amnesty International that she does not speak English and had no idea why she was being held. She also told Amnesty International that ICE officers said that it was her fault she was being separated from her family and she should just accept an order of deportation. After nearly three weeks in detention with no indication of when she would be able to return to her family, she tried to kill herself. She told Amnesty International “I started feeling a nervous breakdown—can you imagine, being locked up...the kids needed me... I started hanging myself. I don’t know what happened, but everything started turning dark.” When officers responded, “[I]nstead of helping me they handcuffed me” and took her to another cell. She was later released on bond and is still awaiting final determination of her case.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

Immigration officers (ICE agents) stopped a father walking his daughter to school in California in 2008. The officers asked the young girl, not more than 8 years old, to translate their questions about her father’s immigration status, as he did not speak English. Immigration authorities later took her father away.²⁰

There are two divisions within DHS tasked with immigration enforcement: Customs and Border Protection (CBP) is responsible for enforcement at the border, and Immigration and Customs Enforcement (ICE) is responsible for enforcement

within the United States. If DHS has a reasonable belief that an individual does not have permission to enter or remain in the United States, then that person may be placed in “removal proceedings,” which means the government is seeking to deport him or her from the United States.

Individuals apprehended by immigration authorities often do not know what is happening and may not understand what their rights are. Many may accept immediate deportation even though they may not have had an opportunity to consult with an attorney and they may not actually be deportable.²¹ A person may be eligible to remain

in the United States for a variety of reasons, including a well-founded fear of persecution in his or her home country, having a US citizen spouse, or exceptional hardship caused to his or her US citizen children. Amnesty International has identified more than a hundred cases in the past ten years in which US citizens and lawful permanent residents have incorrectly been placed into removal proceedings.²²

Individuals subject to deportation still have human rights. International law requires that deportation procedures follow due process and conform to international human rights standards. Like any other circumstance, detention pending removal proceedings must be justified as a necessary and proportionate measure in each individual case, and should only be used as a measure of last resort and be subject to judicial review.

While ICE reported an average detention stay of 37 days in 2007,²⁴ Amnesty International found that immigrants and asylum seekers may be detained for months or even years as they go through deportation procedures that will determine whether or not they are eligible to remain in the United States.

"FREEDOM FROM IMPRISONMENT—FROM GOVERNMENT CUSTODY, DETENTION, OR OTHER FORMS OF PHYSICAL RESTRAINT—LIES AT THE HEART OF THE LIBERTY [THE DUE PROCESS] CLAUSE PROTECTS."

US Supreme Court²³

For example, according to a 2003 study, asylum seekers who were eventually granted asylum spent an average of 10 months in detention with the longest reported period being 3.5 years.²⁵ Amnesty International has documented several cases, detailed in this report, in which individuals have been detained for four years. Individuals who have been ordered deported may languish in detention indefinitely if their home country is unwilling to accept their return or does not have diplomatic relations with the United States.²⁶

An important safeguard against arbitrary detention is the ability of an individual to challenge his or her detention before an independent judicial body. The US criminal justice system provides individuals detained and charged with criminal offenses with the opportunity to challenge their detention before a court and provides legal counsel for individuals who cannot afford to pay themselves. However, individuals detained on the basis of civil immigration violations are not provided with such safeguards. Many individuals are held in immigration detention without access to an immigration judge or judicial body and have to represent themselves if they cannot afford a lawyer. Factors such as whether an individual is apprehended at the border, whether an individual is apprehended within the United States, and whether an individual has been convicted of certain crimes may determine whether that individual is detained and what kind of review, if any, takes place.

In the case of individuals who are apprehended at the border, an immigration officer makes decisions about whether or not the person will remain in detention—these individuals are not entitled to a review of their detention by an immigration judge.²⁷ Those apprehended inside the United States are entitled to a review by an immigration judge. However, this review does not always take place, or does not take place in a timely manner.

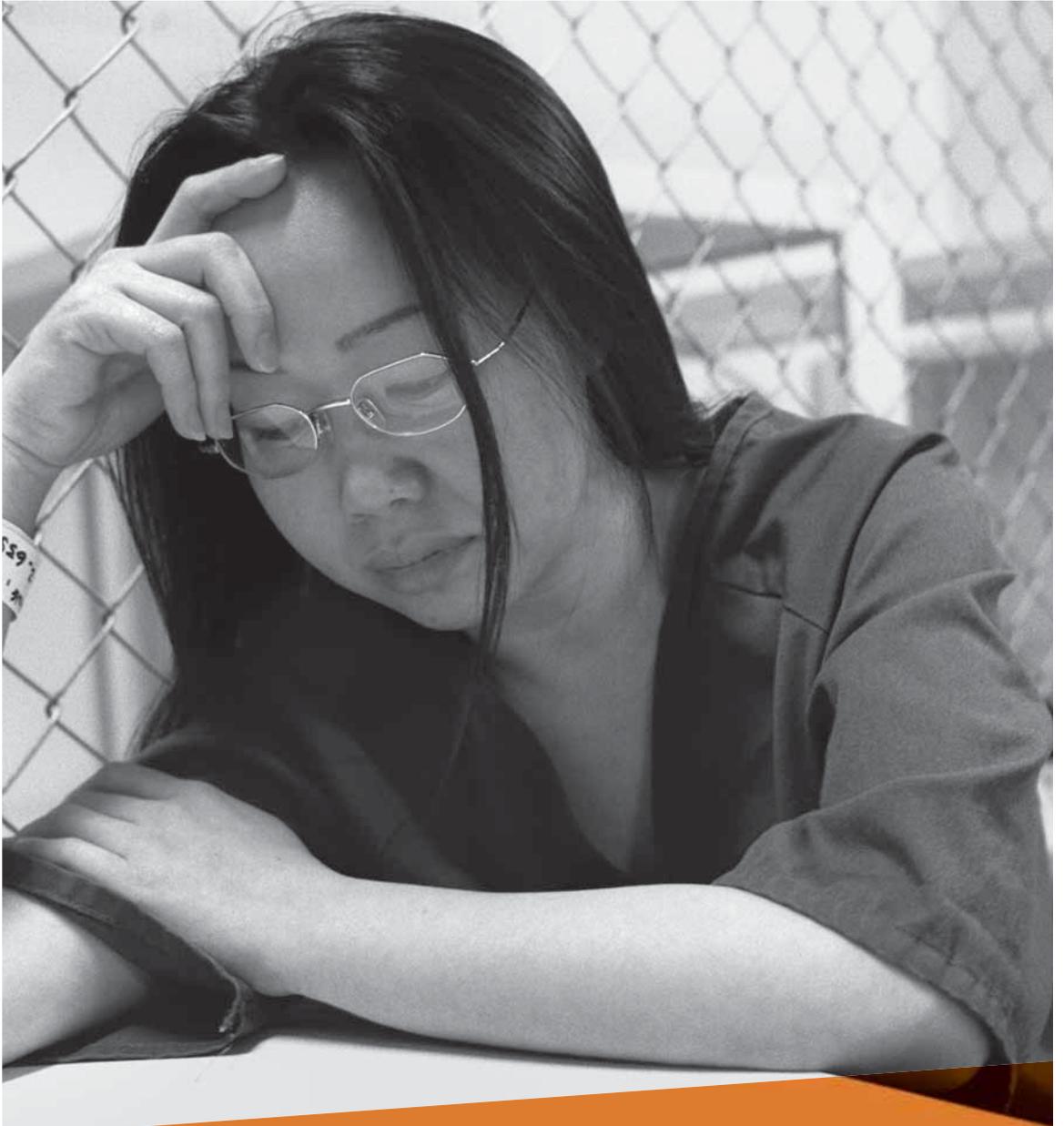
Individuals who have lived in the US for years can be subject to “mandatory detention,” meaning there is no opportunity for an individual hearing to determine whether he or she should be released, and deported for minor crimes they committed years ago. Thousands of individuals every year are subject to mandatory detention while deportation proceedings take place. It is not known exactly how many individuals are subject to mandatory detention, and DHS did not respond to a request from Amnesty International to provide this data. US citizens and lawful permanent residents have been incorrectly subject to mandatory detention, and have spent months or years behind bars before being able to prove they are not deportable from the United States.

The ability to access the outside world is an essential safeguard against arbitrary detention. However, Amnesty International documented significant barriers immigrants face in accessing assistance and support while in detention. Problems included lack of access to legal counsel and consulates; lack of access to law libraries along with inadequate access to telephones; and frequent and sudden transfers of detainees to facilities located far away from courts, advocates, and family.

Amnesty International also documented pervasive problems with conditions of detention, such as commingling of immigration detainees with individuals convicted of criminal offenses; inappropriate and excessive use of restraints; inadequate access to healthcare, including mental health services; and inadequate access to exercise. In 2000, immigration authorities introduced detailed detention standards for facilities housing immigration detainees, covering issues such as access to attorneys and conditions of detention. However, these guidelines are not binding regulations and are not legally enforceable.

Geovanny Garcia-Mejia, 27, from Honduras, died on March 18, 2006. He was detained at the Newton County Correctional Center in Texas. He had been placed in a medical unit, where he was found writing on the floor with his blood, internal records show. But he was returned to the jail’s general population after a psychologist wrote in his chart, “No idea why he is in suicide cell.” He hanged himself 12 days later, on his 27th birthday. The local sheriff concluded that guards who should have been checking him every 15 minutes “made no rounds through the night... [I]t goes without saying that the incident could have been avoided.”²⁸

In September 2008, ICE announced the publication of 41 new performance-based detention standards, which are to be implemented over 18 months and will take full effect in all facilities housing ICE detainees by January 2010.²⁹ Amnesty International welcomes this step toward improving conditions in immigration detention; however these are still only guidelines and are not legally enforceable. Amnesty International findings indicate that conditions of detention in many facilities do not meet either international human rights standards or ICE guidelines.³⁰ There is an urgent need to ensure that all facilities housing immigration detainees comply with international human rights law and standards. Ensuring that detention standards are legally binding, and creating a mechanism for independent oversight of their implementation, would better protect the human rights of immigrants in detention in the United States.



A Vietnamese immigrant detainee held at a facility in Washington state.
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KEY RECOMMENDATIONS

1. The US Congress should pass legislation creating a presumption against the detention of immigrants and asylum seekers and ensuring that it be used as a measure of last resort.

2. The US government should ensure that alternative non-custodial measures, such as reporting requirements or an affordable bond, are always explicitly considered before resorting to detention. Reporting requirements should not be unduly onerous, invasive or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to judicial review.

3. The US Congress should pass legislation to ensure that all immigrants and asylum seekers have access to individualized hearings on the lawfulness, necessity, and appropriateness of detention.

3.a Detention should be used only if the US government demonstrates in each individual case that it is a necessary and proportionate measure. No one should be subject to “mandatory detention.”

3.b All decisions to detain should be subject to formal and regular review by a judicial body. Measures must be immediately taken to ensure that the discretion currently exercised by individual ICE officers to detain immigrants be subject to formal judicial review.

3.c Immigrants should be advised of the release options available to them and how to access them.

4. The US government should ensure the adoption of enforceable human rights detention standards in all detention facilities that house immigration detainees, either through legislation or through the adoption of enforceable policies and procedures by the Department of Homeland Security. There should be effective independent oversight to ensure compliance with detention standards and accountability for any violations.

2 IMMIGRANTS' RIGHTS ARE HUMAN RIGHTS

EVERYONE HAS THE RIGHT TO LIBERTY AND SECURITY OF PERSON. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION.

Article 9 of the United Nations International Covenant on Civil and Political Rights

As a general rule, Amnesty International is opposed to the use of detention for the purposes of migration control. Everyone has the right to liberty and security of the person, including the protection from arbitrary arrest and detention, regardless of legal status. Detention of migrants will only be lawful when the authorities can demonstrate in each individual case that it is necessary and proportionate to the objective being achieved, that alternatives will not be effective, that it is on grounds prescribed by law, and where there is an objective risk of the person absconding.

All immigrants irrespective of their legal status, have fundamental human rights, including the right to liberty and freedom from arbitrary detention.³¹ International standards, including instruments to which the United States is a party, contain a strong presumption against the detention of immigrants and asylum seekers. For example, the International Covenant on Civil and

Political Rights (ICCPR) clearly sets out the right to be free from arbitrary detention.³²

Detention should only be used as a measure of last resort; it must be justified in each individual case and be subject to judicial review. Detention is only appropriate when authorities can demonstrate in each individual case that it is necessary and proportionate to the objective being achieved and on grounds prescribed by law, and that alternatives (such as reporting requirements, bail or financial deposits) would not be effective. The U.N. Working Group on Arbitrary Detention has called on governments to ensure that "alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention."³³

A limited number of specific purposes are recognized as legitimate grounds for detention under international standards, including verifying identity, protecting national security or public order, and preventing a person from absconding following an objective assessment of flight risk.³⁴

The U.N. Human Rights Committee has stated that detention is arbitrary if no consideration is given to the necessity of detaining an individual and that detention should not continue beyond the period for which a government can provide appropriate justification.³⁵ The U.N. Working Group on Arbitrary Detention has explicitly stated that where the detention of unauthorized immigrants is mandatory, regardless of their personal circumstances, it violates the prohibition of arbitrary detention in Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights.³⁶ International law requires that any person detained should be provided with a prompt and effective remedy before an independent judicial body to challenge the decision to detain him or her,³⁷ and that every decision to keep a person in detention should be open to review periodically.³⁸

International law and standards also require that the conditions of detention are humane and that the human rights of detainees are respected. Fundamental human rights while detained include protection against torture, cruel, inhuman or degrading treatment; access to medical care; exercise; and the ability to communicate with the outside world including consulates, attorneys and family.³⁹

Immigrants and asylum seekers subject to deportation are also entitled to procedural safeguards including the ability to challenge the decision to deport, access to legal counsel and interpretation services, and access to a review—ideally a judicial review—of a negative decision. Deportation of non-nationals, including those who have been charged with or convicted of

serious criminal offenses, can raise human rights concerns, for example, when a person has spent the majority of his or her life in their country of residence and has no meaningful links with the country of origin, when it results in family separation or when it places a person at risk of torture or other serious human rights violations.⁴⁰ Under the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture,⁴¹ and customary international law,⁴² the United States government is under an obligation not to return individuals to a situation in which he or she would be at risk of torture or other serious human rights abuses: the principle of *non-refoulement*.

The United States is party to the 1967 Protocol Relating to the Status of Refugees which sets out the rights of refugees seeking protection and is a follow up to the 1951 Convention Relating to the Status of Refugees. However, it is not yet party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families which came into force on July 1, 2003. The Migrant Workers Convention recognizes the human rights of all migrant workers and their families regardless of their legal status in the host country, including the right to liberty⁴³ and to adequate conditions of work.⁴⁴ Amnesty International calls upon the US government to sign and ratify the Migrant Workers Convention.

