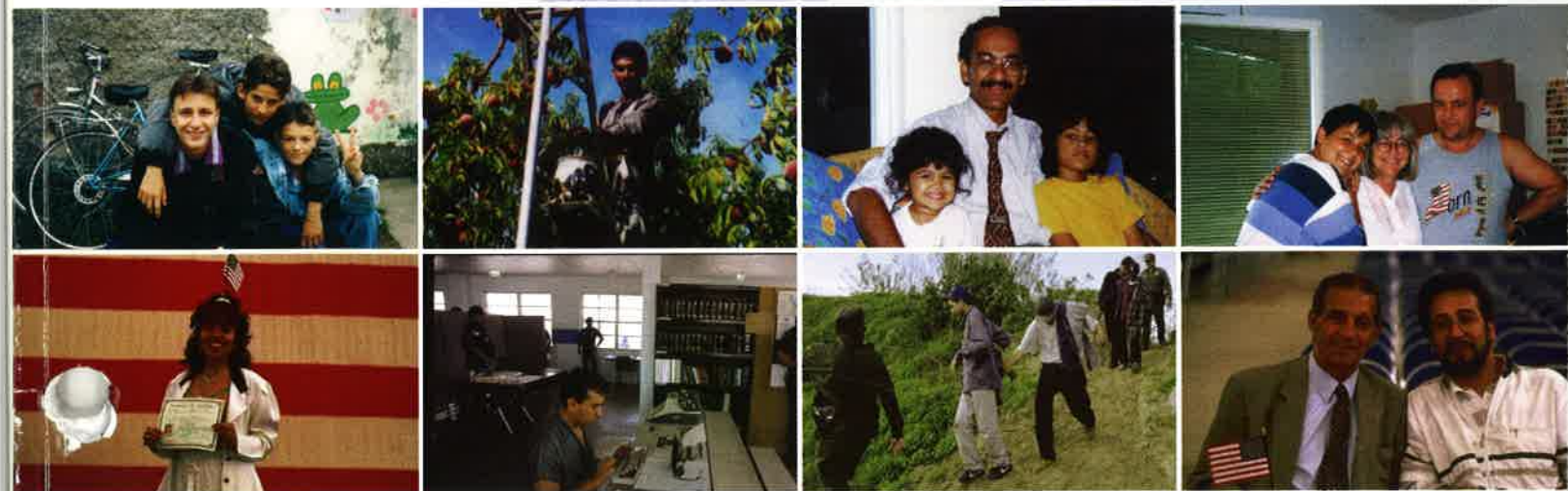


# THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES

WHY ARE WE LOCKING UP ASYLUM-SEEKERS, CHILDREN, STATELESS PERSONS,  
LONG-TERM PERMANENT RESIDENTS, AND PETTY OFFENDERS?



## Credits

This report is the fourth in a series of reports produced by the Catholic Legal Immigration Network, Inc. (CLINIC) on “at-risk” immigrants. The series attempts to put a human face on the difficulties faced by discrete populations of immigrants in the United States. Past reports in this series have covered immigrant families, naturalization, and low-wage laborers.

Since its inception in April 1999, this project has been a collaborative one. CLINIC paralegal Molly McKenna has brilliantly staffed the project; she has collected many of the case studies and did much of the research for this report. Donald Kerwin, CLINIC’s Chief Operating Officer, wrote significant sections of this report and pulled its various pieces into a cohesive whole. Other significant contributors include Mark von Sternberg, Juan Osuna, Mary McClenahan, Alicia Triche, Helen Morris, and Tom Shea. Charles Wheeler and Juan Osuna helped edit various versions of the report.



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Suggested citation:

Kerwin, Donald, Mark von Sternberg, Juan Osuna, Mary McClenahan, Alicia Triche, Helen Morris, and Tom Shea. 2000. *The Needless Detention of Immigrants in the United States: Why Are We Locking Up Asylum-Seekers, Children, Stateless Persons, Long-Term Permanent Residents, and Petty Offenders?* CLINIC “At-Risk Immigrants” Report Series. Washington, DC: CLINIC. <https://doi.org/10.14240/atriskreport4>.

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# A C K N O W L E D G M E N T S

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“The Needless Detention of Immigrants in the United States” is the fourth in a series of reports produced by the Catholic Legal Immigration Network, Inc. (CLINIC) on “at-risk” immigrants. The series attempts to put a human face on the difficulties faced by discrete populations of immigrants in the United States. Past reports in this series have covered immigrant families, naturalization, and low-wage laborers.

CLINIC, a subsidiary of the U.S. Catholic Conference, provides legal support services to a network of 121 local Catholic immigration programs. CLINIC also operates national legal service projects for “at-risk” newcomers, including a six site program for immigrants in the “administrative” custody of the Immigration and Naturalization Service (INS). CLINIC is one of the three founding agencies of the Detention Watch Network, an affiliation of more than 100 agencies that provide legal, pastoral, and social services to INS detainees.

Since its inception in April 1999, this project has been a collaborative one. CLINIC paralegal Molly McKenna has brilliantly staffed the project; she has collected many of the case studies and done much of the research for this report. Donald Kerwin, CLINIC’s Chief Operating Officer, wrote significant sections of this report and pulled its various pieces into a cohesive whole. Other significant contributors include Mark von Sternberg, Juan Osuna, Mary McClenahan, Alicia Triche, Helen Morris, and Tom Shea. Charles Wheeler and Juan Osuna helped edit various versions of the report. CLINIC’s detention attorneys provided most of the report’s case studies. They are Denise Baez, Mary Howells, Mary McClenahan, Tom Shea, Jill Sheldon, Alicia Triche, Ferdinand Ubozoh, and Allison Wannamaker. The following people also provided case studies and key information:

David Cole, Georgetown University Law Center;

Chris Einolf, Lutheran Social Services of the National Capitol Area;

Madeline Ellis, Morgan, Lewis & Bockius LLP;

Regis Fernandez, Reitman & Parsonnet;

Mark Messenbaugh, Davis, Polk & Wardwell;

Sr. Marlene Perrotte, Las Americas Refugee Asylum Project;

Shirley Tang, Friedman & Siegelbaum;

Sue Weishar and Kathleen Harrison, Catholic Charities of New Orleans;

Wendy Young, Womens’ Commission for Refugee Women and Children.

This series would not have been possible without the financial support of the Ford Foundation, the Foundation for Child Development, Faye and Sandor Strauss, and the Rosenberg Foundation. This report was also made possible (in part) by a grant from the Carnegie Corporation of New York. Finally, CLINIC could not have taken on this project without the support and collaboration of its sister agency, the Migration and Refugee Services division of the U.S. Catholic Conference. Of course, the statements made in the report and the views expressed are solely CLINIC’s responsibility.

CLINIC appreciates the many contributions it received in putting together this report. It hopes that the final product contributes, in part, to comprehensive reform of the INS detention system.

# THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES:

*Why Are We Locking Up Asylum-Seekers, Children, Stateless Persons, Long-Term Permanent Residents, and Petty Offenders?*



Photo Courtesy: INS

*We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted ... The Declaration of Independence*

*I know not whether laws be right, // Or whether laws be wrong; // All that we know who lie in gaol // Is that the wall is strong; // And that each day is like a year, // A year whose days are long.*

*Oscar Wilde, The Ballad of Reading Gaol*

Over the last several years, human rights and immigrant advocacy agencies have exhaustively documented the shortcomings in the INS detention system. Reports and articles have detailed significant problems related to asylum-seekers,<sup>1</sup> children,<sup>2</sup> women,<sup>3</sup> indefinite detainees,<sup>4</sup> mandatory detainees,<sup>5</sup> immigrants in local jails,<sup>6</sup> the standards governing INS detainees and oversight of its contract facilities,<sup>7</sup> health care,<sup>8</sup> immigrants in select INS processing centers and for-profit prisons,<sup>9</sup> and particular ethnic populations.<sup>10</sup> Over the last five years, roughly 100 legal, pastoral, health, and social service agencies who

work with detainees have come together in the Detention Watch Network to identify and publicize the problems that they witness each day.

The same problems have surfaced with dispiriting consistency in human rights reports, advocacy meetings, and a steady stream of newspaper articles. Overcrowding, lack of privacy, and despair have become endemic throughout the INS system. Many inmates languish in the same dormitory-style rooms, up to 23 hours a day, without educational or recreational opportunities. The INS warehouses others in

remote locations, apart from their families and support services. Detainees face multiple hurdles in their mostly unsuccessful attempts to obtain counsel. Local jailers commingle immigrants with criminals serving prison sentences, with predictable consequences for the immigrants. The INS system suffers from a shortage of pastoral services and the lack of a formal chaplaincy program. INS officials fail to communicate even the most basic information to detainees about their status and situation; detainees often cannot reach the INS deportation officers assigned to their cases. Thousands face long-term detention, typically in facilities designed for short-term use. Jailers fail to respect dietary restrictions and provide culturally inappropriate food. Detainees receive medical care which ranges from perfunctory to the shockingly bad. Jailers place draconian restrictions on visits by family members, legal counsel, and human rights delegations. Immigrants abandon their legal claims to avoid further detention, only to remain detained for weeks and months afterwards. The INS transfers detainees frequently, often without reference to existing attorney-client relationships or other support services. Jailers use segregation punitively, and occasionally for transgressions that result from language difficulties or mental illness. Guards verbally and physically abuse detainees. Hunger strikes, suicide attempts, and even riots occur with alarming frequency.

At this point, the severity and institutional nature of the problems in the INS detention system cannot be refuted. In effect, immigrants in “civil” custody face all the privations, inhumanity, and violence of prison.<sup>11</sup> Even under our current laws, this need not be the case. Thousands of immigrants in INS custody could be released under supervision. In addition, the law’s “mandatory detention” provisions could be satisfied through home detention and other alternative forms of custody. Lending the current system’s problems an air of intractability is the seeming inability of INS headquarters, under the agency’s current structure, to enforce its detention policies on local INS district offices, much less on the jails and contract facilities the INS uses to detain most of those in its custody.

Despite its lamentable track record and failure to make even marginal progress on many of these issues over the span of many years, Congress passed legislation in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“the 1996 Immigration Act”),<sup>12</sup> that has nearly tripled the number of non-citizens in INS custody. The 1996 Immigration Act requires the INS to detain: (1) virtually all immigrants inadmissible or deportable on criminal and national

security grounds;<sup>13</sup> (2) virtually all asylum-seekers who present themselves at the border but lack proper documents, until they can demonstrate a “credible fear” of persecution;<sup>14</sup> (3) those seeking admission to the United States who appear inadmissible for other than document problems<sup>15</sup>; (4) those ordered removed for 90 days or, if the person “conspires or acts to prevent his removal,” for more than the 90-day “removal period.”<sup>16</sup>

The 1996 Immigration Act and its immediate predecessor, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>17</sup> also culminated a decade of legislation that expanded the crimes for which immigrants could be removed and severely restricted their ability to contest their removal based on their equitable ties to the United States.<sup>18</sup> Under current law, long-term permanent residents, with U.S. citizen spouses and children, good jobs, and the absence of any ties to their countries of birth, can now be deported for relatively minor crimes that they committed years before. The operative term for one category of crimes that trigger removal and mandatory detention — “aggravated felonies” — encompasses serious felonies, but also less severe offenses like money laundering, tax evasion, fraud, shop-lifting, receipt of stolen property, obstruction of justice, perjury, document fraud, smuggling family members into the country (in some cases), certain gambling offenses, and illegal re-entry following removal for an “aggravated felony.”<sup>19</sup>

Locked up in a hodgepodge of INS “service processing” centers, for-profit prisons, federal prisons, and local jails, this growing population of “civil” detainees also includes unaccompanied children, persons in indefinite custody because their countries will not accept their return, persons with claims to U.S. citizenship, torture survivors, and those fleeing persecution in their home countries.

The INS has informed CLINIC that, as of July 2000, it detained 19,300 persons a day. The INS cannot be blamed for current laws that mandate the detention of vast numbers of immigrants. The 1996 Immigration Act tied the hands of the INS in many ways, requiring the agency to detain non-citizens who simply should not be in custody and exacerbating what had long been a crisis situation. The Act has already caused untold suffering for thousands of persons, with no end in sight. At the same time, the INS deserves abundant criticism for: (1) its failure to exercise its discretion in a principled, uniform manner to release those immigrants it can; (2) its unconscionable failure to develop “alternatives-to-detention” that safeguard the public



and prevent immigrants from absconding; (3) its failure to explore cost-effective alternative forms of detention (like home detention enforced through electronic monitoring or “tether” programs) that would satisfy our law’s detention mandates.

This report contributes to the now extensive literature on the suffering caused by the INS detention system, with a particular focus on persons who should not be detained and the INS’s failure to pursue alternatives for groups that it need not and should not detain. Section A describes the detention of vulnerable persons, including asylum seekers, women and children. Section B covers persons subject to mandatory and indefinite detention, as well as those detained based on secret evidence. Section C recommends steps that could be taken to reform the INS detention system.

## A. VULNERABLE GROUPS UNNECESSARILY IN DETENTION

Detention represents a particularly unjust and unnecessary response to thousands of non-citizens in INS custody. Many should not be detained at all. For others, detention should be a solution of last resort. While always difficult, detention causes particular anguish for certain populations because of their gender, age, and other characteristics. For example, confinement in correctional facilities with juvenile delinquents can scar immigrant children for life. For certain asylum-seekers, detention can evoke and even mirror the conditions they fled.

### 1. Detention of People Fleeing Persecution

The United States has a long and proud history of offering refuge to persons fleeing persecution in their native lands. This tradition finds expression in the Statue of Liberty’s welcome to the “huddled masses yearning to breathe free.” With the world’s population of refugees and asylum-seekers exceeding 14 million at the end of 1999,<sup>20</sup> the United States’ leadership in the areas of refugee protection and international human rights has never been more crucial. Unfortunately, the United States undermines its international standing through its laws and policies related to those fleeing persecution. The detention of asylum-seekers, often for prolonged periods, offers an egregious example.

### a. The Obligations of the United States to Asylum-Seekers

The United States, along with more than 130 other countries, has agreed to be bound by international treaties that seek to protect refugees by guaranteeing their right to apply for asylum. These include the 1951 United Nations’ Convention relating to the Status of Refugees and the 1967 United Nations’ Protocol relating to the Status of Refugees.<sup>21</sup> The Refugee Act of 1980 enshrined these international obligations in domestic law.<sup>22</sup> Under it, a person cannot be returned to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Under international law, the United States may not return individuals without providing an interview regarding their status; “rejection at the frontier” is forbidden. Adding to its international obligations, in 1994 the United States became a party to the United Nations’ Convention Against Torture<sup>23</sup>, which prohibits the return of persons to countries where they would be in danger of torture, for whatever reason.

The asylum process can be complicated and exhausting to negotiate. Often, victims of human rights violations must provide extensive documentation and wait for years while government officials evaluate their cases. To complicate matters, both international and domestic standards are constantly in flux. The “expedited removal” system, discussed below, represents the 1996 Immigration Act’s most egregious erosion of the U.S. asylum system.

In 1996, Congress also introduced a one-year asylum filing deadline.<sup>24</sup> As it stands, a person who wishes to apply for asylum in the United States must do so within a year of his or her arrival. There are exceptions to this deadline, but these are narrow and their interpretation remains uncertain. They include provisions permitting “late” filings if the individual can show either “changed circumstances” that affected the person’s eligibility for asylum, or that the delay in filing was caused by “extraordinary circumstances.”<sup>25</sup> The latter can be shown, for example, by evidence that the individual was the subject of a medical or physical restraint which rendered the timely filing of a claim beyond his or her control, or that he or she suffered from a legal disability (e.g., was an unaccompanied minor) that effectively prevented the filing.<sup>26</sup> Getting around the one-year deadline can be a

daunting task. Immigration Judges (known as “IJs”) and INS officers often require documentation that many asylum seekers cannot secure.

Detainees face increased barriers in collecting evidence to support their claims. In the worst case scenario, detention can prevent an asylum-seeker from presenting or establishing a claim, and can lead to his or her removal. Although the U.S. asylum system remains generous, new legal restrictions and procedural glitches serve to undermine its very purpose.

### **Anguish Over Her Family Places Asylum-Seeker in Peril**

“Mrs. D-” fled her native country, the Democratic Republic of the Congo (DRC), after her husband was tortured and killed due to his involvement in a pro-democracy movement. Smuggled out of the country by Catholic priests, Mrs. D- was forced to leave behind her eight children, ages 8 to 24. Four of these children were Mrs. D-’s by birth, two belonged to her husband by a prior marriage, and two were the adopted children of Mrs. D-’s deceased sister. Upon her arrival in the United States, Mrs. D- filed an application for political asylum.

In January 1998, Mrs. D-’s asylum application was “recommended” for approval. A “conditional” grant means the asylum application will be approved, once the FBI verifies that the asylum-seeker has no criminal record. In the meantime, however, the person cannot sponsor her immediate family members for admission to the United States. In the case of Mrs. D-, final approval did not occur until one year after the “recommended” grant, due to problems in processing her fingerprints. Mrs. D-’s lawyer wrote the INS five letters during this period and made repeated telephone calls. Once Mrs. D- received final approval of her asylum application, an additional nine months passed while she sought visas for her children. Waiting periods like this have regrettably become the norm.

These delays placed Mrs. D- and her children in peril. In early 1999, Mrs. D- received word from relatives in the DRC that her children, sick and malnourished, were living just over the Congolese border in Rwanda. By the time she received this news, Mrs. D- had been separated from her children for more than 18 months. The anguish caused by the separation proved too difficult for her and Mrs. D- left the United States, returning to Africa to look for her children. She has not

been heard from since, and her attorneys and friends fear the worst.

## **b. Expedited Removal**

The 1996 Immigration Act created a new “expedited removal” process to deter the filing of frivolous asylum claims. The law targets persons who arrive at U.S. ports-of-entry with false travel documents or no documents. It allows the INS to return them without a hearing.

After arrival and initial questioning by an INS officer, persons subject to expedited removal are sent to “secondary inspection.” Unless they indicate a desire to apply for asylum or express a fear of persecution in their home country, immigrants processed at secondary inspection face summary return to their last port of embarkation. If they do successfully convey their fears, they must then demonstrate that they harbor a “credible fear” of persecution. At the credible fear interview, the individual must establish that there is a significant possibility that he or she could make out a legitimate claim for asylum. Prior to a credible fear finding, the asylum-seeker must be detained.

In fiscal years (FY) 1997-1999, the INS removed a total of 189,177 persons pursuant to the expedited removal process, which represents almost half of all persons removed from the country during that period.<sup>27</sup> Over the same period, 14,951 persons were referred for a credible fear interview; 88 percent of those referred were later determined to have satisfied the credible fear standard.<sup>28</sup>

A major problem with expedited removal has been the secrecy surrounding the secondary inspection process. The only outside organization that has been allowed to observe the inspection process is the United Nations High Commissioner for Refugees (UNHCR).<sup>29</sup> The absence of effective monitoring leaves open the possibility that asylum-seekers may be removed without a hearing on their claims — a potential violation of the prohibition against “rejection at the frontier.” Apart from the concerns it raises from the perspective of international law, there is a growing realization that expedited removal may not be essential to deterring frivolous claims. Certain reforms adopted by the INS in 1995 significantly reduced asylum filings, obviating the need for expedited removal.<sup>30</sup> Overall, the number of new asylum applications has declined 75 percent since 1993.<sup>31</sup>

Another problem involves the extensive use of detention throughout this process, which may be



inconsistent with the international obligations of the United States. Article 31 of the 1951 Refugee Convention provides that countries “shall not impose penalties, on account of their illegal entry or presence” on refugees arriving from countries in which they fear persecution. It goes on to forbid states to apply any “restrictions” to the movements of refugees unless they are “necessary.”

U.S. law mandates that all arriving aliens seeking asylum must initially be held in detention if they are not in possession of a visa or other proper entry documents. As with other INS detainees, asylum-seekers must endure prison-like conditions. In some facilities, they have been subject to abuse.<sup>32</sup> Family members who arrive together are often split apart, even young children from their parents. Although the government calls this “civil detention,” from the asylum-seekers’ perspectives it is in fact a “penalty” inflicted “on account of their illegal entry,” and thus violates Article 31.