3 RIGHT TO REVIEW OF DETENTION AND OPTIONS FOR RELEASE

“SOMETIMES I WANTED TO GIVE UP BECAUSE I COULDN'T DEAL WITH WHAT I WAS GOING THROUGH.”

Amnesty International interview with former immigration detainee and torture survivor who was granted asylum (identity withheld), June 2008.

Mr. N, a Buddhist monk from Tibet, fled to the US after he had been arrested, incarcerated, and tortured twice on the basis of his religious beliefs and political expressions in support of Tibetan independence. He arrived in New York and was immediately placed into immigration detention. Mr. N's attorney filed a parole application that included an affidavit from a member of the American Tibetan community who pledged to provide Mr. N lodging and ensure his appearance at any hearings. During Mr. N's ten-month detention, the government provided no response to this request, and Mr. N was never given the opportunity to argue for his release before a judge. Mr. N was granted permission to remain in the US in September 2007.⁴⁵

Amnesty International's findings indicate that immigrants can be detained in the United States for months or years without any form of meaningful individualized review of whether their detention is necessary. There is a lack of uniformity in the type

of custody review, if any, that is available to detained immigrants. The type of custody review available depends on whether someone was apprehended at the border or within the United States and whether or not he or she has been convicted of certain crimes.

In some cases, the continued detention of individuals may amount to arbitrary detention in contravention of international law. There is an urgent need to ensure that all individuals subject to immigration detention receive a custody assessment that complies with international law to avoid the arbitrary detention of immigrants and asylum seekers.

Amnesty International found that the detention of immigrants and asylum seekers puts considerable pressure on individuals to abandon potentially valid claims to remain in the United States.

3.1 IMMIGRANTS AND ASYLUM SEEKERS DETAINED AT THE BORDER

Individuals arriving at US borders without proper documentation may be detained for months, and

A 26-year-old Chinese woman cried as she told AI researchers that she fled persecution after she and her mother were beaten in their home for handing out religious fliers. She arrived in the United States in January 2008 seeking asylum and was detained at the airport before being moved to a county jail. No one explained to her why she was being detained. An ICE Field Office Director decided that she should remain in detention unless a bond of \$50,000 was paid. Neither her uncle in the United States nor her family in China had sufficient funds to meet the required amount. Her attorney told Amnesty International that the immigration judge indicated that he did not have the authority to release her from detention or change the amount of the bond set. Family members in the United States were finally able to raise the money needed to secure her release in December 2008, after she had spent nearly an entire year in detention.

Amnesty International interviews with a detained asylum seeker and her attorney (identities withheld), June 2008.

**“AS FAR AS POSSIBLE, THE
DETENTION OF FOREIGNERS
WHO ENTER THE COUNTRY
WITHOUT THE NECESSARY
VISA OR WHO REMAIN IN
THE COUNTRY ONCE THEIR
VISA HAS EXPIRED SHOULD
BE AVOIDED.”**

UN Working Group on Arbitrary
Detention⁴⁶

in some cases years, and are not entitled to any form of detention review by an immigration judge. Under US law, all individuals apprehended at the border “shall be detained” pending deportation proceedings.⁴⁷ This includes asylum seekers fleeing persecution who arrive at the US border seeking protection,⁴⁸ and in some instances it also includes lawful permanent residents who left the United States and may find themselves barred from re-entry.⁴⁹

US law does provide that these individuals may be released on parole on a case-by-case basis for “urgent humanitarian reasons” or for “significant public benefit” where the individual presents neither a security risk nor a risk of absconding.⁵⁰ In practice, an individual immigration officer (ICE Field Office Director) decides whether someone is released from detention and the conditions of any

such release, such as the amount of bond to be posted or reporting requirements.

Previously, guidelines provided for the release of asylum seekers who satisfied certain criteria, including establishing identity and community ties. However, in November 2007, ICE issued more restrictive guidelines that limited the ability of asylum seekers to receive parole.⁵¹ Department of Justice regulations specifically state that immigration judges do not have jurisdiction to review decisions made by ICE Field Office Directors involving individuals apprehended at the border.⁵²

The discretionary nature of the parole decision making process means that an individual's chances of release may depend entirely on where he or she is detained. Rates of release of individuals seeking asylum range from 4 percent in Newark, New Jersey to 98 percent in Harlingen, Texas in 2004.⁵³ Advocates told Amnesty International that some ICE offices have unwritten "no release" policies, rendering the ICE officer's review meaningless.

The parole process concentrates extraordinary power in the hands of individual ICE officers and lacks effective oversight and review, in contravention of international human rights standards. To protect against arbitrary decisions and the abuse of discretionary power, all decisions regarding the use of detention, as well as alternatives to detention, must be subject to review by a judicial or other competent and independent authority.

3.2 IMMIGRANTS AND ASYLUM SEEKERS APPREHENDED INSIDE THE UNITED STATES

A different set of rules applies to individuals apprehended within the United States. US law provides for the release of all persons apprehended inside the United States, on a minimum bond of \$1,500 or on conditional

Mr. A fled to the USA from India in 1999 after being severely tortured and jailed multiple times due to his political activities. In 2006, he was arrested and detained by ICE and required to pay a \$15,000 bond. His wife contracted with a bail bondsman to pay the bond and Mr. A applied for asylum. Over two years he appeared regularly for all immigration court hearings, but at the end of a hearing in which he had testified for hours about the torture he suffered in India, he was again arrested and detained by ICE. At a bond hearing before an immigration judge he was ordered released upon payment of an \$80,000 bond. Mr. A's family and friends pooled their resources, using credit cards and their homes as collateral in order to secure his release. Mr. A was eventually granted asylum protection.

Amnesty International interview with a former immigration detainee (identity withheld), June 2008.



Samuel Komba Kambo ©AP Photo/Gloria Ferniz.

parole, as long as he or she is not subject to mandatory detention on certain criminal or terrorism-related grounds.⁵⁴ An individual ICE Field Office Director again makes the initial decision regarding whether someone remains in detention or is released. In these cases, however, individuals may ask for a review by an immigration judge. This review is not automatic – an individual detainee must request it. People who do not have representation or other assistance may not even realize that it's possible to make such a request, and so lose one of only a few options for securing release from detention.

Reports to Amnesty International indicate that increasingly, immigration judges are not releasing people on bond; that in many cases the bond is set too high; and even if bond is granted and an immigration judge orders an individual to be released, immigration authorities have the authority to invoke an "automatic stay," which means that an individual remains in detention pending a lengthy administrative review process. In addition, Amnesty International found that

some immigration judges may not be aware of all of the release options that are available to them.⁵⁵

3.2.1 Immigration judge review

In order to be considered for release, an immigrant or asylum seeker must show that he or she does not present a danger to persons or property, is not a threat to national security, and does not pose a flight risk.⁵⁶ After the initial custody and/or bond determination by ICE, an immigrant detained within the United States may challenge this decision and apply for a bond re-determination before an immigration judge.⁵⁷ If an individual is eligible for release on bond, an immigration judge may consider factors such as employment history in setting the amount of bond.

According to the Executive Office for Immigration Review (EOIR), in 2006 immigration judges in the United States declined to set a bond in 14,750 cases. In 2007, that number increased to 22,254, and in the first five months of 2008 immigration judges had already refused to set bond in 21,842 cases.⁵⁸ Estimates of the number of bond cases

heard each year vary considerably; for example, EOIR data provided to Amnesty International said that 273,139 bond decisions were made in 2007,⁵⁹ but the Office of Planning, Analysis, and Technology reported in its annual statistical update that just 42,171 bond re-determination hearings were completed.⁶⁰ Thus, it is impossible to assess the percentage of people being denied bond out of the total number of those requesting a bond redetermination. It is important that comprehensive and accurate data is collected and made public.

Sam Kambo, married with four US citizen children, had been living in the United States for 12 years and was applying to become a lawful permanent resident, when he was detained in October 2006 by immigration authorities and charged with taking part in politically motivated executions in his native Sierra Leone. In June 2007, an immigration judge found that there was “no credible evidence” to tie him to crimes in Sierra Leone and ordered him released from immigration detention on bond; however, ICE immediately appealed this determination and Mr. Kambo remained in detention. “Where’s Papa going?” Seth Kambo (aged 4) asked as his father was led back to jail in handcuffs. A US District Court judge finally ordered immigration authorities to release Mr. Kambo in October 2007 nearly one year after he was first taken into detention. The US government has appealed his release.⁶¹

Even when an immigration judge has ordered someone released, ICE may continue to keep that person in detention. ICE retains the authority to “automatically stay” an immigration judge’s decision if an ICE officer initially denied bond or set a bond of at least \$10,000.⁶² This means that the person concerned remains in detention

pending review by the Board of Immigration Appeals (BIA), which determines whether the immigration judge properly set bond. Amnesty International was told by advocates that in some jurisdictions, ICE routinely denies bond so that it may later invoke this “automatic stay” authority.

3.2.2 Exorbitant bonds

Even in those cases in which an immigration judge sets bond, immigrants and asylum seekers are often unable to secure release because they are unable to pay the bond. If they do, they may find themselves and their families in significant debt due to exorbitant bonds. If an immigration judge declines to release someone on his own recognizance, the minimum bond that may be set by an immigration judge is \$1500,⁶³ but bonds are regularly set at much higher rates. Across the United States, the average immigration bond is \$5,941.⁶⁴ In New York, the average is \$9,831, and in at least eight other jurisdictions the average is over \$6,000. One immigration judge told Amnesty International that he always sets the bond of Chinese nationals who are believed to have been smuggled into the US at \$25,000.⁶⁵ Decisions related to bond should not be based on an individual’s nationality or manner of entry. They should be based on an individual’s specific circumstances and whether the person presents a flight or security risk.

Unauthorized immigrants work for wages that are often below the national average and like many families in the United States, immigrant families struggle to pay bills and support themselves.⁶⁶ Many immigrants told Amnesty International that they were unable to pay bonds and were forced to use bail bondsmen, who regularly charge 15 percent to 20 percent of the bond amount.⁶⁷ This fee is paid up front or in monthly increments. Even when an immigrant wins a case before the immigration court, it may take months for ICE to prepare the paperwork needed to be released from a contract with a bail bondsman. In the meantime, the immigrant is required to continue making interest payments.

Having a lawyer can impact whether or not an individual remains in detention while his or her case is ongoing. For example, one study conducted in New York City found that the likelihood of having a lower bond set by an immigration judge was increased if an individual was represented by an attorney.⁶⁸

An immigration judge in New York set a \$30,000 bond for a man whose mother is a US citizen. He had lived in the US since 1992, maintained a good employment record, and had no known criminal charges. He was not represented by an attorney at the bond hearing and waived his right to appeal.⁶⁹

While there is nothing in the Immigration and Nationality Act or regulations that would preclude immigration judges from releasing individuals without a monetary bond (for example, releasing someone on his or her own recognizance), a number of attorneys told Amnesty International that immigration judges will not do so as a general rule.⁷⁰ Indeed, a number of immigration judges with whom Amnesty International spoke expressed confusion about whether or not they had the authority to release someone without monetary bond.⁷¹ Information provided to Amnesty International by the Executive Office for Immigration Review, however, indicates that immigration judges do have this authority. For example, immigration courts released 2,442 people on their own recognizance in 2006 and 3,066 people in 2007.⁷² There are, however, wide regional variations: immigration courts in Houston, Texas, for example, released 462 people without monetary bond in 2006, whereas immigration courts in New York City and Las Vegas released no one on this basis.⁷³

3.3 MANDATORY DETENTION

Immigrants—including those who have lived in the US for most of their lives - can be deported

for certain crimes, including minor, non-violent crimes (such as receiving stolen property) committed years ago. These individuals are subjected to mandatory detention when they are placed in deportation proceedings and do not receive any form of custody review. Many individuals who did not serve any time in prison for their offenses find that they are immediately locked up and are not entitled to any individualized determination as to whether they pose a danger or a flight risk that would justify their detention pending deportation proceedings. It is believed that thousands of individuals are subject to mandatory detention every year: the exact number of people impacted is not known as the DHS does not publish this data.⁷⁴

In 1996 the US significantly expanded the categories of individuals who would be subject to mandatory detention to include a person convicted of a variety of crimes, including non-violent misdemeanor convictions without any jail sentence, and anyone considered a national security or terrorist risk.⁷⁵ If already in the United States, a person is subject to mandatory detention if he or she is suspected of being a national security or terrorism concern, or is charged under immigration law with two “crimes involving moral turpitude,” an “aggravated felony,” a firearms offense, or a controlled substance violation. If he or she is “seeking admission” into the US, even

**“CAN YOU
PLEASE BRING
MY DAD HOME?”**

David age 7 in a letter to immigration court, after not having seen his lawful permanent resident father for over four years.



A child in Georgia, 2 years old, who was born a U.S. citizen. His father was deported to Mexico, and his mother fled when ICE raids began in her state. ©AP Photo/Stephen Morton.

as a lawful permanent resident, he or she is subject to mandatory detention if charged under immigration law with one crime involving moral turpitude, prostitution, domestic violence, or if he or she has received any number of criminal sentences totaling five years or more.⁷⁶

The terms aggravated felony and crime involving moral turpitude are broad and confusing and subject to constant interpretation by the immigration courts, Board of Immigration Appeals, and the federal courts. As a result many individuals are detained for years while courts determine whether a prior criminal conviction is actually a “crime involving moral turpitude or an aggravated felony” and as such a deportable offense. Mistakes are common, and in the meantime, individuals incorrectly subject to mandatory detention have no opportunity for release.⁷⁷

A 37-year-old lawful permanent resident, who had lived in the United States for 18 years, was deported to Haiti for two convictions for possession of stolen bus pass transfers. The immigration court found that these convictions

constituted two crimes of moral turpitude, a decision that led to his deportation.⁷⁸

Trevor Drakes, a native of Guyana, came to the United States when he was 11 years old. A lawful permanent resident, he was arrested after signing traffic tickets using a false name and later pleaded guilty to two counts of forgery. On March 2, 1999, he was sentenced to two years of imprisonment, which was suspended for time served, followed by two years of probation. He was then transferred into immigration detention. His case went through several appeals, but on February 20, 2001, the Third Circuit Court of Appeals affirmed that his convictions were aggravated felonies under immigration law and that he should be deported.⁷⁹

While a person can challenge whether he is properly included in a mandatory detention category, it is his burden to demonstrate that ICE is “substantially unlikely to establish” the charge

of deportability.⁸⁰ Unlike other areas of US law, it is the detainee's burden to demonstrate that he should not be deprived of his liberty rather than the government's burden to demonstrate that detention is necessary and proportionate. This inversion generally supports mandatory detention, because most individuals in detention have no legal representation and face considerable challenges in developing their own legal arguments in a complex and ever-changing field of law.⁸¹

Amnesty International found that some US citizens and lawful permanent residents are incorrectly subject to mandatory detention, and spend months or years behind bars proving they are not deportable from the United States. According to Amnesty International's research, at least 117 individuals have been held in mandatory detention on the basis of crimes that were ultimately determined not to constitute an aggravated felony offense for which they could be deported.⁸²

Because these cases can take years to resolve and wreak havoc on families, attorneys and detainees told Amnesty International that mandatory detention often results in the decision to give up the fight to remain in the United States, even when relief from deportation is available. The US mandatory detention system, which provides for the automatic detention of individuals, amounts to arbitrary detention, and is in violation of international law, which requires that detention be justified in each individual case and be subject to judicial review.⁸³

3.3.1 People who should not be in detention at all but are subject to mandatory detention

A. US Citizens

The immigration detention of US citizens cannot be justified on any legal basis and is therefore arbitrary under international law. However, immigration judges, advocates and detained immigrants interviewed by Amnesty International reported cases of US citizens being detained for months while they try to prove their

citizenship; due to a lack of due process protections guaranteed under international law. US citizenship is a particularly complex and constantly changing area of immigration law and detainees must prove their own US citizenship.⁸⁵ While this may sound straightforward, in many cases it is not, in particular for detainees who cannot obtain assistance with the retrieval of required documents. For example, citizens born at home with the assistance of midwives do not have a hospital record of birth, and therefore their location of birth is questioned by ICE attorneys.⁸⁶ ICE deported a mentally disabled US citizen to Mexico in 2007. It took his mother months to locate him and secure his re-entry into the US.⁸⁷

Mr. W., a US citizen, was placed in immigration detention in Florence, Arizona. According to the Florence Immigrant and Refugee Rights Project, he was born in Minnesota and had never left the United States in his life. Because he was detained, he did not have access to his birth certificate, and was working in the prison kitchen for a dollar a day to earn the thirty dollars it would cost to order a copy of his birth certificate. Mr. W. was finally released after being detained for over a month.⁸⁸

An unknown number of US citizens are detained and deported each year. In 2007, legal service providers identified 322 individuals in detention with potential claims for US citizenship.⁸⁹

B. Foreign Nationals Who Are Not Deportable

Lawful permanent residents,⁹⁰ many of whom have been residents in the United States for years or even decades, may be subject to mandatory detention. They may spend months and years behind bars while attempting to prove the crimes for which immigration authorities are seeking to deport them, may not actually be deportable offenses. The immigration detention of lawful permanent residents who are not deportable

Y.S., a 34-year-old US citizen, spent seven months in immigration detention fighting deportation. ICE reportedly determined that the detention was mandatory because he had been convicted of a controlled substance violation and could not be released unless he proved his citizenship. At an interview with immigration officials that lasted more than three hours, Y.S.'s mother broke down crying and could not remember whether he had been born in the morning or evening. Immigration authorities were not satisfied that they were related and ordered the family to undergo DNA testing, which cost several hundred dollars, money the family had to scrape together. ICE finally released Y.S. in October 2007, recognizing that he was a US citizen and terminating deportation proceedings. He told Amnesty International that without a pro bono attorney, he would have given up and been deported to Thailand.⁸⁴

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

Mr. B, a 57-year-old lawful permanent resident of the United States for more than forty years with US citizen children and grandchildren, spent four years in mandatory detention while fighting deportation. In August 2003, he pled guilty to two misdemeanors and received probation. As part of his probation, he was required to check in with a probation officer, and he did so regularly. Before Thanksgiving in 2003 his probation officer asked him to come in and when he did so, ICE officers arrested Mr. B based on the misdemeanor convictions and sought to deport him, claiming that his convictions constituted aggravated felonies under immigration law. "I was in complete shock and kept asking my probation officer why I was being taken away. I had never heard of ICE," Mr. B told Amnesty International. His wife returned home from work that day to a voicemail that said she should pick her husband's car up. She told Amnesty International, "My husband didn't call me for two or three days. I didn't know what was happening. No one would tell me." Although an immigration judge ruled that his convictions were not aggravated felonies, he remained in detention while his case went through several government appeals. In November 2007, the federal court of appeals found that Mr. B was not an aggravated felon and ordered his immediate release. Although he was no longer subject to deportation, ICE refused to release Mr. B unless he paid bond. Mr. B told Amnesty International, "My tears came down my eyes because I learned that I would not be released unless I paid \$10,000. I didn't know why." Mr. B's wife raised this money from family and friends; after his release, however, ICE did not return the bond money for over five months. When Mr. B finally received it, his family had to use the money to pay bills. He is still trying to pay back his friends and family, and his daughter has moved back into the home to help him and his wife financially.

Amnesty International interview with Mr. B and his wife (identities withheld), January 2009.

cannot be justified on any legal basis and is therefore arbitrary under international law.

Individuals seeking protection through asylum or Convention against Torture claims⁹¹ may be caught in the mandatory detention system even though under international law, they cannot be deported if it would place them at risk of persecution, torture or other serious human rights violations. These individuals may spend months or even years in detention as they fight for protection.

Huyen Thi Nguyen, a 63-year-old Vietnamese woman, was placed in deportation proceedings and detained by immigration authorities after she was convicted of food stamp fraud. She spent 16 months in jail fighting deportation, afraid to return to Vietnam because she had been imprisoned there for four years as a political prisoner. She was held in a facility thousands of miles away from her 72-year-old husband, a US citizen. An immigration judge determined she was neither a flight risk nor a danger to the community and should be released on bond, but ICE appealed the decision and denied her release. Ms. Nguyen was finally released when a District Court judge granted her habeas petition.⁹²

C. The Burden of Proof: Are People Actually Deportable?

Reports to Amnesty International, as well as hearings observed by Amnesty International, indicate a pattern in which ICE is not always prepared for court with necessary documentation substantiating the alleged criminal conviction to demonstrate that someone is deportable and subject to mandatory detention. Although it is ICE's burden to prove that a person is deportable by "clear, unequivocal and convincing evidence,"⁹³ sometimes ICE is not even prepared

to demonstrate why the person is subject to mandatory detention. Courts routinely allow ICE attorneys to postpone and reschedule hearings in order to establish the needed burden of proof, causing unacceptable delays and prolonged detention. Because of the pressure on individuals created by mandatory detention, some judges accept an individual's decision to be deported without proper examination of the evidence, leading to deportation of individuals with potentially valid claims.

At an immigration hearing Amnesty International observed in New York, a man stated that he wanted to take an order of deportation rather than fight his case in detention. He was the father of a newborn baby and a lawful permanent resident. The immigration judge told him that because ICE could not meet its burden of proof that day, he could not deport him. Instead, he would have to wait for a month in detention while ICE came up with new documents to deport him. "In the interest of justice," the ICE attorney agreed to write up new documents so that the man could be ordered deported immediately.

At hearings Amnesty International observed in San Francisco in June 2008, in several cases ICE had no documents to support the grounds that triggered mandatory detention and deportation. Even though ICE could not meet its burden of proof, three individuals without legal representation accepted orders of deportation rather than remain in detention. The judge accepted their oral testimony to establish a criminal conviction.⁹⁴ Immigration lawyers reported that deportations such as these, in which the government cannot meet its burden of proof, are commonplace particularly among those without attorneys. One immigration lawyer told Amnesty International "This is normal...it's lethal to due process."

As expansive as the "crimes involving moral turpitude" and "aggravated felony" categories are, ICE does not have to charge a person with one of these grounds for him to be subject to mandatory

detention. Instead, ICE can simply argue orally in court that an individual has a criminal conviction that qualifies him for mandatory detention.⁹⁵ While it's likely most immigration courts would require that ICE submit some proof, they will usually grant an adjournment allowing immigration authorities more time to secure the conviction documents, leaving the immigrant in detention while ICE establishes whether or not it can secure the relevant documents.

3.4 INDEFINITE DETENTION

Amnesty International is concerned that immigrants and asylum seekers who have been through removal proceedings and ordered deported from the United States are languishing indefinitely in immigration detention, in contravention of domestic and international law and standards. These individuals remain in immigration detention despite the fact that they cannot be removed from the United States because they are from countries with which the United States does not have diplomatic relations or whose home country will not accept their return.

Immigrants who are deemed removable from the United States must be deported within a period of 90 days.⁹⁶ ICE may detain immigrants during this "removal period."⁹⁷ The US Supreme Court has ruled that if an individual is detained longer than 90 days, ICE is required to conduct a custody review to determine if the individual is a flight risk or danger to national security.⁹⁸ If the individual remains in detention six months after the removal order has become final, another detention review is to be conducted. Once it is determined that removal is not reasonably foreseeable, the regulations require the individual to be released under conditions of supervision.

Immigration advocates, however, reported to Amnesty International that regular custody reviews are not taking place. A 2007 Department

of Homeland Security, Office of the Inspector General report also reached this conclusion and made recommendations to ensure that custody reviews are meaningful and occurring regularly. According to a study conducted by Catholic Legal Immigration Network, ICE's compliance with and implementation of the custody review rules are not uniform throughout the United States nor within individual ICE field offices. The organization found that inconsistent internal record-keeping of detainees' length of detention, failure to conduct custody reviews during the mandated time frame, and lack of communication and access to information for detainees to comply with removal contribute to prolonged or indefinite detention.⁹⁹

Volsaint Doissaint was granted asylum and became a lawful permanent resident in 1995. Volsaint was convicted of second-degree assault in 2000 and served 70 months in prison, expecting that he would be released thereafter. Instead, he was held in immigration detention for three years and denied the opportunity to contest his detention while fighting deportation to Haiti. ICE failed to adhere to its own custody review procedures by failing to review documents supporting his request for release and by failing to notify his lawyer about the decision. On August 26, 2008, the US District Court granted Volsaint's petition for writ of habeas corpus; found that the failure of ICE to provide him with adequate opportunity to contest his detention in his custody reviews constituted a denial of his right to due process; and ordered that he is entitled to a bond hearing before an immigration judge.¹⁰⁰

A detention review should take place at the outset in order to justify that detention is necessary and proportionate, and all decisions to keep someone in detention should be open to periodic review



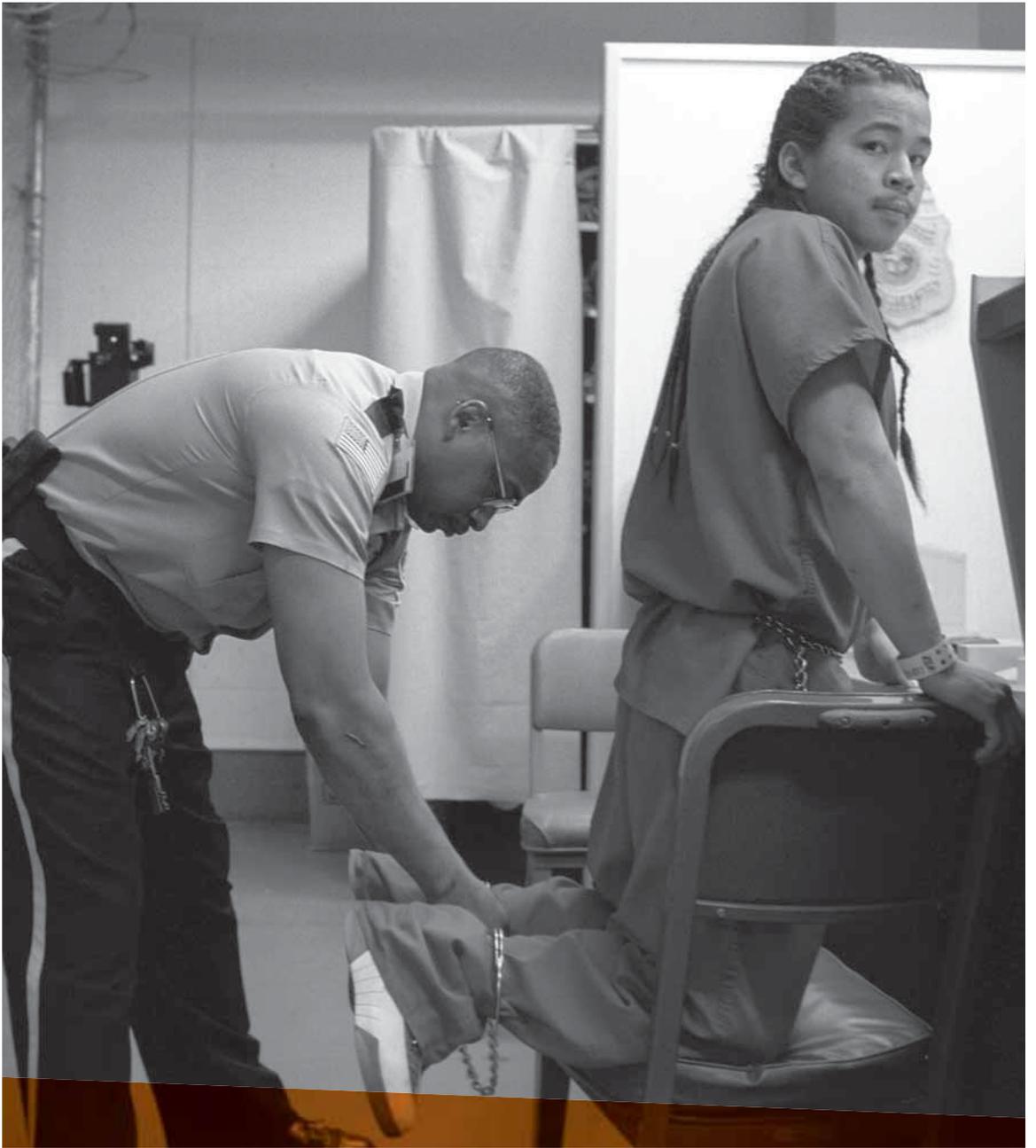
and be subject to judicial review. The United States must act immediately to address this serious violation of human rights.

3.5 RIGHT TO HABEAS CORPUS REVIEW

Individuals can seek release from detention by filing a petition for a writ of *habeas corpus* (a procedure that requires authorities to justify a person's detention) in a federal court. However, it is difficult to do without an attorney who can assist with this complicated process. The majority of immigration detainees are not represented by an attorney. The few who are able to pursue this option may nevertheless be subject to prolonged detention for years before they are released.

half years of immigration detention upon arrival in the United States in October 2001. She was granted asylum in 2004. However, immigration authorities appealed the decision, and Ms. Thangaraja remained in detention. She was finally released in March 2006 after filing a habeas petition. Despite posing no danger to the community and demonstrating a commitment to pursuing her asylum claim, Ms. Thangaraja was never given a custody hearing during the four and a half years she was detained.¹⁰¹

Saluja Thangaraja fled the brutal beatings and torture that she suffered during the Sri Lankan civil war only to endure more than four and a



A detained immigrant in a detention facility in Washington state. ©Steven Rubin.