The Vienna Convention on the Law of Treaties requires that “every treaty in force...must be performed...in good faith” and that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given its terms.”<sup>33</sup> Detention of asylum-seekers in prison-like settings often rises to the level of persecution, and cannot be considered a good faith interpretation of the Refugee Convention. At its heart, that Convention expresses a desire to protect refugees, as explained in its preamble: “The United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of ... fundamental rights and freedoms.” The United States’ practices do not manifest “profound concern,” but instead discourage the exercise of the right to “seek and enjoy asylum” that is guaranteed in the United Nations’ Universal Declaration of Human Rights.<sup>34</sup>

Several international organizations have spoken out against the detention of asylum-seekers; their statements may be considered persuasive evidence of international opinion. Most notably, the UNHCR has repeatedly expressed its disapproval of the detention of asylum-seekers.<sup>35</sup> Its Executive Committee recently averred:

In view of Article 31 of the 1951 Convention relating to the Status of Refugees and the fact that the majority of asylum-seekers have not committed crimes — and indeed they are not suspected of having done so — their detention raises significant concern, both in relation to the fundamental right to liberty, and because of the

standards and quality of treatment to which they are subjected.<sup>36</sup>

Such statements may be looked to as both authoritative interpretations of the Refugee Convention<sup>37</sup> and illustrations of international opinion. Both Amnesty International and Human Rights Watch have also condemned U.S. policy regarding the detention of asylum-seekers.<sup>38</sup>

Given the problems inherent in detaining asylum-seekers, one would expect the INS to pursue programs that offered alternatives to their confinement. In fact, the INS has recently funded a pilot program in New York that provided for the supervised release of asylum-seekers and others not subject to mandatory detention.<sup>39</sup> The program sought to satisfy the only valid rationale for detaining asylum-seekers — that is, that they might abscond before appearing for their court hearings.

### **The INS Fails to Build on Successful Pilot Program to Supervise Released Asylum-Seekers and to Assure Their Appearances in Court**

From February 1997 to March 31, 2000, the Vera Institute for Justice administered a pilot project to assure court appearances by immigrants in removal proceedings. This “alternative-to-detention” program provided intensive supervision for non-citizens who would otherwise have been detained. The program verified that potential participants had a community sponsor and a fixed address, and screened them based on their community ties, compliance in prior immigration proceedings, and potential danger to others. Intensive supervision consisted of “mandatory personal and telephonic reporting, home visits (sometimes prearranged, sometimes not), and consistent monitoring of participants’ whereabouts and the progress of their cases.”<sup>40</sup> The program also provided information on the legal process, made legal referrals, and accompanied participants to court hearings.

The 165 persons subject to the program’s intensive supervision track included 83 asylum-seekers in expedited removal, 16 immigrants that had committed minor crimes, and 66 persons arrested in work-site raids.<sup>41</sup> Overall, 91 percent of the intensively supervised immigrants appeared for all of their required hearings, including 93 percent of asylum-seekers.<sup>42</sup> Only two asylum-seekers failed to appear for the merits hearings in their cases. Apart from its success in preventing flight, intensive supervision cost only \$12 a day

per immigrant, compared to the \$61 average daily cost of detention.<sup>43</sup> In short, the program presented a humane and cost-effective alternative to detention.



Photo Courtesy: INS

### c. The Impact of Detention on Asylum-Seekers

Beyond its propriety under international law, the detention of asylum-seekers raises numerous practical difficulties. Of greatest concern, detention burdens the ability to pursue asylum claims, and leads many to abandon their cases altogether.<sup>44</sup> Most INS detention centers and contract facilities, particularly local jails, are located far away from family, legal, and other support systems. Even facilities located in urban areas, like the for-profit facility in Elizabeth, New Jersey, cannot be easily reached by public transportation. Typically, detainees cannot collect the kind of documentation necessary to support their claims. For example, asylum cases invariably benefit from medical affidavits setting forth a physician's opinion as to whether injuries actually sustained are consistent with the asylum-seeker's account. Yet, statistics gathered by Physicians for Human Rights in Boston, Massachusetts, indicate that detention hinders the ability to obtain such affidavits. Between July 1, 1999 and December 31, 1999, Physicians for Human Rights serviced 73 percent of requests for medical affidavits for asylum-seekers not detained, but only 50 percent of requests by detainees.<sup>45</sup>

Legal libraries in prisons tend to be outdated, and often do not include current materials on immigration laws and procedures. If counsel can be obtained, he or she must overcome a range of barriers to effective representation. Proposed standards, developed by the American Bar Association (ABA), attempt to address legal access problems that have historically included

limited visiting hours, visiting hours that are not honored, transfers of clients away from counsel, the difficulty of reaching clients by phone, collect-call only phone policies within facilities, the inability to conduct attorney/client interviews in private, outdated or inaccurate legal services lists, and long delays in waiting for clients at the facilities. While the INS agreed to implement most of the ABA-proposed standards in its own detention facilities, it has thus far (1) refused to enshrine those standards in a federal regulation, (2) refused to extend the standards to local jails (that house the majority of INS detainees), and (3) failed to address severe telephone access problems in jails.

Apart from making it difficult to prepare an asylum case, detention also discourages asylum-seekers from continuing to pursue their claims, especially when they must appeal negative decisions by IJs. The administrative appeals process usually takes between 6 and 12 months, and sometimes longer. After months in detention, many asylum-seekers opt to forego their cases and submit to deportation with all its risks.<sup>46</sup>

#### The Prospect of Spending Another Year in Detention Prompts Refugee to Give Up Claim

"Mr. K-," an engineer in his late twenties, was living a full life in Cameroon. His business allowed him to provide for his wife and two young sons. He was also politically active, and had become a leader on the local level of the Social Democratic Front (SDF), Cameroon's opposition party. He knew that his political activities carried risks, but did not realize their severity until government officials arrested several of his associates at a demonstration he had helped to organize. After authorities came to his home to arrest him, Mr. K- went into hiding. Subsequently, an article was published (with Mr. K-'s photograph) reporting that he was wanted by the police because of his anti-government activities. At this point, Mr. K- fled the country.

He arrived in the United States in September 1997 and requested political asylum. He was transferred to an INS detention center, where he spent the next four and a half months. Mr. K- had a strong asylum case. At the judge's request, his lawyer obtained from the U.S. Embassy in Cameroon a copy of the newspaper article on his anti-government activities. The U.S. Embassy also put Mr. K-'s lawyer in touch with a high-level SDF official who verified, in writing, Mr. K-'s status in the party. Notwithstanding this evidence, the IJ denied his claim.

Mr. K-'s attorney urged him to appeal the judge's denial. She thought that the Board of Immigration Appeals (BIA) would see the injustice of the judge's decision and reverse it. However, Mr. K- did not want to appeal because he could not face the prospect of spending another year in detention. The long months in detention had sapped him of his confidence and resolve, and by the time his case was denied in January, he was desperate to be released. Mr. K- was deported to Europe on February 15, 1998. On June 24, 1999, he was granted asylum in France.

Many flee to the United States in the hope that they will be provided a fair opportunity to show that their rights have been violated. Some have spent time in prison because of their political or religious beliefs. Many have been tortured by prison guards, soldiers, and others. Others have lost family members, friends, and colleagues to violence. For such persons, detention invariably comes as a shock and can evoke the very conditions that they fled.

### **Caught in a Web, Through No Fault of His Own**

"Mr. A-" is a native and citizen of the DRC. He fled the regime of Laurent Kabila in fear of persecution for having worked in housing projects for the former regime of Mobutu Sese Seko.

Mr. A- had been arrested, imprisoned and tortured for three days by the Kabila government. Unable to obtain a passport from the government he was fleeing, Mr. A- attempted to enter the United States with a passport that did not belong to him. At the airport, he spent 17 hours handcuffed and shackled to a stool in a small room. He passed a credible fear interview and was sent to a detention facility. After three adjournments caused by Mr. A-'s inability to obtain an attorney, an IJ denied his claim. Mr. A-'s detention made it difficult for him to secure qualified legal counsel. He was ultimately forced to settle for a lawyer who knew very little about his case, had visited Mr. A- only once prior to the proceeding, and presented no evidence about the conditions in the DRC. The lawyer also failed to appeal the decision, despite having told Mr. A- that an appeal would be filed.

After the IJ's decision, the INS twice tried to remove Mr. A- from the United States. On the first occasion, officials handcuffed him, humiliating him before other travelers passing through the airport. During the ride from the airport terminal to the plane, the officials were told to

return Mr. A- to the detention center to verify the status of his appeal. One month later, when it became clear that Mr. A- did not have an appeal pending, the INS attempted to deport him again. Again, Mr. A- was handcuffed, but this time he refused to cooperate and was placed in "segregation." He was confined to a small cell without windows, with nothing to read and no human contact. After three days, Mr. A- was returned to his dormitory. At this time, he contacted his attorney, who admitted to him that no appeal had been filed. Mr. A- then immediately contacted the UNHCR, which advised him that he could file an application for protection under the Convention Against Torture, which he did. One week later, detention officials again told Mr. A- that he was going to be deported. UNHCR contacted Mr. A-'s deportation officer and explained that a Torture Convention claim was pending. As a result, the INS agreed to suspend the deportation.

Mr. A- obtained a new lawyer who assisted him in filing a "motion to reopen" his asylum case based in part on changed country conditions. An IJ granted the motion. By now, after a year in detention, Mr. A- found his continued detention difficult to endure. While detained, Mr. A- was allowed only one hour of recreation each day in an "outside" courtyard with very high walls and a heavily screened roof. Mr. A- left the facility only on his periodic trips to the airport and once to be hospitalized. He could receive visitors only one day a week, and then for only 30 minutes at a time.

Like others in the facility, Mr. A- saw no need for his continued confinement, especially since his case had been reopened and he had shown that, under the new circumstances in the DRC, he had a legitimate asylum case. He decided to join a hunger strike protesting the harsh conditions at the facility and the INS's unjust release policies. On the 14th day of the strike, prison officials placed Mr. A- and other participants in solitary confinement for one week. Mr. A- only drank water during this period. By the last day of his confinement, he attempted to commit suicide by swallowing Ben Gay and Tylenol. A guard noticed him lying on the floor next to the empty Ben Gay container. He was shackled, handcuffed and taken to the emergency room of a nearby hospital. He remained in the hospital for two days, chained to the hospital bed.