4 ALTERNATIVES TO DETENTION

“MY BABY WAS DELIVERED WHILE I WAS IN PRISON ... I MISSED THE BIRTH OF MY CHILD AND, I’LL NEVER GET THAT BACK.”

Amnesty International interview with former immigration detainee (identity withheld), June 2008

Governments are obliged by international law to ensure that alternatives to detention are made available to immigrants and asylum seekers, in both law and in practice. Alternatives to detention, such as conditional release, reporting requirements, bond, or financial deposits, should always be considered before resorting to immigration detention. Indeed, in order to establish that detaining an individual is necessary and proportional, governments must first consider less restrictive alternative measures.¹⁰²

Governments must take into account the particular situations of immigrants to ensure that the conditions or criteria of each alternative do not discriminate in law or practice against particular groups of non-nationals, whether on the basis of their origin, economic situation, immigration, or other status. Only that measure that interferes least with the human rights of the individual concerned should be used, and only where no less intrusive or restrictive means can be used to reach the same objective. To safeguard against arbitrariness, a right to appeal or review by a judicial or other competent and independent authority must be available.¹⁰³

Alternatives to detention have been shown to be effective and significantly less expensive than holding people in immigration detention in the United States. A study of supervised release conducted by the Vera Institute in New York yielded a 91 percent appearance rate at an estimated cost of just \$12 per person per day.¹⁰⁴ The US Congress has recently increased funding to explore alternatives to detention however concerns have been raised that ICE is using these funds for programs such as electronic monitoring to supervise individuals who are eligible for release rather than for individuals who would otherwise be detained.¹⁰⁵

ICE currently operates two supervised release programs; the Intensive Supervision Appearance Program (ISAP) and the Enhanced Supervision/ Reporting (ESR) Program. In 2004, ICE implemented ISAP as a pilot project in a handful of cities nationwide. The program, which is run through a private contract with Behavioral Interventions, Inc., uses electronic monitoring devices (bracelets), check-in by telephone, home visits, and restrictions on movement to



A detained immigrant visits with his son and family members in a California detention center. @Steven Rubin.

make sure that an individual complies with his or her conditions of release and shows up for immigration court proceedings.¹⁰⁶ The ESR Program was introduced in 2007 and uses several of the same procedures as ISAP, as well as additional supervisory tools like residence verification, but it does not include ISAP's collaboration with community resources. Currently, ISAP and ESR (with full reporting) can supervise 6,000 and 7,000 individuals, respectively. This is approximately 5 percent of the detentions ICE initiates each year.¹⁰⁷ In addition to the supervised release programs, ICE utilizes "electronic monitoring only" as an alternative to detention. According to ICE, this option has no enrollment limit and is deployed nationwide. Currently more than 5,400 immigrants are enrolled and monitored in this manner.¹⁰⁸

While alternatives to detention should be made more widely available and easier to access, Amnesty International does have concerns that such programs may be used in ways that violate immigrants' human rights. The placing of electronic tagging devices on immigrants who are not considered security threats or flight risks is a disproportionate infringement upon their right to liberty, as well as their rights to privacy and human dignity. In considering alternatives to immigration related detention, authorities should use the least restrictive means necessary.

5 CONDITIONS OF DETENTION

“[A]CCCESS TO LEGAL COUNSELING AND REPRESENTATION ... IS OF EXCEPTIONAL IMPORTANCE.”¹¹¹

UN Working Group on Arbitrary Detention

Immigrants and asylum seekers detained during removal proceedings are held under US law in administrative custody. International standards require that administrative detention should not be punitive in nature.¹⁰⁹ However, in reality, conditions of detention frequently violate fundamental human rights. Immigration detainees are often detained in jail facilities with barbed wire and cells, alongside those serving time for criminal convictions. They are not able to wear their own clothes but instead wear prison uniforms and are often handcuffed.

Amnesty International documented significant barriers for immigrants to accessing assistance and support while in detention. Such issues included lack of access to legal counsel and other forms of assistance in detention such as “know your rights” presentations, lack of access to and inadequate resources related to law libraries and legal materials, failure to provide immigration specific detainee handbooks, inadequate access to telephones, lack of translation and interpretation services, and frequent transfers between facilities which undermines detainees’ ability to access to legal counsel and relatives.

Amnesty International documented pervasive problems with respect to conditions of detention, such as the commingling of immigration detainees with criminal detainees, inappropriate and excessive use of restraints, inadequate access to healthcare including mental health services, and inadequate access to exercise for ICE detainees. Problems related to conditions of detention have also been documented by US government agencies, including the Department of Homeland Security’s Office of Inspector General and the US Government Accountability Office.¹¹⁰

In September 2008, ICE announced the publication of 41 new performance-based detention standards to be implemented over 18 months. These will take full effect in all facilities housing ICE detainees by January 2010. These standards, if effectively implemented, will improve conditions for immigration detainees. However, Amnesty International is concerned that they are not legally enforceable and do not provide adequate sanctions for violations.

5.1 ACCESS TO ASSISTANCE AND SUPPORT: SAFEGUARDS RELATING TO DETENTION

The ability to access the outside world is an important safeguard against arbitrary detention; however, Amnesty International found that immigration detainees in the US face considerable barriers in communicating with anyone outside the detention facility and accessing assistance.

5.1.1 Access to lawyers

Every detained person has the right to the assistance of legal counsel. International law provides that if the interests of justice require it, legal assistance should be assigned without payment if the person does not have sufficient means to pay for it.¹¹² In the United States, individuals in deportation proceedings have the “privilege” to secure counsel but at no expense to the government.¹¹³ This means that if an individual cannot afford an attorney, one will not be appointed. As a result, the majority of immigrants in detention are unrepresented.¹¹⁴

According to the US Department of Justice, 58 percent of individuals in deportation proceedings do not have a lawyer during removal proceedings.¹¹⁵ However, for detained immigrants that figure rises to 84 percent.¹¹⁶

Amnesty International observed hearings in California in June 2008 during which a man confirmed before an immigration judge that upon arrival in the United States, he had stated that he was afraid to return to his home country. After being incarcerated in a county jail pending removal proceedings, he retracted his fear of return and agreed to be deported. He did not have a lawyer during these proceedings.

Historically, the Board of Immigration Appeals and federal courts had long recognized and protected the right to effective counsel.¹¹⁷ Yet on January 7, 2009, just days before the end of his



Detained immigrants from Vietnam, Laos and Cambodia at a detention facility in California. The United States only established repatriation agreements with Cambodia in 2002 and Vietnam in 2008; until these agreements, immigrants slated for deportation to those countries languished in indefinite detention. The United States still does not have an agreement with Laos. ©Steven Rubin.

term, Attorney General Michael Mukasey issued a decision declaring that no one in immigration court has the right to effective counsel because there is no statutory or constitutional right to counsel. What this means is that an immigrant may have no remedy if an attorney makes an error that affects his or her case.¹¹⁸ For example, if an attorney misses a deadline to file an application for permanent residence on behalf of a US citizen's spouse, an immigration judge can order the spouse deported. While in the past an application to reopen the case could be made due to the ineffective assistance of their attorney, now it will be almost impossible to rectify this mistake.

Representation by legal counsel can have a significant impact on the outcome of an individual's case. Unrepresented individuals may unknowingly give up valid claims that would allow them to remain in the United States legally. One study found that individuals are five times more likely to be granted asylum if they are represented.¹¹⁹

Immigration courts are obligated to provide a list of pro bono and low cost non-governmental organizations and attorneys to unrepresented immigrants.¹²⁰ However, immigrants and lawyers told Amnesty International that these lists are frequently unhelpful. Reportedly many and sometimes all of the organizations on the lists do not accept collect calls. Others may only take cases involving individuals of a specific ethnicity,

**"IF I DIDN'T HAVE A
LAWYER I'D BE IN
BRAZIL. I'D BE A
DEAD PERSON."**

Amnesty International interview
with a formerly detained asylum seeker
(identity withheld), June 2008.

T. is a 29-year-old lawful permanent resident with a 2-year old US citizen son. She was adopted by a US couple at 14, after suffering physical and psychological abuse during her childhood in Russia. In September 2007, she was placed in removal proceedings after serving a three-month criminal sentence. She represented herself in immigration court, seeking to prove she was a US citizen. She told Amnesty International that it was very hard for her to complete the appellate briefs and meet deadlines because she had infrequent computer access and had to write all of the necessary documents by hand, in triplicate. Despite her efforts, she lost her fight to remain in the United States and is currently awaiting deportation to Russia. As of January 2009, she has been held in immigration detention for more than a year.

Amnesty International
interview with
an unrepresented
immigration detainee
(identity withheld),
June 2008.

only represent asylum seekers, or do not accept cases where individuals are detained. Amnesty International researchers observed a New York immigration judge who, after reviewing the entire list, admitted to a detainee that only one organization the Legal Aid Society might be able to take his case.¹²¹ The few available programs that provide free assistance are often unable to meet the high demand for services and must turn away the majority of those who seek their help. In the California Bay Area, just two programs represent detainees on a pro bono basis, the Asian Law Caucus and the University of California at Davis Immigration Law Clinic. “It’s impossible to handle the volume. We have a stack of 100 letters we can’t even respond to,”¹²² a lawyer from the clinic told Amnesty International. Many detention centers are in rural areas, contributing to detainees’ difficulty in accessing counsel.

“I CAN’T GO BACK ... THERE ARE PEOPLE THERE TRYING TO KILL ME. I WROTE SO MANY LETTERS TO LAWYERS ASKING THEM TO HELP ME.”

Amnesty International interview with an unrepresented immigration detainee (identity withheld), June 2008.

5.1.2 Access to information and other forms of assistance in detention

People in immigration detention often have to represent themselves in immigration proceedings and have limited resources to assist them in understanding the complex immigration system and what claims might be available to them. Some of the obstacles that individuals face include limited access to law libraries and legal materials, and to Legal Orientation and Know Your

Rights Programs provided by non-governmental organizations. Under international law it is the government’s obligation to ensure that any person subject to detention be provided with information about his or her rights, including how to avail himself or herself of such rights.¹²³

Law Libraries

As so many individuals have to represent themselves in immigration court, access to a law library with immigration-related materials is imperative in order to navigate the complex immigration system and adequately bring a claim for relief. ICE Detention Standards state that facilities should provide detainees with access to a law library and legal materials for a minimum of five hours per week.¹²⁴ The libraries must contain a specified list of immigration-related legal resources, and should be updated regularly. Amnesty International spoke to several former and current detainees who said they had only limited access to the law library for example, one individual reported that he could usually only go to the library once a week and that requests for access often depended on the “mood of the guards.” Detainees also told Amnesty International that the law library didn’t contain immigration-related material or that materials were outdated or not available in the languages they needed.

Know Your Rights presentations

According to ICE detention standards, non-governmental organizations may conduct “Know Your Rights” presentations for immigration detainees. However, detainees may not have access to these presentations because non-governmental organizations may lack the necessary resources to conduct them, or may not be able to travel to detention centers in remote locations. Amnesty International spoke with 11 current immigration detainees in California, none of whom reported receiving a presentation even though two of them had been detained for over eight months. Indeed, the warden of the Santa Clara County Jail, California, told Amnesty International that the facility does not allow such presentations at all.

ONE DETAINEE TOLD AMNESTY INTERNATIONAL, “NO ONE ELSE IN DETENTION SPEAKS MANDARIN.” SHE LOOKS UP WORDS IN AN ENGLISH DICTIONARY AND WRITES THEM DOWN TO TELL GUARDS WHAT SHE NEEDS.

Amnesty International interview with a detained asylum seeker (identity withheld), June 2008.

Some detainees may have the opportunity to access the federally funded Legal Orientation Program. The EOIR contracts with non-governmental organizations to conduct these orientation programs, which seek to provide detainees with basic information on forms of relief from removal, how to represent themselves in proceedings, and how to obtain legal representation. Immigration judges report that individuals who attend these programs appear better prepared, have a better understanding of the court process, and are more likely to be able to identify the relief for which they are eligible.¹²⁵ However, these programs are not available to all detainees. As of November 2008 these programs were offered in only 13 detention centers and served approximately a quarter of immigration detainees. EOIR has recently reported plans to add 12 more locations; yet even with this expansion, these programs are not available nationwide.¹²⁶

Finally, while the Know Your Rights presentations are certainly important, they cannot replace the benefits of having individual legal representation.

Handbooks

ICE guidelines state that facilities should give each detainee a handbook that provides an overview of the rules and procedures at the facility, as well as a copy of the ICE National Detainee Handbook, which contains information regarding detainees' rights under the ICE detention standards and other related information such as the right to contact consular officials, and the right to make free calls to pro bono legal service providers. Several detainees Amnesty International spoke with in California reported that they did not receive any handbook at all, while others received a facility handbook but nothing specific to immigrants. A number of detention facilities Sacramento County Jail and Santa Clara County Jail, California; Palm Beach County Jail and Monroe County Jail, Florida; Ulster County Jail, New York; Butler County Sheriff's Office, Ohio; Yamhill County Jail, Oregon; Lackawanna County Prison, Pennsylvania; Arlington County Detention Facility, Virginia told Amnesty International that they do not provide an ICE National Detainee Handbook.

ICE Officers

Often, the only source of information for many detainees about the status of their case is ICE itself. According to ICE detention standards, ICE officers must regularly visit detention facilities where immigrants are detained to provide information on the general immigration process. However, detainees told Amnesty International that ICE staff often do not appear, and when they do, they are unable to provide useful information. Reportedly ICE staff is frequently unable to tell detainees more than the date of their next court appearance. One former detainee told Amnesty International, "You're very dependent on ICE. You ask them questions, but then have to wait for them to go back and get the information for you. Often times they would come back without any information."¹²⁷ That ICE officers may represent the only source of information for many detainees, particularly those without a lawyer, presents a troubling conflict of interest since ICE

is also seeking to deport them. It is essential that detainees have access to other forms of assistance.

5.1.3 Translation and interpretation services

While interpreters are generally available when an immigrant appears before an immigration court, a number of detainees reported that while in detention they needed to rely on other detainees or guards in order to obtain necessities, such as food and toiletries, translate documents or request assistance. ICE should ensure that all detention facilities provide adequate interpretation and translation services for immigration detainees.