After his condition stabilized, Mr. A- was returned to the detention facility. The INS promised to

review the strikers' cases and to release those found deserving of parole, but apparently this never occurred. In July 1999, Mr. A- participated in another hunger strike, this one lasting a week. Some of the strikers were transferred to maximum security jails. The remaining participants, fearing transfer to facilities where they would be housed with criminals, gave up the strike.

In September 1999, almost two years after he requested asylum, an IJ approved Mr. A-'s claim. Upon his release, nine days later, Mr. A- filed for a work permit and a social security card. He received his work permit five weeks later. When Mr. A-'s social security card finally arrived in mid-November, he found a job working at the reception desk of a youth hostel.

As Mr. A-'s case demonstrates, detention takes a particular toll on asylum-seekers who typically cannot understand why they are being "punished." There were numerous junctures in Mr. A-'s case when release would have been appropriate: (1) when Mr. A- passed his credible fear screening; (2) when it became clear that he qualified for protection under the Convention Against Torture; and (3) when the IJ granted his second attorney's motion to reopen. The fact that none of these events prompted the INS to release Mr. A- raises fundamental questions about the system.

### **Detained For More Than a Year, Despite Committing No Crime**

"Mr. Z-," a Sudanese national, was detained in the United States after indicating that he wished to apply for asylum. He based his claim on both the harm he feared because he refused to be drafted into the Sudanese national army and persecution he had already suffered at the hands of Sudanese rebels when he refused to let them appropriate his family's livestock. Mr. Z- had been brutally attacked by the insurgents, as attested to by a series of marks on his back. His detention, however, made it difficult to schedule a medical interview and a medical report was not available on the day of his asylum hearing. The IJ denied his asylum application.

The rejection of his claim left Mr. Z- in anguish. He could not comprehend what purpose his detention served. Ultimately, he requested to be deported to the United Kingdom, rather than to continue life in the detention facility. When the United Kingdom refused to accept Mr. Z-, he agreed to pursue a claim under the Convention

Against Torture in the United States. At the hearing, the IJ granted Mr. Z-'s application for relief, finding in part that those taken into custody in Sudan routinely face torture and human rights abuses. By this point, Mr. Z- had been confined for more than a year.

The detention of torture survivors, like Mr. Z- and Mr. A-, is cruel and inappropriate. The United States has ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and in 1998 it implemented that treaty. The Convention Against Torture prohibits the return of those who have "good reasons" for believing that they would be tortured if they were returned to their home countries. Torture survivors often find detention in the United States especially traumatic because prison reminds them of what happened to them in their own countries. Handcuffs, leg irons, belly chains, prison jumpsuits, strip searches, and abusive guards can summon painful memories and trigger post-traumatic stress disorder.

### **Three Years Lost in INS Detention Prior to Obtaining Asylum**

"Mr. E-," a 41-year-old Kenyan, opposed the government in his home country. After being arrested at a demonstration, he spent five years in a Kenyan prison where the authorities beat him with rifle butts and burned his skin with hot metal pliers. After his release, members of the opposition party held him illegally for nine months because they accused him of revealing party secrets. When he managed to escape, he fled the country.

Mr. E- arrived in the United States as a stowaway in early 1997. He requested asylum and was transferred to an INS detention center. Mr. E- could not afford an attorney. Although he had only a seventh grade education, he was forced to represent himself in immigration court. Not surprisingly, the judge denied his claim. Mr. E- appealed the decision. A year and a half later, the BIA sent Mr. E-'s case back to the IJ, who denied it again. Mr. E- appealed a second time. The entire process took more than three years.

Mr. E-'s time in detention was extremely difficult for him. He had terrible memories of the torture he had suffered and detention made it harder for him to overcome this trauma. At times, Mr. E- became so depressed that he lost hope. He attempted suicide more than once. After two and a half years at the INS detention facility, the INS transferred him to a county prison in a

different state. Although Mr. E- was held with criminals at the county prison, he preferred it to the INS detention center because he had the chance to go outdoors.

In March 2000, the BIA granted Mr. E-'s asylum request. When he was released a few days later, after three years in detention, he kissed the ground in front of the prison.

Detention particularly devastates families who must wait months or even years for their loved ones to be released. Beyond the emotional distress caused by separation, family members on the outside often face grave economic hardship. In other cases, the INS detains entire families, but in different locations and often fails to inform them of the others' fate.

### **Unreasonable Detention Policies Split Up Family Fleeing Persecution**

"Mr. and Mrs. D-" arrived at an international airport in the United States without proper documentation after fleeing Algeria. Because Mrs. D- had worked for the Algerian government, she had been repeatedly harassed and threatened by Islamic extremists, who not only viewed her as an enemy, but also believed that women did not belong in the workplace. Immediately upon their arrival in the United States, Mrs. D- and her husband expressed a desire to apply for asylum. While still at the airport, the INS arrested them. It then placed them in different facilities without telling them what was happening to the other. When Mr. and Mrs. D- eventually tracked each other down, officials prohibited them from seeing or telephoning each other. Although Mrs. D- wrote to Mr. D-, he did not receive her letters.

The INS later removed Mrs. D- from the detention facility and placed her in a jail with inmates serving criminal sentences. During her five weeks in detention, Mrs. D- became severely depressed. Once released, she had no knowledge of her surroundings, no place to go and no money. In addition, the INS neglected to provide her with information on her husband's status. Since the INS did not provide advance notice that Mrs. D- would be released, there was no opportunity to make living arrangements for her. Mrs. D- left detention scared and confused.

The INS released Mr. D in July 1999, one week after his wife. They will soon have a hearing on their asylum claims.

In many cases, children must fend for themselves until their parents are released from custody or even after

the parents have been removed from the United States. Even if the INS eventually releases the parents, the family is typically in far worse condition for having gone through the experience.

### **Husband and Wife Detained in Separate Pods and Away From Their Children**

In March 1998, the INS took "Mr. and Mrs. M-", political asylum-seekers from El Salvador, into its custody, leaving their 21- and 18-year-old daughters and a 16-year-old son to fend for themselves. For 16 months, Mr. and Mrs. M- lived in (separate) overcrowded "detention" pods, where they were required to stay — to sleep, eat, shower, and use the bathroom — 23 hours a day. Separated from each other and from their children, Mr. and Mrs. M- tried to maintain their spirits through Bible study and helping other detainees.<sup>47</sup> Apart from the absence of privacy, they endured shoddy medical care and, in the husband's case, threats from gang members. Mrs. M- now tests positive for tuberculosis. In fact, exposure to tuberculosis and other infectious diseases threatens to reach crisis proportions in teeming INS facilities.<sup>48</sup> Mr. M-, in turn, nearly died from a burst appendix that the detention authorities neglected to treat for two days. According to the couple, the facility's health clinic typically provided detainees with Tylenol, whatever their symptoms.

Prior to their detention, the family owned a triplex, living in one unit and renting the other two. Without their parents, the children could not meet the mortgage payments, and were evicted in November 1998. After their eviction, the oldest child dropped out of college and took part-time work as a parking attendant to support her siblings. She lived with friends. The second daughter cleaned, cooked, did laundry and cared for two children, in return for lodging for her brother and herself. Mr. and Mrs. M- sent the children any money they could scrape together by selling their food rations and artwork to other detainees.

In July 1999, the couple was released from detention, without work, a home, health insurance, or means of support. One week prior to their release, each underwent a medical examination that included chest x-rays. While Mrs. M- was only x-rayed once, Mr. M- received x-rays on four consecutive days. Mr. M- requested his medical records, but did not receive them and was assured that "no news is good news." In January 2000, after his release, Mr. M- developed a severe cough. A second round of x-rays

revealed a cancerous tumor in his lung. In early February, doctors removed half of his lung. The doctors have told Mr. M- that a tumor of the size removed could not have developed in the six months since his release from detention.

The INS detention system often fails to accommodate the religious practices and other unique needs of those in its custody.

### **Moslem Somali Youth Observing Ramadan Placed in 24-Hour Lock-Down**

On November 28, 1999, "Mr. H-," a 17-year-old Somali, arrived at a U.S. airport and requested asylum. He had been persecuted due to his membership in the Midgaan clan, an ethnic minority considered "untouchable" in Somalia. His mother was from another ethnic group, and married his Midgaan father against the will of her family. She and her husband had been killed because of their marriage.

Although Mr. H- had no criminal history, the INS detained him at a state correctional center, placing him in a medium security unit with adults serving criminal sentences. A devout Moslem, Mr. H- was observing Ramadan and could not eat during daylight hours. One evening, he was served ham (which he could not eat) for dinner. On another occasion, he tried to save a chicken sandwich served at lunch for his dinner. For this, he was punished with 24-hour lock-down in his cell.

On December 18, 1999, he was released from detention to stay with his cousin. His asylum case will be heard soon.

## **d. The Need for Consistently Generous INS Release Practices**

Although the law requires the INS to detain asylum seekers who arrive at airports without proper documents, it also presumes that the INS will release those who have passed the credible fear screening. INS detention guidelines state that "it is INS policy to favor release" for asylum-seekers who can meet these requirements.<sup>49</sup> Released asylum-seekers can pursue their cases while living with relatives or friends who have legal status in the country.

In theory, all INS districts should follow the same release standards. The statute provides for parole

(release) based on urgent humanitarian reasons or significant public benefit.<sup>50</sup> Yet, inconsistent release practices have plagued the expedited removal process from the outset.<sup>51</sup> Significant numbers of asylum-seekers have been unnecessarily detained for months or years because certain INS districts arbitrarily refuse to release them. INS headquarters' failure or inability to enforce uniform release policies has been abundantly documented, as have the shifting release practices of local district offices. In 1998, the INS districts in Miami, Los Angeles, New York, and New Jersey each changed their release policies.<sup>52</sup> In 1997, individuals who passed the credible fear screening were generally denied parole everywhere but in New Jersey. Starting in 1998, the INS began to release asylum-seekers in these other sites.<sup>53</sup> Release became almost automatic for detainees in Miami.<sup>54</sup> Some districts currently parole very few detainees. In FY 1999, for example, only about nine percent of asylum-seekers held in the Elizabeth Detention Center in New Jersey were released from detention.<sup>55</sup>

In short, custody determinations often turn on where and when the person is detained, rather than the equities of his or her case. Certain INS districts regularly refuse parole to qualified applicants. Others normally release asylum-seekers who meet the requirements. In recent years, the New Jersey and New York INS districts have been particularly intransigent in their refusal to release bona fide asylum-seekers.<sup>56</sup> As human rights agencies have documented, many of these persons receive asylum after months in detention at taxpayer expense.<sup>57</sup> Adding insult to injury, in some cases, the INS does not ultimately contest their asylum cases. In effect, such persons have been detained for no reason at all.<sup>58</sup>

### **INS Needlessly Detains Asylum-Seeker Later Granted Asylum**

"Mr. F-," a 23-year-old asylum-seeker from Somalia, was held for more than four months in INS detention. He was denied parole even though he had passed a preliminary screening interview, had established his identity, had a U.S. citizen cousin willing to care for him, and had no criminal record.

Mr. F- fled Somalia after a bomb was thrown into his home by members of the majority Hawiye clan militia. The bomb killed his father and severely burned Mr. F-'s face and hands. Neighbors hid Mr. F- for months while his wounds healed. He then fled Somalia. Mr. F-'s

mother, who militia members later attempted to rape, remains in hiding. The bombing culminated a series of attacks against his family and other members of the Meheri clan. On one occasion, Hawiye militia members had severely beaten Mr. F-'s father when he attempted to stop them from sexually assaulting his wife. Mr. F- was tied up and held in another room during the attack. He heard his mother's cries and his father begging the men not to harm his family.

In detention, Mr. F- was plagued with memories of the horrors he had faced. He suffered from migraine headaches, had difficulty sleeping, and woke up with images of his family's persecution fresh in his mind. In addition, the skin on his body that had been burned often caused him pain.

If released, Mr. F- would have been able to seek therapy. Instead, months of detention compounded his trauma. After more than four months, he was granted asylum and released.

Release determinations should not turn on the vagaries of geography or the idiosyncracies of local INS officials. There should be a national policy mandating the release of bona fide asylum-seekers and this policy should be uniformly applied. It is particularly cruel to detain asylum seekers who have family or friends willing to house and care for them.

### **Political Prisoner Flees to the United States, Where He Finds Detention Instead of Freedom**

"Mr. L-" was a pro-democracy activist in his native Nigeria. His beliefs led him to organize demonstrations against Nigeria's notoriously corrupt military government. He was involved in rallies protesting the assassination of former president Abiola's wife, as well as the suspicious death of Chief Abiola in prison. Because of Mr. L-'s activities, he was repeatedly arrested and severely beaten by authorities. After the military government detained Mr. L- and killed his brother, Mr. L- fled from Nigeria. Unable to obtain travel documents from the government that was persecuting him, Mr. L- arrived at the United States without proper documents and requested asylum.

Mr. L- was taken in handcuffs to an INS detention center where officials strip-searched him and forced him to change into a prison jumpsuit. From that point on, he faced confinement 22 hours a day in the same room

where he ate, slept, showered, and used the toilet (without any privacy). He could never go outside, but only to a room with high walls and a partially open ceiling covered with wire. His friends and family could visit him through thick glass in the non-contact visitation area for no more than one or two hours a week.

After an INS officer determined that Mr. L- had a credible fear of persecution, his attorneys requested that he be paroled from detention to the care of his family and friends. He has six cousins in the United States, one a U.S. citizen and the others permanent residents. His parole request was supported by a U.S. citizen family member who lived nearby and a family friend who was a city engineer. Notwithstanding these ties, the INS refused to release Mr. L-. After three months, an IJ granted him asylum.



Photo Courtesy: INS

### **e. Lack of Access to Legal Assistance for Detained Asylum-Seekers**

Most detained asylum-seekers cannot obtain legal representation, although this can make all the difference in the outcome of their cases. In 1999, 506 of 2,072 (almost 25 percent) of represented detainees who applied were granted asylum. In the same year, only 40 of 1,172 (3.4 percent) of unrepresented detainees received asylum.<sup>59</sup>



Immigrants in removal proceedings enjoy a statutory privilege of legal counsel, but “at no expense to the government.”<sup>60</sup> According to the INS, this language does not preclude government funding to support immigrant legal services.<sup>61</sup> However, a different statute bars federal agencies from employing counsel “for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested.”<sup>62</sup> The INS has concluded that in combination these provisions prohibit “using appropriated funds to pay the salaries of persons representing aliens.”<sup>63</sup> At the same time, it concedes that the federal government can fund “things that will facilitate aliens obtaining representation.”<sup>64</sup>

### **Executive Office for Immigration Review Fails to Build on Successful Pilot Project to Provide “Legal Rights” Presentations to Detainees**

In the summer of 1998, the Executive Office for Immigration Review (EOIR), the division of the Department of Justice that oversees IJs and the BIA, funded a modest pilot project that provided “legal rights” presentations to detainees in three sites. The project sought to determine whether informing INS detainees of their “legal rights” would have any impact on representation rates, the efficiency of deportation proceedings, or INS detention expenditures. The project took place over a 90-day period at the Florence, Arizona detention facility (staffed by the Florence Immigration and Refugee Project), the San Pedro INS Processing Center in Los Angeles (staffed by CLINIC), and the Port Isabel INS Processing Center in Harlingen, Texas (staffed by the South Texas Pro Bono Asylum Representation Project).

In its program evaluation, the EOIR concluded that the “rights presentations” benefitted the detainees, the INS, and IJs.<sup>65</sup> Detainees benefitted from accurate legal information and increased rates of legal representation. The INS benefitted from reduced anxiety among detainees and decreased detention costs, as the “rights presentations” convinced many to abandon their cases since they did not have viable legal claims. IJs, in turn, were able to complete more cases in a summary fashion and benefitted from immigrants who came to their hearings informed about the process and the law. The report estimated that it would cost \$1.3 million to expand the project nationwide. Although a humane, cost-effective program, EOIR apparently has no plans to replicate it.

Because representing detainees is time-consuming and costly, private attorneys often charge more than their normal rates and nonprofit agencies cannot accept significant numbers of these cases. As a result, large numbers of detainees go to court unrepresented.<sup>66</sup>

The problem is compounded for immigrants detained in remote locations. For example, the 1,000-bed Bureau of Prisons (BOP) facility used by the INS in Oakdale, Louisiana is two and a half hours away from the nearest major city, Baton Rouge. No free legal services are currently available to detainees at Oakdale, and only one private immigration lawyer regularly goes to the facility. Detainees in remote county jails face the same dilemma.

### **Mozambican Asylum-Seeker Detained for Three Years in Remote Arizona Prison**

“Mr. S-,” a 29-year-old asylum-seeker from Mozambique, has been detained for more than three years in Eloy, Arizona. Because an IJ mistakenly found Mr. S- barred from applying for asylum, he has never been able to present his claim. Because he was poor and detained in a remote location, Mr. S- could not find a lawyer. The Eloy facility is located in the middle of the desert; until recently few free legal services were available to detainees there.

Mr. S- and his family fought in the Mozambican civil war. His father was a well-known local leader of the Mozambican National Resistance (RENAMO), which opposed the communist government. Mr. S- himself had been a RENAMO soldier since age 14. After his parents were captured and killed, the authorities began looking for Mr. S-. He fled the country, and eventually made his way to the United States.

Mr. S- crossed the U.S.-Mexico border with no documents, no money, and nowhere to go. He approached a church in an Arizona border town, hoping for assistance. Finding no one there, he took a bicycle that was leaning against the wall. When he returned the bicycle, he was arrested and charged with burglary. He pled guilty and was sentenced to 80 days in jail and three years probation. He was then turned over to the INS, taken to the Eloy facility, and placed in deportation proceedings.

At Eloy, Mr. S- could not find a lawyer to represent him for a price he could afford. No pro bono lawyers were available. At what was supposed to be Mr. S-'s final hearing, the IJ told

him that he was barred from applying for asylum. Under a new law, the judge maintained, Mr. S- was considered an aggravated felon. In fact, the judge was mistaken, which an immigration lawyer could have brought to his attention. However, Mr. S- was unable to defend himself and, as a result, he spent the next three years in detention. His 1999 request for protection under the Convention Against Torture was denied. When he finally obtained legal representation, his lawyer appealed his case to the BIA, where it is currently pending.<sup>67</sup>

Some INS detainees try to represent themselves, but even if their prison happens to have an updated legal library with immigration materials (and most local jails do not), few can master the complex legal procedures and standards that apply to their cases.

Detainees also face problems with new procedures for conducting removal hearings. In particular, removal hearings are increasingly being held by video-conference.<sup>68</sup> In these cases, the judge and the detainee observe and speak to each other through monitors in both the court and the detention center. The INS trial attorney likewise remains in the court room. The detainee's counsel may appear in person or telephonically.

The INS and EOIR view video-conferencing as a tool to provide removal hearings for non-citizens who are serving criminal sentences, obviating the need to transfer them to an INS detention facility. In this way, the INS hopes to facilitate the deportation of detainees not eligible for relief from removal.

Video hearings put asylum-seekers at a distinct disadvantage. An in-person hearing affords an asylum-seeker a better opportunity to establish a human connection with the judge and to demonstrate his or her credibility. Video-conferencing also interferes with a detainee's right to counsel because it allows the INS to keep a detainee at a distant location, away from counsel and other support systems. If the detainee can secure counsel at all in these circumstances, pre-trial attorney/client contact is limited. The ability to examine witnesses, object to questions by the INS, and otherwise provide adequate representation at the hearing may also be compromised.

## f. Inadequate Health Care and Failure to Release Those with Severe Medical Conditions

The shoddy and occasionally life-threatening health care provided to immigrants has been a consistent theme in human rights reports on the INS detention system over the last decade.<sup>69</sup> Recent reports indicate that, if anything, the quality of care has deteriorated in recent years.