5.1.4 Access to attorneys and relatives

Amnesty International's findings indicate that many immigrant detainees have only infrequent access to attorneys and family members. The ability to maintain contact with the outside world is an important safeguard against arbitrary detention, and international standards stipulate that individuals should be "kept in a place of detention or imprisonment reasonably near his usual place of residence."¹²⁹

Yong Sun Harvill, a lawful permanent resident, was taken into custody by ICE on March 22, 2007. According to news accounts in The Washington Post, she suffers from serious and complex medical issues, including repeated episodes of soft-tissue cancer, hepatitis C, and psychiatric problems. Her family and doctors live in Florida. She was originally detained for two months at a jail in Florida; however, ICE transferred her to the Florence Service Processing Center in Arizona, allegedly to secure better long-term care. One month later she was moved again to Pinal County Jail, Arizona, a facility that did not have a full time staff doctor. The jail is more than 2000 miles from her family. Her attorneys were also unable to have telephone calls with her, and she only saw

"LIFE IS MISERABLE. THE CHILDREN CONSTANTLY ASK FOR THEIR FATHER AND WAKE EVERY MORNING ASKING WHERE HE IS ... I'M BY MYSELF, ALONE AND CRYING. I DON'T KNOW WHY THEY PUNISH PEOPLE LIKE THIS."

Amnesty International interview with the wife of a former immigration detainee who had been held hundreds of miles away from his family for more than four years (identity withheld), June 2008.

her attorneys and family during video hearings for her case once a month. Her family filed a lawsuit against ICE regarding lack of medical care and she was finally released on July 2, 2008. She is now in Florida with her family, getting medical treatment and awaiting the final determination on her case.¹²⁸

Amnesty International is concerned by reports of detainees being held at facilities at a great distance from family and attorneys, sometimes thousands of miles, making visits and communication costly and time consuming. Being detained in close proximity to attorneys is imperative in order to adequately prepare for court. Also family members may possess or be able to acquire documents necessary for immigration court, including birth certificates or passports. The distances also impact the mental health of detainees and their families, in particular young children.

Frequent transfers to facilities all across the country are reportedly common, further undermining detainees' ability to communicate with legal counsel and relatives. A detainee from Guyana was

reportedly transferred between ten facilities as far apart as Alabama, Virginia and New Jersey during his six and a half years in detention. He was released in December 2006 after he was granted relief under the Convention Against Torture.¹³⁰

It was also reported to Amnesty International that guards may threaten detainees with transfer to another facility if they complain about conditions.

5.1.5 Access to telephones

The primary means of communication for immigration detainees to contact attorneys, family and consular officials is the detention facility's telephone system. However, detainees reported having limited access to telephones. Several detainees told Amnesty International that there were only 2-3 phones available for as many as 40 to 50 detainees. As a result, detainees often had to wait a long time to make a phone call. Amnesty

A detainee told Amnesty International that his wife, a US citizen, comes to visit him at the Yuba County jail, California every Saturday, "She drives three and a half hours just to have 45 minutes there. We should have longer time together." The facility where he is held does not allow physical contact visits between ICE detainees and their family. "She brings our daughter. Sometimes it makes me cry. One time, [my] daughter said, 'Daddy come out!' She saw a door in the waiting room and said, 'Look at the door in the back, come out!' I couldn't stand it. It hurt me a lot. I told her, 'I want to hold you and kiss you.'" He told Amnesty International that he'd been in immigration detention for two months. "Before, on the outside, I was the provider. I had my own company and worked for myself. While you're in prison, your hands are tied, you can't do anything." His wife has had to apply for welfare to support herself and their 2-year-old child. In tears, he told Amnesty International "What hurts is my daughter. I want to be there for her. I want to go to work every day, come home and see what she needs. I want to take her to the ocean, spend time with her. It's killing me. Sometimes I break down." He told Amnesty International that he feels he has no alternative but to stay in detention and fight deportation, because he fears that he and his family would be targeted by people who have made threats on his life. "I don't want to take my family to get hurt. I'd rather they stay here. I really can't go back."

Amnesty International interview with immigration detainee (identity withheld), June 2008.

M.D.H. told Amnesty International that he had painful dental problems that went untreated for the length of his detention, making it difficult for him to eat. He was told, “If you complain, we’ll ship you out to Bakersfield” a California facility that is several hours almost 200 miles away from his family and legal representation in the San Francisco area.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

A Vietnamese lawful permanent resident living in the United States for 27 years was detained while fighting deportation. He told Amnesty International that his niece was able to get in touch with a legal service provider willing to provide representation free of charge. However, he was not able to contact the provider from jail because the provider did not accept collect calls.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

International also received reports that detainees are unable to make free calls to pro bono legal services, although ICE guidelines provide for this. This may have a profound impact on a detainee’s ability to secure counsel, since calls from prisons are often costly, and many pro bono legal service providers with scant resources are unable to accept collect calls.¹³¹ Under ICE detention guidelines, facilities are also required to provide

direct or free calls to consulates, and ICE is required to provide updated telephone lists for all consulates.¹³² Amnesty International spoke with one detainee who tried to call the consul of Afghanistan, but the page with the telephone number was missing from the list. He said he reported this issue to an ICE officer but no number was provided.

“THE FACILITY, YOU DON’T KNOW WHAT’S GOING TO HAPPEN TOMORROW NIGHT. YOU HAVE GANGS FROM STATE PRISON IN THERE.”

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

5.2 CONDITIONS OF DETENTION

5.2.1 Housing with detainees convicted of crimes

Immigration detainees, including asylum seekers, are in civil administrative detention, yet they are often housed in prisons and jails with individuals serving sentences for criminal convictions. This is contrary to international standards, which provide that those held under administrative detention shall be kept separate from individuals in criminal custody.¹³³ ICE detention standards state that all facilities should develop a classification system for immigration detainees and ensure that detainees are physically separated from detainees in other categories. The standards, however, do not specifically require facilities to keep ICE detainees separate from individuals serving sentences for criminal offenses.

A warden at one facility in California told Amnesty International that immigration detainees are commingled with criminal detainees. Various facilities across the country responding to

Amnesty International's survey reported similar practices.¹³⁴ A number of detainees described being commingled with criminal detainees during certain times of the day, such as when performing work or during recreation time.

Housing immigration detainees alongside individuals serving sentences for criminal offenses can put them at risk of physical harm. Immigration detainees said there were often confrontations, and in some instances, physical violence between them and the criminal detainees.

5.2.2 Inappropriate and excessive use of restraints

Juana Villegas, an unauthorized immigrant from Mexico, was nine months pregnant when she was arrested for a driving without a license in July 2008 and taken to the Davidson county jail in Nashville, Tennessee. Two days later, she went into labor and was taken to hospital in an ambulance, chained to a gurney. At the hospital, her left ankle and right wrist were shackled to the bed and removed just before delivery of her baby boy and for approximately six hours after giving birth. But then, her left ankle was again shackled to the bed until her release from hospital; her feet were shackled together except when she had to visit the bathroom. Her lawyer said this was done in violation of doctors' orders. Ms. Villegas was forbidden from seeing or speaking to her husband, friends, or relatives, and the telephone in her hospital room was disconnected. Her husband collected their baby on July 7, 2008, and his wife returned to jail; he was not allowed to see or speak with her. Juana Villegas was released on July 8, and she is now subject to deportation proceedings.¹³⁵ Amnesty International considers the routine use of restraints on pregnant women, and particularly on women in labor, a cruel, inhuman and degrading practice that seldom has any justification in terms of security concerns.



“N.” ©Keith Brauneis.

A transgender woman from Brazil told Amnesty International about her experiences at Santa Clara County Jail in California. N. was granted protection under the Convention Against Torture due to the torture she suffered in Brazil. She told Amnesty International that when she first arrived at Santa Clara, she was housed with several men. She claims she was sexually harassed by the other detainees. She was eventually placed in a private cell, but she said it took nearly two months before that happened.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

Interviews with current and former detainees indicate that the use of restraints during transportation is routine, in violation of international standards.¹³⁶ The types of restraints used vary. Some detainees said they were handcuffed, some said they were handcuffed with belly chains, and others said they wore handcuffs, belly chains, and leg restraints. In interviews with current and former detainees, it appears that the use of restraints during transportation for all detainees is the rule, rather than the exception. Routine use of restraints on women contradicts ICE detention standards, which specify that as a rule, women and children should only be restrained in exceptional circumstances.¹³⁷

International standards require that restraints be removed when a person appears before a

judicial or administrative authority.¹³⁸ However, Amnesty International observed immigration court hearings in San Francisco and New York City where immigration detainees were restrained. In New York, immigration detainees were brought into court individually wearing belly chains and handcuffs, and only their right hand was released from the restraints in order to take the oath before the court. In San Francisco, as many as seven detainees were brought into the courtroom handcuffed and chained together, and they remained in joint restraints at the back of the courtroom throughout the proceedings. An attorney told Amnesty International that this is standard procedure and noted, “They [the detainees] are told to be diligent, to pay attention to what is going on, but they’re shackled and in the back. They can’t take notes on a lot of important things deadlines, what to bring...”¹³⁹

A CHINESE WOMAN PURSUING AN ASYLUM CLAIM DESCRIBED BEING TRANSPORTED BACK AND FORTH TO COURT IN HANDCUFFS AND BELLY CHAINS.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

5.2.3 Medical Treatment

ICE detainees may find it very difficult to get timely and at times any treatment for their medical needs. International standards clearly specify that medical care and treatment shall be provided whenever necessary.¹⁴⁰ ICE detention standards state that all facilities should provide detainees with initial medical screening, cost-effective primary care, and emergency care.

A Brazilian transgender woman in Santa Clara County Jail in California described to Amnesty International how she was transported to immigration court in handcuffs, belly chains and leg restraints, even though men in the vehicle were only restrained in handcuffs. She reported that when she was last taken before the immigration judge, she had chains between her two thumbs, as well as her wrists, waist and ankles.

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

L.N. is 27 years old and was born in Afghanistan. He was 7 years old when he and his family came to the United States as refugees. He was placed in deportation proceedings and held in mandatory detention because of a drug conviction in 2007. He began urinating blood not long after, and was experiencing constant fatigue, pain and discomfort. He had to wait a month and a half before he was first seen by a doctor. After nine months, he had yet to receive any diagnosis or treatment. He has filed four grievances about his lack of medical treatment and told Amnesty International that he is so frustrated and afraid that he is considering giving up his claim of citizenship and going back to Afghanistan in order to obtain medical care. He told Amnesty International that he was particularly concerned about his wife and daughter, who will suffer because he “made a mistake.” “There’s no life for my wife and daughter in Afghanistan.”

Amnesty International interview with immigration detainee (identity withheld), June 2008.

Several recent cases reported in the media have involved failure to provide medical treatment, which resulted in the death of immigration detainees. According to ICE, 74 people have died while in immigration detention over the past five years.¹⁴¹ Following heightened public attention, the Office of Inspector General (OIG) of the Department of Homeland Security conducted a review examining ICE’s standards on medical treatment of immigration detainees and procedures related to detainee deaths. The study found a need to improve

oversight at facilities housing immigration detainees to ensure adherence to standards of medical care.¹⁴²

Boubacar Bah, a 52-year-old tailor from Guinea, had lived in the United States for ten years when he was detained in May 2006 for overstaying his tourist visa. On February 1, 2007, Bah collapsed and struck his head on the floor. According to other detainees, Bah had been ailing for two days,

and had asked unsuccessfully to see a doctor. Bah was taken to the medical unit where symptoms of severe injury were overlooked instead of receiving treatment, the incoherent and agitated Bah was shackled to the floor and later placed in solitary confinement for “behavior problems.” Over thirteen hours later after repeated notifications that Bah was unresponsive and foaming at the mouth medical staff acknowledged the severity of Bah’s condition. Despite emergency surgery for a skull fracture and brain hemorrhage, Bah entered a coma. He died four months later, without waking.¹⁴³

Victoria Arellano, a 23-year-old transgender woman from Mexico, was detained at ICE’s San Pedro Facility in May 2007. Arellano was suffering from AIDS though not exhibiting symptoms. In detention, her condition deteriorated because she was not given access to the antibiotics she needed. According to The Los Angeles Times, her requests to see a doctor were ignored by facility staff. Other detainees dampened towels to reduce her fever and created makeshift trash cans from cardboard boxes to collect her vomit. Only after a strike and civil disobedience by detainees in the facility did staff take her to the infirmary. Arellano died two days later, after two months in detention, due to an AIDS-related infection.¹⁴⁴

Some individuals in immigration detention require mental health services, particularly those who have been victims of torture and abuse. Detention itself can have detrimental effects on an individual’s mental health.¹⁴⁵ However, reports indicate that such services are frequently not provided, or are inadequate. One detainee who had been in detention one year, reported he was taking anti-depressants, but he only speaks to a mental health practitioner by phone briefly once every two months about whether the medications

are working. He told Amnesty International that the mental health practitioner doesn’t seem to know the reason why he is on the medications: he was a prisoner of war in his home country and raped while captive. He is seeking relief from removal under the UN Convention Against Torture.

Sebastian Mejia Vincentes died on August 22, 2004, while detained at Hampton Roads Regional Jail in Virginia. He had a history of schizophrenia and hanged himself with a bed sheet. According to a DHS Office of Inspector General report, the jail violated its rule that detainees must be checked on every 30 minutes. A medical examiner told the investigators that she “found it troubling” that Mejia had been dead for “at least four to six hours before his body was found.”¹⁴⁶

5.2.4 Exercise

The majority of detainees who spoke with Amnesty International reported that they did not have the opportunity to exercise daily. Reports ranged from being allowed time to exercise from two to four days per week. Exercise is reportedly often scheduled at unreasonable hours of the day. One detainee described how recreation time is scheduled for one hour at 5:30 a.m. and that it only takes place when the majority of the detainees in the housing unit want to go. Detainees reported that they often forego their recreation time because it is scheduled so early in the morning. Amnesty International also received reports that some detainees do not have the opportunity to exercise outdoors. The DHS Office of Inspector General conducted an investigation into the treatment of immigration detainees housed in ICE facilities and found that immigration detainees do not always have access to adequate exercise.¹⁴⁷

International standards provide that detainees should have at least one hour of suitable exercise

in the open air daily if the weather permits.¹⁴⁸ Under ICE's detention guidelines, detainees should wherever possible be housed in a facility that offers outdoor recreation, and each detainee should have access for at least one hour daily, at a reasonable time of day, weather permitting.