In 1998, for example, Human Rights Watch found extreme problems in the medical care provided to INS detainees in local jails, including "lack of prompt treatment, requirements that detainees pay for medical treatment, inadequate diagnosis or treatment of mental problems, inability to communicate with detainees seeking medical treatment, and a dental policy in which extraction is the sole remedy for every dental problem."<sup>70</sup> The report identified poor management as the source of these problems, concluding that "INS has no discernible policy regarding which medical services should or should not be provided by local jails."<sup>71</sup> A recent investigation by the DOJ's Civil Rights Division regarding the medical care provided to inmates in one INS contract facility, the Jackson County Correctional Facility in Florida, uncovered significant problems in "access to care; physician supervision of medical care; medication access and management; chronic illness management; emergency/urgent care; infectious disease control; mental health care; care and supervision of isolated or restrained inmates; and medical diets."<sup>72</sup>

In 1999, Amnesty International concluded that the INS violated international standards for the treatment of detainees by failing to determine whether asylum-seekers in its custody had been tortured and, as a consequence, failing to take appropriate steps to manage their trauma.<sup>73</sup> The report found that the INS victimized many asylum-seekers by placing them in solitary confinement for behavior caused by past trauma.<sup>74</sup>

The additional stress placed on the INS system by mandatory detention does not bode well for improved medical care in the future. The cases of Mr. and Mrs. M-, discussed above, illustrate the increased risk of contracting infectious diseases (like tuberculosis) and the inability of detainees to obtain appropriate care in overcrowded facilities. Language difficulties often exacerbate problems in medical treatment. New

arrivals often do not speak English. While the U.S. Public Health Service, which provides medical services in many facilities, can use telephone interpreters to communicate with detainees in their own languages, doctors and nurses often insist on speaking in English. The INS also continues to detain asylum-seekers who should be released for medical reasons.

### **Asylum-Seeker with Facial Paralysis Cannot Communicate with Doctor**

“Mr. H-,” a young Somali, came to the United States to apply for asylum. He belongs to a small minority clan in Somalia, and feared persecution from the large clan militias that fight for control over the country. One of these militias imprisoned and tortured Mr. H-, and killed his father. Mr. H- eventually made his way out of the country, and bought a ticket to the United States. He had to buy travel documents because Somalia had no government that could validly issue them. Upon arriving at an international airport, he was transferred to a detention facility.

After almost five months, Mr. H- was still waiting in detention for his asylum hearing. One afternoon, while brushing his teeth, he was suddenly unable to move the muscles on the right side of his face, which felt completely numb. He panicked, and with the help of another Somali detainee, asked to see a doctor. The nurse who examined him later that night did not make a diagnosis, but told him that he needed to see a doctor. Yet, three days passed without Mr. H- seeing a doctor. During that time, Mr. H- was terrified that he had suffered a stroke. On the fourth day, a doctor finally examined him. Mr. H- does not speak or read English, so he asked for an interpreter. The doctor refused. Although the doctor diagnosed Mr. H- with Bell’s palsy, which is not a serious condition, Mr. H- was not able to understand the diagnosis. During subsequent medical examinations, public health personnel consistently refused Mr. H-’s requests for an interpreter. Mr. H- remained confused and fearful, and was often unable to sleep at night because he was so worried about his health.

Mr. H-’s paralysis and numbness went away after a few weeks. However, he reports that the experience was the most frightening and dehumanizing aspect of his detention. After more than eight months in detention, Mr. H- was granted asylum and released.

### **Asylum-Seeker Who Is More Than Seven Months Pregnant Nearly Goes into Labor in Detention**

“Mrs. I-” fled her home country, Nigeria, in order to seek asylum in the United States. When she arrived, although she was seven and a half months pregnant, the INS detained her. For more than four days, she suffered from a high fever and vomiting. After five days in detention, she went into false labor and the INS finally took her to a local hospital. Although the law generally prohibits the release of asylum-seekers before they have passed the credible fear screening, in this case the INS could have released Mrs. I- under regulations that allow for parole “to meet a medical emergency.” After Mrs. I-’s condition stabilized, the INS attempted to take her into custody again, but the hospital refused to release her because of her medical condition. Ultimately, Mrs. I- received parole on humanitarian grounds, allowing her to live with her relatives in the United States.



Photo Courtesy: INS

### **g. Lack of Access to Pastoral Care and Social Services**

Immigration detainees experience loneliness, frustration, confusion, and despair. Like prisoners serving criminal sentences, they are separated from friends and family and face the daily indignities of incarceration. They also face the additional stress of uncertainty. Unlike criminal prisoners, INS detainees cannot predict the length of their detention. Even worse, they do not know if they will ultimately be released or deported to a country where they might be persecuted. In these circumstances, the assistance of pastoral and social workers can make all the

difference. Unfortunately, the INS does not have a formal chaplaincy program for those in its custody and, as a result, many detainees do not have access to pastoral services.

### **INS Terminates English Classes and Bible Study for Asylum-Seekers**

“Ms. R-,” a single mother of twins, came to the United States in February 1997. When she arrived at the airport and asked for asylum, she was handcuffed and transferred to a detention center. Ms. R-’s asylum claim has twice been denied by an IJ, and her case is currently on appeal. Although she has no criminal record, Ms. R- has spent more than three years in INS detention. She wears a prison uniform, and sleeps, eats, showers, and uses the toilet in the same room that she shares with other detainees. She is never allowed outside.

Detention under these conditions has caused Ms. R- great anguish. She worries constantly about her twin boys in Africa. She believes that her stress and inactivity contribute to her high blood pressure. Despite poor English language skills, Ms. R- managed to communicate her frustrations and fears to the priest who celebrated mass at the facility. With his help, she contacted the Jesuit Refugee Service (JRS).

Ms. R- became an avid participant in programs that JRS provided at the detention center. She attended an English class each week and was able to forget temporarily that she was in prison. The new words she learned helped her communicate with guards and other detainees. She also regularly attended Bible study sessions and small group pastoral visits, which “helped [her] learn about God.” “You know, sometimes all you want to do is cry, cry in detention,” she said. “But then you see it doesn’t help anything. So instead I pray ... I leave it to God.”

In late 1999, the INS canceled all of these programs because the pastoral volunteers discussed detention during Bible study and English class. The INS said that this violated its (unwritten) rules, raising the question, if not detention, what would pastoral workers discuss with detainees? Ms. R- now finds that she has nothing to look forward to and has begun to “think too much” again. After more than four months, Bible study classes finally began again. Now, however, she says that the classes are monitored by the INS and “are not conducted with joy like before.” English classes and pastoral visits are still prohibited.

## **h. Overcrowding**

The physical conditions at detention facilities, including overcrowding and the resulting lack of privacy, drive many detainees to despair. At the Elizabeth Detention Center in New Jersey, which the INS considers a model facility, asylum-seekers spend 22 hours a day in the same room. In that room, as many as 40 people eat, sleep, shower, and use the bathroom. They must use the toilets and showers in plain view of other detainees and guards. They can never go outdoors, only to an indoor room with a partially-open ceiling that is covered with a chain-link fence. Some men and women have been living in these conditions for more than two years.

The INS’s Krome Service Processing Center in Miami has consistently suffered from overcrowding. In recent years, the center’s population has risen from 300 to 550, and at times, has exceeded 600.<sup>75</sup> While many of those confined at Krome have criminal convictions, others are asylum-seekers who arrived at the Miami International Airport.

As a result of overcrowding, temporary cots have become a staple at Krome, and buildings that were supposed to be closed or used for other purposes are now being used to house detainees. At this writing, 16 cots have been added to six of the pods for detainees with criminal convictions, even though those pods were already filled to their maximum capacity of 50 persons. Detainees have complained that mattresses for these cots have been in short supply. Moreover, officials have converted part of the Public Health Service building into housing for detainees and male asylum-seekers have been housed in a building that was supposed to be closed.

The overcrowding has not only made daily life more difficult for detainees, it has also limited attorney access. Because of the high numbers at Krome, daily counts taken at the facility are frequently inaccurate, resulting in recounts which effectively close the facility for hours. Since detainees must remain in one location during this time, attorneys who would like to visit their clients must either wait or return another day.



Photo Courtesy: INS

## i. Abuse by Prison Officials and Misuse of Segregation

The conditions in INS “processing centers” and contract prisons has led to hunger strikes, suicide attempts, and even riots.<sup>76</sup> Abuse by guards and other detention officials represents a recurring theme in reports on the INS system.<sup>77</sup> For example, ten guards at the Union County jail in New Jersey were convicted for various offenses related to assaults against INS detainees in their custody.<sup>78</sup> Among other abuses, the guards beat and kicked immigrants, stuffed their heads into toilets, yanked out their pubic hair, and squeezed their tongues with pliers.<sup>79</sup> In a bitter irony, the victims of these assaults had been transferred to Union County from the INS contract facility in Elizabeth, New Jersey where, according to an INS report, they had been “subjected to harassment, verbal abuse, and other degrading actions” by guards.<sup>80</sup> At that facility, for example, guards refused to issue sanitary napkins to women and provided them with oversized male underwear marked with hand-written question marks on the crotch area.<sup>81</sup>

### **Abuse of Asylum-Seekers**

“Ms. T-” arrived in the United States three years ago, as a 19-year-old asylum-seeker. In her native Uganda, Ms. T- had opposed the government and supported the opposition rebels. As a result, the government threatened to kill her. After the military kidnapped her sister thinking that it was Ms. T-, Ms. T- fled Uganda in the only way open to her, with false documents.

Ms. T- arrived at an international airport a few days later. After she asked for asylum, the INS handcuffed her, shackled her ankles, and took her

to a detention center. She remained detained there for seven months before being transferred to a county jail.

At the jail, Ms. T- was strip-searched and placed in minimum security. Shortly after her arrival, she was moved to the maximum security section without explanation, even though she was a non-criminal detainee. When she saw the conditions of the other prisoners in maximum security, Ms. T- became despondent and started crying. She attempted to explain that she sought asylum and was not a criminal.

Her protests seemed to enrage the guards, who yelled at her and forcibly took her to her cell. Ms. T- continued to cry. As a result, the guards placed her in what they called the Bad Attitude Unit or “BAU.” Prisoners viewed the BAU as a form of punishment for rule violations.