5.2.5 Physical and verbal abuse

Amnesty International received reports that some individuals have been subjected to physical and/or verbal abuse while held in immigration detention, in violation of international standards.¹⁴⁹ Reported allegations of mistreatment include the following:

The transgender asylum seeker held at Santa Clara County Jail told Amnesty International that she was verbally and physically abused in immigration detention in early 2008. She reported that guards constantly called her "he/she," "faggot," and "fag-boy." On one occasion, she requested assistance from guards because she was afraid for her safety after being placed in a cell with five men. When a guard finally responded, she said he handcuffed her behind her back and pulled up her hands so hard that "my shoulder popped out of the socket. They put me in a holding cell. I was there by myself for 12 hours before I received medical attention." She also told Amnesty International that on another occasion, while being held at another facility, she tried to bring the guards' attention to another inmate who had fainted. She said an officer took her by the neck and rammed her head into the wall, shouting, "It's not your fucking problem!" She told Amnesty International, "I wrote a lot of grievance forms, but nothing happened."

Amnesty International interview with former immigration detainee (identity withheld), June 2008.

Mr. C arrived from Nigeria to the United States in 1985. He is married to a US citizen and has four US citizen children, ranging in ages five to 17. On April 6, 2004, Mr. C was arrested at his house and taken into ICE custody for overstaying his student visa. On May 12, 2004, after refusing to sign his deportation order without first speaking with an attorney, Mr. C said he was handcuffed and shackled when he was beaten by six officers "... forcefully slamming me on the wall and concrete floor, pinning me on the concrete floor with their knees on my back." Mr. C said he was bleeding and dazed, and he was rushed to a facility clinic. In October 2004, he told Amnesty International he was still suffering the effects of the beating. "I continue to have migraine headache, back pain, psychological and emotional pain," he said. He filed a civil lawsuit after grievances to ICE about the incident met with no result. In an August 2006 letter to Amnesty International, he stated that he was still detained and fighting his deportation and he continued to have nightmares about the beating and humiliation he suffered. He told Amnesty International, "My family has been undergoing extreme hardship since my detention, both emotionally and financially."

Amnesty International correspondence with immigration detainee (identity withheld), September 2004.

6 RECOMMENDATIONS

ENSURE PRESUMPTION AGAINST DETENTION OF IMMIGRANTS AND ASYLUM SEEKERS

- The US Attorney General and the Secretary for the Department of Homeland Security should ensure a statutory presumption in law, policy, and practice against the administrative detention of immigrants and asylum seekers.
- Immigration detention should be used only if, in each individual case, DHS demonstrates that it is a necessary and proportionate measure, in conformity with international law. Any form of immigration detention should always be as short as possible.

ENSURE THAT ALL DECISIONS TO DETAIN IMMIGRANTS AND ASYLUM SEEKERS ARE SUBJECT TO JUDICIAL REVIEW

- The Department of Homeland Security and the Department of Justice (Executive Office for Immigration Review) should ensure that any decision to detain immigrants and asylum seekers is based on a detailed and individualized assessment, which should include the individual's personal history, whether she or he presents a danger to persons or property, and the risk of absconding. Such assessment should consider the necessity and appropriateness of detention, including whether it is proportionate to the objective to be achieved. This evaluation should

be extended to those currently subjected to "mandatory detention."

- Any detention decision should be automatically and regularly reviewed as to its lawfulness, necessity, and appropriateness by means of a prompt oral hearing by a court or similar competent independent and impartial body.
- All decisions to detain an immigrant or asylum-seeker should be subject to review by an immigration judge and appeal to a competent independent and impartial body.

ENSURE ALTERNATIVES TO DETENTION ARE AVAILABLE

- The Department of Homeland Security should take all measures to ensure that non-custodial measures and alternatives to detention are provided for in law, policy, and practice.
- Alternative non-custodial measures, such as reporting requirements, an affordable bond, or supervision programs operated by community-based organizations, should always be explicitly considered before resorting to detention. Reporting requirements should not be unduly onerous, invasive, or difficult to comply with, especially for families with children and those of limited financial means. Conditions of release should be subject to review by an immigration judge.

- Alternatives to immigration related detention should use the least restrictive means necessary. Electronic tagging devices should not be used for immigrants who would not otherwise be considered security threats or subject to detention.
- All immigrants and asylum seekers should have equal access to bond. All decisions regarding release on bond should be individualized and subject to review by an immigration judge. Conditions of bail, bond or surety must be reasonable and realistic for the individual seeking release.
- The Department of Homeland Security should not have the authority to keep an individual in detention if an immigration judge has ordered that individual released.

ENSURE SAFEGUARDS AGAINST ARBITRARY DETENTION

- The Department of Homeland Security should ensure that all immigrants have unrestricted access without delay to competent legal representation in order to be able to challenge their detention.
- The Department of Homeland Security should not enter into a contract with a facility to detain immigrants unless the facility provides a plan for ensuring that immigrants will have access without delay to legal representation.
- The Department of Homeland Security should ensure that facilities provide a current and accurate list of local organizations and lawyers that provide immigration advice and legal representation to every detainee upon arrival. Facilities should be required to provide telephone calls to these service providers free of charge.
- The Department of Homeland Security should ensure that all immigrant detainees have daily access to updated and comprehensive jail law libraries and services. Individuals without legal

representation should be granted enhanced access in order to meet filing deadlines.

- The Department of Homeland Security should ensure that presentations by non-governmental organizations, including legal orientation programs, are allowed on a regular basis at least weekly in all detention facilities. The US Congress should provide funding for such programs to ensure all detainees have access to such presentations.
- The Department of Homeland Security should ensure that all detainees have proper access to working telephones while in detention and that regularly updated lists of pro bono or low cost representation and consulates are kept in the vicinity of telephones. Calls to legal service providers offering free or low cost legal representation, attorneys, and consuls should be provided at no expense to the detainee or the group receiving the call.
- The Department of Homeland Security should ensure that each detainee receives a handbook that provides an overview of the rules and procedures in effect at the facility. In addition, DHS should ensure that all detainees receive a copy of the ICE National Detainee Handbook, which should include information such as the right to contact consular officials, the right to make free calls to consulates, immigration courts, and pro bono legal service providers, and the availability of legal rights presentations and other information regarding detention standards. Handbooks should be provided in the language of that particular detainee.
- The Department of Homeland Security should ensure that all detention facilities provide adequate and regular interpretation and translation services for immigration detainees.
- The Department of Homeland Security should ensure that detainees are held in a facility that is in close proximity to the immigration court

with jurisdiction over his or her case, as well as to the detainee's attorney and family. All measures should be taken to prevent the transfer of detainees to facilities that are far away from the immigration court with jurisdiction over their case, their lawyers and their families. Should a transfer take place, all measures should be taken by the detention and removal officer in charge to inform the court with jurisdiction over the case, the attorney of record, and the immigrant's family in advance of the transfer; the officer should include the reasons why and ensure that the detainee's legal documents and medical records are immediately transferred to the new facility.

ENSURE THAT FACILITIES HOUSING IMMIGRATION DETAINEES COMPLY WITH INTERNATIONAL STANDARDS AND ARE HELD ACCOUNTABLE IF THEY DO NOT

- The Department of Homeland Security should ensure the adoption of enforceable human rights detention standards in all detention facilities that house immigration detainees, either through legislation or through the adoption of enforceable policies and procedures. There should be effective independent oversight to ensure compliance with detention standards and accountability for violations.
- The US Congress should ensure that detainees have the ability make confidential complaints about conditions of detention directly to an independent agency, such as an ombudsman. Calls to such an agency should be free of charge and detainees should be protected from any retaliatory actions. These complaints should be promptly investigated and appropriate redress provided. The US General Accounting Office and/or the Office of Inspector General should review complaints made and where patterns are identified conduct their own investigations and make recommendations to Congress.

- The Department of Homeland Security should terminate contracts with facilities that do not comply with detention standards.
- The Department of Homeland Security should ensure that immigrants and asylum seekers are not confined with individuals held on criminal charges or serving criminal sentences.
- The Department of Homeland Security should immediately begin consultations with transgender organizations to identify best practices for policies in making housing decisions in a detention facility.
- The Department of Homeland Security should ensure that medical and mental health care be available at no cost to detained immigrants and asylum-seekers; the decision to deny medical care should be reviewed by an independent appeals board composed of medical professionals.
- The Department of Homeland Security should ensure that any detained immigrants are held in facilities which offer outdoor recreation with at least one hour of recreation time at a reasonable hour (during daylight hours and at a time that affords detainees adequate sleep) on a daily basis.
- The Department of Homeland Security should ensure that restraints are not used on immigration detainees except in certain limited situations in order to prevent escape during a transfer, to prevent the person from injuring himself or others, or to prevent the person from damaging property. They should only be used for as long as is strictly necessary. Policies should prohibit the use of restraints on pregnant women when they are being transported, when they are in hospital awaiting birth, and after they have just given birth. Restraints should always be removed when a person appears before a judicial or administrative authority.

ENDNOTES

1. An individual is eligible for protection under the Convention Against Torture if he or she can demonstrate that it is "more likely than not" that he or she will be subjected to torture upon removal to his or her country of origin. 8 CFR § 1208.16 -1208.18.
2. Individuals subject to "mandatory detention" in the United States are not entitled to a bond hearing before an immigration judge. See INA § 236(c). In July 2008, the Court of Appeals for the Ninth Circuit determined that individuals who have a stay of removal pending a decision on their appeals before the circuit courts, or whose cases have been remanded to the Board of Immigration Appeals after obtaining judicial review, are not subject to mandatory detention and therefore have the right to a bond hearing. See *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). Because Mr. M had a stay of removal pending a decision on his appeal, he benefited from this decision and was provided with a bond hearing.
3. Amnesty International correspondence with Mr. M's attorney (identity withheld), January 12 2009.
4. Office of the Inspector General, US Department of Justice, Audit Report 97-05 (1/97), *Immigration and Naturalization Service Contracting for Detention Space*, January 1997, page 2, available at: <http://www.usdoj.gov/oig/reports/INS/a9705/index.htm>.
5. United States Government Accountability Office, *Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities*, June 4, 2008 available at: <http://www.gao.gov/new.items/d08869t.pdf>.
6. In its 2009 budget, DHS requested \$46 million to pay for an additional 1,000 detention bed spaces. However, the total amount allocated was \$71.7 million, which would be enough for 1,400 beds. See *US Department of Homeland Security fact sheet, US Department of Homeland Security Announces 6.8 Percent Increase in Fiscal Year 2009 Budget Request*, 4 February 2008, available at: http://www.dhs.gov/xnews/releases/pr_1202151112290.shtm; *US Department of Homeland Security, US Immigration and Customs Enforcement Fact Sheet Fiscal Year 2009*, 23 October 2008, available at: <http://www.ice.gov/doclib/pi/news/factsheets/2009budgetfactsheet.doc>.
7. US Department of Homeland Security Annual Report, *Immigration Enforcement Actions: 2007*, December 2008, available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf
8. ICE currently detains individuals in seven privately contracted detention facilities, eight ICE-owned facilities and five Federal Bureau of Prison facilities. See *Immigration and Customs Enforcement, Detention Management Program*, 4 November 2008, available at: <http://www.ice.gov/partners/dro/dmp.htm?searchstring=detention%20AND%20management%20AND%20control%20AND%20program>.
9. Detention Watch Network, *About the U.S. Detention and Deportation System*, available at: <http://www.detentionwatchnetwork.org/aboutdetention>.
10. American Immigration Lawyers Association, *Alternatives to Detention Position Paper*, available at: <http://www.aiala.org/Content/default.aspx?docid=25874>.
11. Vera Institute of Justice, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume I, Final Report to the Immigration and Naturalization Service, 1 August 2000, available at: http://www.vera.org/publication_pdf/aapfinal.pdf.
12. Migration Policy Institute, *Annual Immigration to the United States: The Real Numbers*, No. 16, May 2007, available at: www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf; See also US Department of Homeland Security, *Yearbook of Immigration Statistics: 2007*, Washington, DC, September 2008, available at: http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.
13. This is an estimate, since the exact numbers are not known. See, for example, Migration Policy Institute, *Annual Immigration to the United States: The Real Numbers*, No. 16, May 2007, available at: http://www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf; See also US Department of Homeland Security, *Yearbook of Immigration Statistics: 2007*, Washington, D.C., September 2008, available at: http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf; and Michael Hoefer, Nancy Rytina and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, US Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf
14. Michael Hoefer, Nancy Rytina and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, US Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf.
15. These five countries account for approximately 72 per cent of the total number of unauthorized immigrants entering the United States in 2007. See Michael Hoefer, Nancy Rytina and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, US Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, Table 3, Page 4, available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf.
16. See Human Rights Watch, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, 24 January 2005, available at <http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear-0>.
17. Unauthorized immigrants are ineligible for public medical assistance programs. 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWOR) (PL 104-193). See also *Guide to Immigrant Eligibility for Federal Program*, 4th ed., Table 1, National Immigration Law Center, 2002, at: http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf.
18. Peter Hart, *Dobbs' Choice: CNN Host Picks Immigration As His Ax to Grind*, Extra!, Fairness and Accuracy in Reporting, January/February 2004, available at: <http://www.fair.org/index.php?page=1162>.
19. James Pendergraph, speaking at the Police Foundation National Conference, *The Role of Local Police: Striking a Balance between Immigration Enforcement and Civil Liberties*, Washington, D.C.
20. Representative Lynn Woolsey (Democrat-California), *Testimony on Immigration Raids: Postville and Beyond*, Committee on Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International, 22 July 2008.