Ms. T- was seated on the floor in the cell when a female guard and a nurse entered and told her to take off her uniform. She complied, but refused to remove her underwear and her bra. The two women held Ms. T- and forcibly took off her bra and underwear. Ms. T- then went to sit on the bed to cover herself with a blanket, but the bed did not have sheets or a blanket; it was a mattress covered in plastic. She hid under the bed because she was embarrassed to be naked.

Two large male guards arrived and pulled her from under the bed. Five guards then surrounded her and threw her into the middle of the cell. The guards asked whether she was hearing voices or was trying to kill herself. She responded that if she had wanted to kill herself she would have remained in her own country. She told them that she was upset at the way they were treating her. A guard then threw her on the bed in the cell. Because it had no sheets or blankets, it was very cold. The two male guards held her down. One held her arms and head against the bed while the other held down her legs. Meanwhile, another guard injected her with a drug. The guards then released her. She again hid under the bed to hide her nudity. The drug had no effect on her. About 30 minutes later, the guards returned, pulled her out from under the bed and took her to another cell.

When they arrived at the new cell, the guards threw Ms. T- on a bed, and shackled both her legs and her arms to the bed so that she was facing up. She cried out in fear. A guard again injected her with a drug. She continued to cry. A guard returned and put a towel on her stomach,

but this did not cover her entire body so Ms. T- attempted to move the towel with her shackled hand to cover herself, bruising her hand.

Ms. T- was shackled to the bed for two days. She was unconscious during part of the time, perhaps due to the injections. Finally, she was taken to a doctor. He asked her some questions and told her that she could return to the minimum security section of the prison. The guards, however, refused to return her. After 55 days in maximum security, the INS transferred Ms. T- back to the INS detention center. She was released from detention about a year and a half after arriving in the United States. The IJ granted her asylum request four months later. Ms. T- is now attending school and trying to forget her ordeal.

At times, detention officials misuse segregation, turning it from a disciplinary tool into an instrument of cruelty. Segregation seems a particularly cruel response to persons suffering from mental or physical illness.<sup>82</sup>

### **Misuse of Segregation for Mentally Ill Detainee**

Mr. X-, a Sri Lankan national, arrived in the United States in April 1998. He had endured torture by his country's government, as evidenced by his broken fingers. Mr. X- hoped to pass through the United States in transit to Canada, where he planned to join his sister and brother-in-law. However, due to his invalid travel documents, the INS placed him in expedited removal. Although he passed a credible fear screening, Mr. X- remained in detention. At the detention center, Mr. X- suffered serious rectal bleeding, hemorrhaging, and depression. His medical problems were so severe that he was often unable to sleep at night. When he slept he wore diapers, which were soaked with blood by morning. Several of his fellow detainees wrote a letter to the detention center officials stating their concerns about his health. On one occasion, unable to sleep and in agonizing pain, Mr. X- left his bunk and went to the common eating area. At 3:00 a.m., a guard found Mr. X- sitting in the room and listening to his walkman. For failing to obey the center's rules, the guard placed Mr. X- in solitary confinement.

While detained, Mr. X- exhibited mental health and behavioral problems. He attempted suicide several times. Rather than providing Mr. X- with appropriate treatment, officials placed him in solitary confinement, arguing that this was

necessary to prevent Mr. X- from committing suicide. Mr. X-'s attorney estimates that he has spent more than seven months in solitary confinement since his arrival in the United States.

A judge denied Mr. X-'s application for political asylum and the BIA upheld this denial. The IJ also denied his claim under the Convention Against Torture, citing minor inconsistencies in his testimony. An appeal of the IJ's decision is currently pending before the BIA.

During Mr. X-'s prolonged segregation at the INS detention center, his attorney made several requests that he be afforded a psychological evaluation and appropriate mental health care. After his requests were ignored, the attorney notified detention officials that a lawsuit would be filed. Shortly thereafter, the INS transferred Mr. X- to a state prison where he was also placed in solitary confinement. Recently, he was sent to a different state correctional center, where he is being held in a mental ward.

## **j. Improperly Informing Foreign-Government Officials of Asylum-Seekers in Detention**

INS regulations require the agency to maintain the confidentiality of asylum-seekers.<sup>83</sup> Asylum-seekers often fear that if officials from their own governments learn that they have come forward with their stories, their family members abroad will be endangered. Or, if they do not ultimately receive asylum, they will be at even greater risk of persecution themselves. Unfortunately, these fears are often justified.

In order to protect asylum-seekers and their families, the United States must take seriously its responsibility to maintain confidentiality. Some INS districts, however, ignore this duty. For example, in New York, asylum-seekers from certain countries have received letters informing them that their consulates were notified that they are in INS detention. In themselves, the letters comply with a regulation that requires the United States to notify certain governments of the detention of their nationals.<sup>84</sup> However, the INS has gone a step further and informed consulates that their nationals are detained at facilities which hold only asylum-seekers. This effectively violates the prohibition against informing foreign governments of their nationals' asylum claims.

## Confronted by the Government That Killed His Parents

“Mr. B-,” a 27-year-old, fled his native country in Africa after the authorities murdered his mother and father outside their home. His father, a political activist, was shot by soldiers while Mr. B- watched from a window. After his parents’ deaths, Mr. B- learned that he himself was also wanted by the authorities. A friend of his father’s, who was hiding Mr. B-, insisted that he flee the country.

In October 1999, Mr. B- fled to the United States with someone else’s passport. As is typical in such cases, he could not secure his own travel documents from the authorities in his country. Upon his arrival, Mr. B- was detained at an INS detention center. By March, he had obtained free legal assistance and had begun to feel secure in the United States. One day, however, he was called to the visitation area, where he expected to see his lawyer. Instead, he was confronted by two representatives from his country’s consulate who said they wished to interview him. Mr. B- was shocked, because he had not contacted his government and did not wish to speak to members of the regime that killed his parents. He believes that the INS notified his government of his presence and brought them in to see him.<sup>85</sup> Since the facility where Mr. B- was detained holds almost exclusively asylum-seekers, it would have been obvious to the consular representatives that Mr. B- had requested asylum.

Mr. B- is now worried that if he loses his asylum claim and is deported, the government will count his asylum request as another strike against him.



Photo Courtesy: INS

## 2. Protecting the Most Vulnerable: Detention of Women and Children

The detention of bona fide asylum-seekers raises significant concerns about the viability of the United States’ protection regime. Particularly troubling is the long-term detention of those who raise cutting-edge asylum claims. Increasing numbers of women and children, for example, are filing for asylum based on claims that stretch the traditional confines of asylum law. These cases merit particular attention; the UNHCR estimates that women and children comprise up to 80 percent of most refugee populations.<sup>86</sup> However, adjudicators often dismiss novel claims, failing to recognize their merits under modern refugee principles. As a result, many asylum-seekers who make gender- or age-based claims must endure long periods of detention while their cases run their course.

### a. Women in Detention

One of the most publicized cases raising gender issues in recent years involved Fauziya Kassindja, a citizen of Togo.<sup>87</sup> After the death of her father, Ms. Kassindja was taken in by an aunt who insisted not only that she marry a much older man against her wishes, but also that she undergo female genital mutilation (FGM), a procedure that disfigures the female genitalia. Her asylum claim was initially presented while Ms. Kassindja was in INS detention. An IJ denied the claim, maintaining that FGM did not constitute persecution against a specific group, but conformed with a general cultural norm. Eventually, Ms. Kassindja obtained asylum through a landmark ruling by the BIA that FGM constituted persecution for asylum purposes.<sup>88</sup> The case paved the way for many similar claims.



Ms. Kassindja's case arose prior to expedited removal. Had expedited removal been in place, her fate would certainly have been different. There would have been no mechanism to correct the decision reached by the judge.

The system was tested some time later with the case of Adelaide Abankwah, a young woman from Ghana who, unlike Ms. Kassindja, was placed in expedited removal upon her arrival. After passing her credible fear interview, Ms. Abankwah was confined in the Wackenhut detention facility, where she remained for a year and a half. She was 29 and a member of the Nkumissa tribe. This tribe punishes women who engage in premarital sexual relationships. When faced with an arranged marriage which would have revealed that she had engaged in premarital sex, Ms. Abankwah began to fear that FGM would be performed on her and she fled to the United States. An IJ denied her asylum claim, and the BIA affirmed. A federal court eventually overturned this denial, holding that the judge and BIA had imposed too high a burden of proof.<sup>89</sup>

The decision represented a triumph for asylum-seekers. At the same time, it highlighted the difficulties created by detention in such cases. Ms. Abankwah's case attracted considerable attention from the news media, lawyers and advocacy organizations, fortifying her decision to pursue her case. Other women, however, almost certainly have failed to raise or have abandoned similar claims in the face of open-ended detention.

Immigrants who fear the consequences of a purely "personal" dispute have traditionally not been found eligible for asylum. Yet a growing class of asylum-seekers maintain that they fear abuse at the hands of their husbands, and that their government will not protect them.<sup>90</sup> The UNHCR has unequivocally stated that countries are free to apply the refugee definition so as to include women fleeing domestic violence in these circumstances.<sup>91</sup> Canada, for example, issued guidelines recommending that women should be recognized as refugees if they suffered domestic violence, provided that they could not secure protection from their governments.<sup>92</sup> The Canadian Guidelines were mirrored in similar INS guidelines adopted in the United States,<sup>93</sup> and several IJs have granted asylum to women based on unchecked domestic abuse in their homelands. In a 1999 decision, however, the BIA rejected the claim of a woman who had been beaten by her husband and repeatedly denied government protection.<sup>94</sup> The decision has already been used to deny at least one asylum claim that raised similar issues.

## Severely Battered Asylum-Seeker Detained

Mrs. K-, a 50-year-old native of the DRC, was married to a military officer who served under the regime of former President Mobutu. Together, they had four children, ages 24, 21, 12 and 7. During the course of their marriage, Mr. K- repeatedly raped and severely beat Mrs. K-. Mrs. K- also contracted sexually transmitted diseases from her husband. According to the U.S. Department of State, domestic violence is widespread and rarely reported in the DRC. Moreover, the DRC has no laws that address spousal abuse, and no crisis centers or hotlines for victims. Due to Mr. K-'s high ranking military status and the refusal of the government to intervene in what it considers a "private" matter, Mrs. K- had no protection from her batterer.