21. Immediate deportation can happen in a variety of ways. For example, an individual may be offered the opportunity to withdraw his or her application to enter the United States; he or she may be also be deported through processes known as "expedited removal" or "stipulated removal," which means that an individual is not placed in formal removal (deportation) proceedings and waives the right to a hearing before an immigration judge.
22. A full list of cases is on file with Amnesty International. See further: Section 3.3 Mandatory Detention.
23. *Zadvydas v. Davis*, 533 US 678, 690 (2001).
24. US Government Accountability Office, *Alien Detention Standards: Observations on the Adherence to ICE's Medical Standards in Detention Facilities*, 4 June 2008, available at: <http://www.gao.gov/new.items/d08869t.pdf>.
25. *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003, page 5, available at: <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>.
26. See Kathleen Glynn and Sarah Bronstein, *Systemic Problems Persist in U.S. ICE Custody Reviews for Indefinite Detention*, Catholic Legal Immigration Network, Inc., 2005, available at: <http://www.cliniclegal.org/DSP/Indefinite2005FINALforRELEASE.pdf>.
27. These are individuals seeking admission to the United States and are classified as "arriving aliens". The Department of Homeland Security defines this category to include individuals apprehended within 100 miles of the border and within 14 days of entry. See US Department of Homeland Security, *Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border*, Office of the Press Secretary, 30 January 2006, available at: http://www.dhs.gov/xnews/releases/press_release_0845.shtm.
28. Amy Goldstein and Dana Priest, *Five Detainees Who Took Their Lives*, The Washington Post, 13 May 2008, page A08.
29. See US Immigration and Customs Enforcement, Press Release, *ICE Announces New Performance-Based National Detention Standards for all ICE Detention Facilities*, 12 September 2008, available at: <http://www.ice.gov/pi/nr/0809/080912washington.htm?searchstring=DETENTION%20AND%20STANDARDS%20AND%20COMPLIANCE>.
30. As Amnesty International conducted research for the most part before September 2008, analysis focuses on the 2000 Detention Standards. The standards published by US Immigration and Customs Enforcement (ICE) in September 2008 contain forty-one (41) Performance-Based National Detention Standards, four of which are new. These include: News Media Interviews and Tours, Searches of Detainees, Sexual Abuse and Assault Prevention and Intervention, and Staff Training.
31. A more comprehensive overview of human rights standards relating to migrants, asylum seekers and refugees is beyond the scope of this report but is available in Amnesty International's research guides, *Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees* and in the Amnesty International Report, *Living in the Shadows: A Primer on the Human Rights of Migrants*.
32. Article 9, Universal Declaration of Human Rights (UDHR); Article 9, International Covenant on Civil and Political Rights (ICCPR).
33. Report of the Working Group on Arbitrary Detention, 18 December 1998, E/CN.4/1999/63, paragraph 69. See Report of the Working Group on Arbitrary Detention, A/HRC/7/4, 10 January 2008, paragraph 53.
34. See UNHCR ExCom Conclusion No. 44 (XXXVII) – 1986, Detention of Refugees and Asylum Seekers, Paragraph (b); UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 3: Exceptional Grounds for Detention; Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, Paragraph 35.
35. *A. v. Australia*, Human Rights Committee Communication No 560/1993; Australia. 30/04/97. CCPR/C/59/D/560/1993.
36. Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendation 33.
37. Article 9 (4), ICCPR.
38. UN Human Rights Committee, Communication No. 560/1993.
39. See UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, and UN Standard Minimum Rules for the Treatment of Prisoners.
40. UN Convention relating to the Status of Refugees, 1951.
41. Article 3, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
42. See Sanremo Declaration on the Principle of *Non-refoulement*, 2001.
43. Article 16, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
44. Article 25, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
45. *Amici Curiae* Brief, Florence Immigrant and Refugee Rights Project, et al, in *Casas-Castrillon v. Lockyer*, No. 07-56261.
46. Report of the U.N. Working Group on Arbitrary Detention, *Addendum: Mission to Equatorial Guinea: A/HRC/7/4/Add.3*, 18 February 2008, Paragraph 100.
47. Under US law, if an individual is apprehended at the border and the Department of Homeland Security suspects that he or she does not have permission to enter the United States, he or she is deemed "inadmissible" and classed as an "arriving alien." INA Section 235(b)(2). The Department of Homeland Security defines this category to include individuals apprehended within 100 miles of the border and within 14 days of entry. See US Department of Homeland Security, *Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border*, Office of the Press Secretary, 30 January 2006, available at: http://www.dhs.gov/xnews/releases/press_release_0845.shtm.
48. While many of those seeking entry to the United States are turned away at its borders, those who express a fear of persecution or torture on return, are entitled to have the opportunity to speak with an immigration officer who conducts a "credible fear" interview. If they pass this interview, they are placed in adversarial removal proceedings which determine whether or not they should be deported. See INA § 235(b)(1)(B).
49. A lawful permanent resident can be considered an arriving alien if she is seeking "admission." INA § 101(a)(13)(C). This can happen, for example, because they remained outside the United States for more than 180 days or may have committed certain crimes.
50. INA § 212 (d)(5)(A). The concept of "parole" in immigration law is complex. It is not considered an admission into the United States, but does permit a person to remain while another

proceeding is pending. See also *Shaughnessy v. US ex rel. Mezei*, 345 US 206, 210 (1953).

51. The new guidelines state that parole decisions for individuals who have established credible fear are to be made only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit." Persons found to have credible fear must now fall within one of the five criteria of 8 C.F.R. § 212.5 (b): (1) Persons with serious medical issues or impairment; (2) Women medically certified as pregnant; (3) Juveniles; (4) Witnesses in proceedings; and (5) Persons whose continued detention is not in the public interest. See ICE Directive 7-1.0, Myers, Asst. Secy., 6 November 2007.

52. Department of Justice regulations specifically divest immigration judges of jurisdiction to review detention decisions of individuals apprehended at the border. 8 CFR §§1003.19(h) (2)(i)(B) and 1236.1(c)(11); *Matter of Oseiwusu*, 22 I & N Dec. 19 (BIA 1998). Although the current law would suggest that people seeking admission at a port of entry (those not subject to expedited removal) are generally eligible for a bond hearing under INA § 236(a), DHS has taken the position that only people apprehended inside the United States are eligible for a bond hearing under INA § 236(a).

53. US Committee for Refugees and Immigrants, *World Refugee Survey 2006*: United States, available at: http://www.refugees.org/countryreports.aspx?__VIEWSTATE=dDwtOTMxNDcwOTk7O2w8Q291bnRyeUREOkdvQnV0dG9uOz4%2BUwqzZxYLIOSfZCZue2XtAOUFEQ%3D&cid=1607&subm=&ssm=&map=&searchtext= See also US Commission on International Religious Freedom, *Expedited Removal Study Report Card: Two Years Later*, February 2007, pages 5-6, available at: http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf.

54. INA § 236 (a) (2), 8 U.S.C.A. § 1226 (a)(2)(A) and (B).

55. All correspondence with immigration judges (identities withheld) (on file with Amnesty International USA), October 2008.

56. 8 CFR § 236.1(c)(8) The factors commonly considered in making the determination to release and/or set bond include local family ties; prior arrests, convictions, appearances at hearings; membership in a community organization; manner of entry and length of time in the United States; and financial ability to post bond. See, for example, *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976); *Matter of San Martin*, 15 I&N Dec. 167 (BIA 1974); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

57. See 8 CFR § 1003.19.

58. Data provided to Amnesty International by the US Department of Justice, Executive Office for Immigration Review, 26 June 2008. In 2006, the EOIR made 189,478 bond decisions and 14,750 were denied (7.78%); in 2007 the EOIR made 273,139 bond decisions and 22,254 were denied (8.15%); in the first five months 2008 the EOIR made 201,468 bond decisions and 21,842 were denied (10.84%).

59. Data provided to Amnesty International by the US Department of Justice, Executive Office for Immigration Review, 26 June 2008. Categories include: Administratively closed, New Amount, No Jurisdiction, No Bond, Released on Own Recognizance and No Change.

60. Executive Office for Immigration Review, *FY 2007 Statistical Year Book*, Office of Planning, Analysis, and Technology, April 2008, available at: <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>.

61. San Antonio Express News, *Ruling on Deportation Due in June*, 31 May 2007, available at: http://www.mysanantonio.com/news/MYSA060107_02B_war_crimes_verdict_33ad4fc_html12304.html, San Antonio Express-News, *Man Cleared in Africa Atrocities Hoping to be Released From Jail*, 17 September

2007, available at: http://www.mysanantonio.com/news/MYSA091807_03B_sierraleone_3137168_html3165.html, Heidi Zhou, *Kamba Grateful for Life on the Outside*, News 8 Austin, 19 November, 2007, available at: http://www.news8austin.com/content/your_news/default.asp?ArID=195552.

62. 8 CFR § 1003.19(i)(2).

63. INA § 236(a)(2)(A).

64. Data provided by Andrew R. Strait, Esq., Acting Coordinator/Policy Analyst, National Community Outreach Program, Office of Policy, US Immigration and Customs Enforcement, 16 January 2009.

65. Interview with immigration judge (identity withheld), August 2008.

66. Based on Data from the March 2005 Current Population Survey, the average weekly earnings for unauthorized males who arrived between 2000 and 2005 was more than \$480 (roughly amounting to \$25,000 per year). See Pew Hispanic Center Fact Sheet, *The Labor Force Status of Short-term Unauthorized Workers*, 13 April 2006, available at: <http://pewhispanic.org/files/factsheets/16.pdf>.

67. Bail bondsmen or sureties are individuals who agree to become legally liable for the debt, default, or failure in duty of another.

68. In the 43 cases observed by the National Lawyers Guild where bond was granted, individual detainees were 18% more likely to receive a bond of more than \$5,000 if not represented, while detainees with legal representation were 18% more likely to receive a bond of less than \$5,000. The bond amounts for all proceedings observed ranged from the minimum of \$1,500 to \$35,000. Detainee Working Group of the New York University Chapter of the National Lawyers Guild, *Broken Justice: A Report on the Failures of the Court System for Immigration Detainees in New York City*, Volume I, September 2006 – May 2007, page 10, available at: http://www.nlgnyc.org/pdf/broken_justice.pdf.

69. Detainee Working Group of the New York University Chapter of the National Lawyers Guild, *Broken Justice: A Report on the Failures of the Court System for Immigration Detainees in New York City*, Volume I, September 2006 – May 2007, page 10, available at: http://www.nlgnyc.org/pdf/broken_justice.pdf.

70. 8 CFR § 1236.1(d) provides that an unauthorized immigrant may petition the immigration judge for "amelioration of the conditions under which he or she may be released...[T]he immigration judge is authorized...to detain the [individual] in custody, release the [individual], and determine the amount of bond, if any, under which the respondent may be released." (emphasis added).

71. Amnesty International correspondence with immigration judges (identities withheld) (on file with AIUSA), October 2008.

72. Data provided to Amnesty International by the US Department of Justice, Executive Office for Immigration Review, 26 June 2008.

73. Data provided to Amnesty International by the US Department of Justice, Executive Office for Immigration Review, 26 June 2008.

74. Immigration and Customs Enforcement did not respond to a request from Amnesty International to provide this data.

75. INA § 236(c).

76. INA § 236(c).

77. According to Amnesty International research, at least 117 individuals have been held in mandatory detention on the basis of crimes that were ultimately determined not to constitute an

aggravated felony offense for which they could be deported. See further footnote 83.

78. *Michel v. INS*, 206 F.3d 253 (2nd Cir. 2000).

79. *Drakes v. Zimski*, 240 F.3d 246 (3rd Cir. 2001).

80. See 8 CFR § 1003.19(h)(2)(II); *Matter of Joseph*, 22 I & N Dec. 799 (BIA 1999).

81. According to the US Department of Justice, 58 per cent of individuals do not have a lawyer during removal proceedings. However, 84 per cent of detained immigrants have no legal representation. See Department of Justice, *FY 2007 Statistical Yearbook*, Executive Office for Immigration Review, April 2008, figure 9 at G1, available at: <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, Vera Institute of Justice, May 2008, available at: http://www.vera.org/publication_pdf/477_877.pdf.

82. A full list of cases is on file with Amnesty International. This number does not capture all of the individuals who are incorrectly subject to mandatory detention, and is therefore an underestimate. In order to identify cases Amnesty International researchers reviewed decisions from the past 10 years in which the circuit courts, district courts and BIA reversed an immigration judge's finding that an individual was an aggravated felon, and therefore subject to mandatory detention. This number does not account for individuals who were unable to secure representation to pursue an appeal before the circuit courts and/or the BIA. It also does not include incorrect findings of "crimes involving moral turpitude," firearms offenses, controlled substances offenses, or other miscellaneous crimes triggering mandatory detention. Finally, it does not capture instances in which an immigration judge terminated removal proceedings because the government could not demonstrate the person was deportable.

83. The UN Working Group on Arbitrary Detention has explicitly stated that where the detention of unauthorized immigrants is mandatory, regardless of their personal circumstances, it violates the prohibition of arbitrary detention in Article 9 of the UDHR and Article 9 of the ICCPR. See Report of the Working Group on Arbitrary Detention on its visit to the United Kingdom, E/CN.4/1999/63/Add.3, 18 December 1998, Recommendation 33.

84. AI interview with Y.S. (identity withheld), June 2008.

85. A person can claim citizenship on a number of grounds, including birth in the United States (INA § 301(a), (b) and (f)), the citizenship of one or both parents (INA § 301(c), (d), (g) and (h)), a combination of parental citizenship and residence (INA § 320 and INA § 322), or through naturalization (INA § 316).

86. Wall Street Journal, *They Say They Were Born in the U.S.A. The State Department Says Prove It: An Old Scam Casts Doubt on the Citizenship Of Texans Delivered by Midwives*, 11 August 2008, available at: <http://online.wsj.com/article/SB121842058533028907.html>.

87. ACLU Press Release, *Illegally Deported U.S. Citizen Pedro Guzman Found After Nearly Three Months In Mexico*, 7 August 2007, available at: <http://www.aclu.org/immigrants/gen/32450prs20070807.html>.

88. Testimony of Kara Hartzler, Florence Immigrant and Refugee Rights Project, before the House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law Hearing on Problems with ICE Interrogation, Detention and Removal Procedures, Second Session of the 110th Congress, 13 February 2008, serial Number 110-80, available at: <http://judiciary.house.gov/hearings/printers/110th/40742.PDF>.

89. In calendar year 2007, Legal Orientation Providers identified 322 people with potential claims to US citizenship. See Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, Vera Institute of Justice, May 2008, page 1, available at: http://www.vera.org/publication_pdf/477_877.pdf.

90. Lawful Permanent Resident (LPR) status allows for residing and working in the United States. An LPR is sometimes referred to as a *green card holder*.

91. An individual is eligible for protection under the Convention Against Torture if he or she can demonstrate that it is "more likely than not" that he or she will be subjected to torture upon removal to his or her country of origin. 8 CFR §§ 1208.16 - 1208.18.

92. *Amici Curiae* Brief, Florence Immigrant and Refugee Rights Project, et al, in *Casas-Castrillon v. Lockyer*, No. 07-56261.

93. *Woodby v. INS*, 385 U.S. 276 (1966).

94. This is of particular concern given that BIA case law recognizes that the admission of a crime involving moral turpitude is only valid if: (1) the admitted conduct constitutes the elements of a crime; (2) the applicant was provided with the definition and essential elements of the offense prior to admission; and (3) the admission was voluntary. See *Matter of K*, 7 I & N Dec. 594, 598 (BIA 1957).

95. *Matter of Kotliar*, 24 I & N Dec. 124 (BIA 2007).

96. INA §241(a)(1)(A).

97. INA §241(a)(2).

98. INA §241(a)(3)(A-D). Two US Supreme Court decisions, *Zadvydas v. Davis* and *Clark v. Martinez* mandate the release of immigrants 180 days after the issuance of a final removal order, if repatriation to their country of origin is not likely to occur in the reasonably foreseeable future except in "special circumstances." Prior to *Zadvydas*, the Government had a policy of detaining individuals even when there was virtually no chance they would actually be removed. In the aftermath of the decision, new regulations were promulgated in order to comply with the Supreme Court decision. Under these regulations, if DHS cannot remove a migrant within the 90-day removal period, the Government is required to provide a post-order custody review to determine if the individual is a flight risk or danger to national security. If the individual remains in detention six months after the removal order has become final, another custody review is to be conducted.

99. Kathleen Glynn and Sarah Bronstein, *Systemic Problems Persist in U.S. ICE Custody Reviews for Indefinite Detention*, Catholic Legal Immigration Network, Inc., 2005, available at: <http://www.cliniclegal.org/DSP/Indefinite2005FINALforRELEASE.pdf>. See also *Amici Curiae* Brief, Pennsylvania Immigration Resource Center, *Wilks v. DHS*, Docket No. 08-3352, 16 September 2008.

100. *Doissaint v. Chertoff*, No. C08-0584-MJP (W. D. Wash. Aug. 26 2008) (adopting the report and recommendation of US Magistrate Judge Theiler).

101. See *Thangaraja v. Gonzales* 428 F.3d 870 (9th Cir. 2005); *Thangaraja v. Ashcroft* 107 Fed.App'x 815 (9th Cir. 25 Aug. 25, 2004); Pet. For Writ of Habeas Corpus, *Thangaraja v. Gonzales*, No. 05CV1608 (S.D. Cal. Aug. 12, 2005); Stipulated Notices of Dismissal, *Thangaraja v. Gonzales*, No. 05 CV 1608 (S.D. Cal. June 7, 2006) See also ACLU of Southern California, Press Release, *Sri Lankan Torture Victim Released After Nearly Five Years*, 27 March 2008, available at <http://www.aclu-sc.org/releases/view/101728>.

102. Amnesty International, *Irregular Migrants and Asylum-seekers: alternatives to immigration detention*, POL 33/001/2009.
103. Amnesty International, *Irregular Migrants and Asylum-seekers: alternatives to immigration detention*, POL 33/001/2009.
104. Vera Institute of Justice report, *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program*, Volume I, Final Report to the Immigration and Naturalization Service, August 1, 2000, available at: http://www.vera.org/publication_pdf/aapfinal.pdf.
105. Between 2004 and 2005, Congress appropriated approximately \$14 million for the exploration of alternatives to detention. In 2008 this had increased to \$53 million. Testimony of Michelle Brane of the Women's Commission for Refugee Women and Children before the Department of Homeland Security Subcommittee on Border, Maritime and Global Counterterrorism, "Crossing the Border: Immigrants in Detention and Victims of Trafficking," 15 March 2007, available at: <http://homeland.house.gov/SiteDocuments/20070315162728-15975.pdf>. Gabriela Reardon, *Immigrants Fight Restrictions at Home*, *City Limits Weekly* (New York), No. 655, 8 September 2008, available at: http://www.citylimits.org/content/articles/viewprintable.cfm?article_id=3616.
106. US Immigration and Customs Enforcement Fact Sheet, *Alternatives to Detention*, 26 November 2008, available at: <http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>.
107. US Immigration and Customs Enforcement Fact Sheet, *Alternatives to Detention*, 26 November 2008, available at: <http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>.
108. US Immigration and Customs Enforcement Fact Sheet, *Alternatives to Detention*, 26 November 2008, available at: <http://www.ice.gov/pi/news/factsheets/080115alternativestodetention.htm>.
109. Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN. 4/2003/85, Paragraph 43.
110. See Richard L. Skinner, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, Office of Inspector General, Department of Homeland Security, June 2008, available at: http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_08-52_Jun08.pdf; Report to Congressional Requesters, *Alien Detention Standards*, US Government Accountability Office, July 2007, available at: <http://www.gao.gov/new.items/d07875.pdf>; David M. Zavada, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, Office of Inspector General, Department of Homeland Security, December 2006, available at: http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-01_Dec06.pdf.
111. Report of the Working Group on Arbitrary Detention, E/ CN.4/1998/44, Paragraph 33(a).
112. Article 14(3)(d) ICCPR; Principle 17(2), UN Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, 1988.
113. By statute, a person has the "privilege" of counsel. See INA § 240(b)(4)(A).
114. The cost of legal representation can run in to tens of thousands of dollars, while immigrants earn on average wages that are well below the national average. Based on data from the March 2005 Current Population Survey, the average weekly earnings for unauthorized males who arrived between 2000 and 2005 was approximately \$480 (roughly amounting to \$25,000 per year). See Pew Hispanic Center Fact Sheet, *The Labor Force Status of Short-term Unauthorized Workers*, 13 April 2006, available at: <http://pewhispanic.org/files/factsheets/16.pdf>.
115. Department of Justice, *FY 2007 Statistical Yearbook*, Executive Office for Immigration Review, April 2008, Figure 9 at G1, available at: <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>.
116. According to the EOIR, between 1 October 2006, and 20 September 2007, approximately 84 per cent of completed detained immigration court proceedings involved unrepresented individuals. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, Vera Institute of Justice, May 2008, available at: http://www.vera.org/publication_pdf/477_877.pdf.
117. See *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *Matter of Assad*, 23 I&N Dec. 553 (BIA 2003), *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974), *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990), *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001).
118. *Matter of Enrique Salas Compean: Matter of Sylla Bangaly: Matter of J-E-C*, et al. 24 I&N Dec. 710 (A.G. 2009).
119. The Transactional Records Access Clearinghouse's Immigration Project of Syracuse University (TRAC) looked at the results of 297,240 asylum cases from the fiscal years of 1994 through the first few months of 2005 and found that asylum claims with representation were five times more likely to be approved by immigration judges than those that proceeded *pro se*. See Table 1, available at: <http://trac.syr.edu/immigration/reports/160/>.
120. 8 C.F.R. §1240.10 (a)(2).
121. See list of New York City *pro bono* and low fee attorneys (scroll down for New York City organizations/attorneys): <http://www.usdoj.gov/eoir/probono/freelglchtNY.htm>
122. Amnesty International interview, Holly Cooper, Lecturer, and Raha Jorjani, Supervising Attorney, Immigration Law Clinic, University of California, Davis, June 2008.
123. See Article 9(2) ICCPR: UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988.
124. See ICE/DRO Detention Standards: Law Libraries and Legal Material, available at: http://www.ice.gov/doclib/PBNDs/pdf/law_libraries_and_legal_material.pdf.
125. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement, Phase II*, Vera Institute of Justice, May 2008, Page v, available at: http://www.vera.org/publication_pdf/475_874.pdf.
126. Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, Vera Institute of Justice, May 2008, page 2, available at: http://www.vera.org/publication_pdf/477_877.pdf. The 13 current LOP sites are located at detention facilities in: Eloy, Arizona; Lancaster and San Diego, California; Aurora, Colorado; Kearny and New Brunswick, New Jersey; Batavia, New York; York, Pennsylvania; El Paso, Houston, Pearsall, and Port Isabel, Texas; and Tacoma, Washington. The 12 new program sites are located at detention facilities in: Florence, Arizona; Los Angeles, California; Miami, Florida; Lumpkin, Georgia; Jena, Louisiana; Newark, New Jersey; Chaparral, New Mexico; Leesport, Pennsylvania; Raymondville, Texas; and Farmville, Portsmouth, and Hanover, Virginia. See Executive Office for Immigration Review, News Release, *EOIR Adds 12 New Legal Orientation Program Sites*, 15 October 2008, available at: <http://www.usdoj.gov/eoir/press/08/LegalOrientationProgramExpands101508.htm>.

- 127.** Amnesty International requested information from ICE on the role of ICE officers in detention facilities; however ICE failed to respond.
- 128.** Amy Goldstein and Dana Priest, *In Custody, in Pain*, Washington Post, 12 May 2008, page A01; Amy Goldstein and Dana Priest, *Lawsuit Leads to Release of Immigrant*, Washington Post, 3 July 2008, page A02.
- 129.** Principle 20, UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.
- 130.** Chris Nugent and Leon Fresco, *Mentally Ill Gay Guyanese Victim of Torture is Freed From a Complex Odyssey of Over Six Years in Immigration Detention*, Immigration Daily, ILW.com, 22 December 2006, available at: <http://www.asylumlaw.org/docs/sexualminorities/Guyana122206.pdf>.
- 131.** See US Government Accountability Office, Report GAO-07-85, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show A Pattern of Noncompliance*, July 2007 available at: <http://www.gao.gov/new.items/d07875.pdf>.
- 132.** ICE/DRO Detention Standards, Telephone Access, available at: http://www.ice.gov/doclib/PBND/ST/telephone_access.pdf.
- 133.** Rule 8(c), UN Standard Minimum Rules for the Treatment of Prisoners; Guideline 10(iii), UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers.
- 134.** Sacramento County Jail and Santa Clara County Jail, California; Clay County Jail and Monroe County Jail and Palm Beach County Jail, Florida; East Point Jail, Georgia; Phelps County Correctional Facility, Nebraska; Rockingham County Jail, New Hampshire; Ulster County Jail, New York; Yamhill County Jail, Oregon; Berks County Prison and Lackawanna County Prison, Pennsylvania; Johnson County Jail, Texas; Utah County Jail, Utah; Arlington County Correctional Facility, Virginia; Platte County Detention Center, Wyoming.
- 135.** Julia Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, The New York Times, 20 July 2008, available at: http://www.nytimes.com/2008/07/20/us/20immig.html?_r=2&adxnln=1&oref=slogin&adxnlnx=1216567152-mVHAvtmlaL94JXmb6touHg.
- 136.** International standards provide that chains or irons should not be used as restraints, and other instruments of restraint should not be used except in certain limited situations in order to prevent escape during a transfer; to prevent the person injuring himself or others, or from damaging property. In these cases, restraints should only be used for as long as is "strictly necessary." Rule 33, UN Standard Minimum Rules for the Treatment of Prisoners.
- 137.** ICE/DRO Detention Standards, Transportation (By Land), available at: http://www.ice.gov/doclib/PBND/ST/transportation_by_land.pdf.
- 138.** Rules 33 and 34, UN Standard Minimum Rules for the Treatment of Prisoners.
- 139.** Amnesty International Interview, Holly Cooper, Lecturer, Immigration Law Clinic, University of California, Davis, June 2008.
- 140.** Principle 24, UN Body of Principles for All Persons under Any Form of Detention or Imprisonment.
- 141.** US Immigration and Customs Enforcement, *Mortality rates at ICE detention facilities*, 17 July 2008, available at: http://www.ice.gov/pi/news/factsheets/detention_facilities_mortality_rates.htm.
- 142.** Richard L. Skinner, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, Office of Inspector General, Department of Homeland Security, June 2008, available at: http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_08-52_Jun08.pdf.
- 143.** Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, The New York Times, 5 May 2008, available at: http://www.nytimes.com/2008/05/05/nyregion/05detain.html?_r=1&pagewanted=all.
- 144.** Sandra Hernandez, *A Lethal Limbo for Migrants*, The Los Angeles Times, 1 June 2008; *Detained Immigrant with AIDS Dies*, The Associated Press, 11 August 2007.
- 145.** *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, June 2003, page 24, available at: <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>.
- 146.** Amy Goldstein and Dana Priest, *Five Detainees Who Took Their Lives*, The Washington Post, 13 May 2008, page A08.
- 147.** David M. Zavada, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, Office of Inspector General, US Department of Homeland Security, December 2006, page 23, available at: <http://trac.syr.edu/immigration/library/P1598.pdf>.
- 148.** Rule 21(1), UN Standard Minimum Rules for the Treatment of Prisoners.
- 149.** International standards limit the legitimate purposes and scope of the use of force. For example, Rule 54(1) of the Standard Minimum Rules for the Treatment of Prisoners permit staff to use force for self-defense, to prevent escape, and in cases of active or passive physical resistance to an order based on law or regulation.

SCOPE AND METHODOLOGY

Information for this report was gathered from a variety of sources from across the country, including immigration law practitioners, non-governmental organizations (NGOs) working with immigrants, asylum seekers, immigration judges, government officials, and more than 100 letters received and reviewed by Amnesty International from immigrants in detention. In-depth interviews were conducted with twenty detained and formerly detained immigrants and asylum seekers. It also draws from responses to surveys sent by Amnesty International to officials of the Executive Office for Immigration Review and facilities housing immigration detainees, as well as immigration hearings observed in both San Francisco, Calif., and New York, N.Y., by Amnesty International researchers. Furthermore, Amnesty International conducted a review of government and non-governmental reports and statistics, case law, and legislation, as well as media accounts. Most case studies were followed up by interviews with the attorneys representing the immigrants and asylum seekers concerned. To protect their identities, the names of the individuals in the case studies who were not reported in the media were changed or withheld. All featured cases are on file with Amnesty International.

The Department of Homeland Security, Immigration and Customs Enforcement did not respond to Amnesty International's repeated requests for data. Of the 243 facilities housing immigration detainees that were surveyed, only 21 responded.

A NOTE ON TERMINOLOGY

There is no single term universally accepted that describes the unique situation of migrants and asylum seekers. While some terms may have specific legal meanings, it must also be acknowledged that many may be used in a broader political or cultural context.

This report describes the human rights situation of individuals who face detention either to prevent them from entering the United States or to forcibly expel them to their countries of origin. This group includes arriving (and rejected) asylum seekers, long time lawful permanent residents, and other immigrants.

People who enter or work in countries without legal authorization have been labeled illegal, undocumented or irregular. The term "irregular migrant" is increasingly used in international human rights standards and in the commentary of UN and regional human rights bodies to refer to individuals who do not have legal permission to remain in a host country.

In the United States, the term "undocumented immigrant" is often used in discussing anyone subject to enforcement or deportation actions. However, many immigrants entered the United States with documentation and have since lapsed out of status or have a status that is being questioned by the government. In this report, therefore, Amnesty International USA uses the phrase unauthorized immigrant to describe individuals who currently have no, or uncertain, legal status in the United States. For example, a person who arrives in the United States on a student visa but then remains past the permitted term of stay is unauthorized: she or he was originally documented and legally allowed into the United States but now the status has lapsed. Likewise, a migrant worker who crossed the southern border without the government's permission is also an unauthorized immigrant.

If DHS has a reasonable belief that an individual does not have permission to enter or remain in the United States, then that person may be placed in "removal proceedings," which means the government is seeking to deport him or her from the United States. For the purposes of this report the terms removal and deportation are used interchangeably.

LIST OF TERMS/ABBREVIATIONS

DHS: Department of Homeland Security.

ICE: Immigration and Customs Enforcement.

CBP: Customs and Border Patrol.

EOIR: Executive Office for Immigration Review.

ICCPR: UN International Covenant on Civil and Political Rights

CAT: UN Convention Against Torture

“Whether I’m documented or not, I’m a human being.
I used to think birds in a cage were so pretty
but no one should be deprived of freedom—no one
should be caged.”

Amnesty International interview with former
immigration detainee (identity withheld), June 2008.



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