In early 1998, Mrs. K- nearly escaped death after a gruesome beating that left her unconscious for four days. She was threatened with a gun, punched, kicked, raped, and dragged across the floor, before her son was able to transport her to her brother's home. After Mrs. K- recovered enough to travel, she fled to the United States using her sister's passport. She could not secure her own passport because she feared that officials at the passport agency would alert her husband that she was trying to flee.

Upon her arrival in the United States in March 1998, Mrs. K- passed a credible fear interview and was sent to an INS detention center. She filed an application for political asylum, arguing that she had suffered persecution as a member of the social group consisting of Congolese women who refused to live at the mercy of abusive husbands. The IJ and subsequently the BIA denied her application. Her case was later reopened and she applied for relief from removal under the Convention Against Torture. In August 2000, 29 months after her arrival in the United States, Mrs. K- was granted protection under the Convention Against Torture and was released from detention.

## b. Children in Detention

Children also deserve special treatment in our immigration system. As in the case of women seeking asylum, the United States has followed Canada in adopting model guidelines intended to establish an appropriate methodology for deciding children's claims.<sup>95</sup> The U.S. guidelines recognize that certain forms of human rights abuses can only be experienced by children.

The celebrated case of Elian Gonzalez, the six-year-old Cuban boy whose custody became a battleground for international relations, drew significant attention to the issue of children in INS custody. Every year, the INS apprehends several thousand unaccompanied minors (under 18 years of age) attempting to enter to the United States.<sup>96</sup> All of them are arrested, almost all of them are detained for some period, and many are eventually deported. In FY 1998, the INS reported having detained roughly 5,300 children; it deported 880 of them.<sup>97</sup> In FY 1999, the INS detained 4,607 undocumented juveniles under the age of 18 and returned 1,218 juveniles.<sup>98</sup> These children travel by land, air and sea, and come from all corners of the globe. A large number originate in Mexico, South and Central America, but children's advocates report assisting detained minors from as far away as Sri Lanka, Albania, Pakistan, and China.

The United States' detention of unaccompanied minors has come under intense criticism. For example, Human Rights Watch concluded that "unaccompanied children awaiting determination of their status should not be detained," and that "the U.S. Congress should not charge the same agency with the care of unaccompanied, undocumented children and also the enforcement of immigration laws against them."<sup>99</sup>

International organizations envision a system that nurtures and cares for children, instead of one that imprisons them. The UNHCR maintains that "children seeking asylum, particularly if they are unaccompanied, are entitled to special care and protection."<sup>100</sup> This should include education, health care, and appointment of a special guardian "with expertise in the field of child caring."<sup>101</sup> In such a system, "unaccompanied minors should never be detained on account of illegal entry or presence."<sup>102</sup>

International treaties affirm the same themes. Article 20 of the 1990 United Nations' Convention on the Rights of the Child, which the United States has not ratified, provides that unaccompanied children "shall be entitled to special protection and assistance provided by the State" and that if not sent to foster care, they should be sent to "suitable institutions for the care of the children." Placement in detention centers and jails, especially with adjudicated juvenile delinquents, is not envisioned and would certainly violate the spirit of the treaty. Despite these international standards, the United States routinely detains children arriving in the country, many of whom fled intolerable situations in their home countries.

## Twin Brothers Flee Street Gangs, Find Refuge

Jose Luis Oliva and Jose Enrique Oliva are 16-year-old twin brothers from Honduras.<sup>103</sup> The Border Patrol arrested them last summer after they swam across the Rio Grande. The INS placed them in a detention facility, where they remained pending a decision on their cases. The children maintain that if returned to Honduras, there would be no one to care for them, they would be forced to live on the street, and their lives would be at risk. Their mother abandoned the boys when they were 22 days old. They lived with various relatives who physically abused them.

The asylum applications filed by these boys raised novel questions. During the pendency of their cases, they remained in detention. The INS argued that releasing the boys would leave them homeless. Their lawyers argued that some form of secure housing, distinct from detention, was required in light of their age and vulnerability. The lawyers requested the appointment of a special guardian to safeguard the children's interests.

Jose Luis' and Jose Enrique's cases had a happy ending. The IJ granted asylum to the boys on February 7, 2000.



Photo Courtesy: INS

## Detained While Only Eleven Years Old

Eber Sandoval is an 11-year-old from Honduras. After crossing the Rio Grande last summer near Brownsville, Texas, Eber was detained at a special facility for juveniles located in Los Fresnos, Texas. Shortly after his birth, both of his parents abandoned him. Like Jose Enrique and Jose Luis, Eber maintained that in Honduras he would have been forced to participate in gang activities and that security forces would have retaliated against

him. In addition, he had no one to look after him there. While Eber was detained at a more appropriate facility than Jose Enrique and Jose Luis, the detention of children always raises concerns.<sup>104</sup> Eber received political asylum in March 2000, and was released from custody shortly thereafter.

### **15-Year-Old Girl Detained in Juvenile Jail for Seven Months Prior to Asylum Grant**

In a case that gained national attention, a 15-year-old girl arrived in the United States from China on April 9, 1999. She had been smuggled into the United States at the request of her parents. As the third child in her family, the girl had been denied education, medical care, and other basic rights in China under her nation's family planning policy. Upon her arrival in the United States, she applied for political asylum. In May 1999, she was transferred to a juvenile jail in Portland, Oregon, where she remained detained (with criminal offenders) throughout the pendency of her application. Although granted political asylum in late October, she was not released until mid-December. INS officials blamed the delay on their inability to find and approve a sponsor for the girl. They cited the complex approval process for placement of children smuggled into the United States, explaining that smugglers often pose as sponsors.

In this case, however, shortly after her arrival, the girl had identified an uncle who resided in New York. Although he was willing to act as a sponsor, her placement with him faced multiple delays. After he visited the New York INS office in September to straighten out the situation, an INS home study was ordered. However, this was not conducted until early December 1999.<sup>105</sup>

Bureaucratic inefficiencies and other shortcomings in the system can also conspire to send detained children back to life-threatening situations.

### **Deported to Honduras by Mistake, Boy Finally Makes It Back**

In late 1997, "J-," a national of Honduras, was apprehended while attempting to cross the southern border. At the age of 17, he had fled his native country due to persecution by a gang. J-'s troubles started when gang members stole a cow belonging to his family. Although he knew that the gang members might seek revenge, J- reported the incident to a judge. In retaliation, the gang members attempted to kill him. During one attack, a bullet barely missed him.

Ultimately, the gang members killed the judge to whom J- had reported the theft.

Upon his apprehension by the Border Patrol in 1997, J- was taken into INS custody. He filed an asylum application in January 1998. An IJ denied the application in late February 1998. The BIA denied his appeal in October 1998. During this time, J- remained in detention. The day after the BIA denied the case, his representative filed a request for an interview under the Convention Against Torture and requested a stay of deportation. Nevertheless, the INS deported J- to Honduras.

J-'s representative contacted INS headquarters and explained the situation. The INS agreed that his deportation had violated the Torture Convention and that he should be returned to the United States. An officer instructed J-'s representative to have J- proceed to the U.S. Embassy in Tegucigalpa.

Since J- was in hiding, finding him in Honduras proved difficult. His representative had a phone number of one of his uncles, who lived in northern Honduras. After a week of trying to reach him, the representative spoke with the uncle and explained the situation. The uncle had not seen or heard from his nephew since his return. However, knowing that the boy's life was in danger, the uncle embarked on an eight-day trip to southern Honduras, where J-'s family was then living. By the time he had reached southern Honduras, Hurricane Mitch had struck. The family was not able to get J- to the Embassy until late December 1999. Upon his arrival, confusion among Embassy officials and difficulty securing appropriate travel documents further delayed J-'s travel to the United States. During this time, J- was paralyzed with fear, and stayed in hiding.

He was finally able to return to the United States in January 2000 and received asylum shortly thereafter.

Children venture alone to the United States for a variety of reasons.<sup>106</sup> Many come to join parents or family members already here. Some arrive fleeing persecution or war in their home countries. Some come because they have been neglected or abandoned by their parents. Some children are sent by their families to earn money to send back home.

Their port of entry, age, immigration history, and the availability of INS bed space all determine where a child will be placed. Some children are held at privately-run, state-licensed shelter-care facilities.

Others, though, are not as fortunate. The INS has reported that it has access to 500 beds in nonprofit shelters, group homes and foster care facilities.<sup>107</sup> Yet, this does not suffice.

Shelter-care facilities are generally run by nonprofit agencies under contract with the INS. For example, there are approximately 60 beds in Chicago at the International Children's Center, administered by the Heartland Alliance for Human Needs and Human Rights. The population there consists mainly of Chinese children, ages 13-17, who arrived at international airports throughout the country. The children take regular field trips, receive legal rights presentations at least once a week, and visits by legal representatives from the Midwest Immigrant Rights' Center at least twice a week. Similarly, all of the approximately 50 Central American minors held at the International Educational Services shelter in Harlingen, Texas have weekly access to legal advice, and take recreational field trips.

Detention rarely serves a child's best interests, particularly when family members or social service agencies can care for him or her. The settlement agreement of a class-action law suit mandates certain standards for the detention of children. The settlement, reached years ago in the case of *Flores v. Reno*,<sup>108</sup> ended a challenge brought by several national organizations on behalf of unaccompanied minors in the Western Region of the INS. Under the *Flores* agreement, minors held in juvenile detention facilities or other non-shelter environments must be "separated from delinquent offenders" and must be transferred to shelter-type facilities within three to five days, depending on the availability of space.<sup>109</sup> There are many exceptions to this policy, however, that leave hundreds of children unprotected. For example, INS minors may be held indefinitely in corrections facilities "in the event of an emergency influx."<sup>110</sup> In addition, the INS has carte blanche to hold any minor who is adjudicated or even suspected of being a delinquent or a flight risk at a "juvenile detention facility."

The *Flores* agreement requires that even minors with criminal backgrounds be held in "separate accommodations" from those with adult criminal convictions. However, in practice, commingling regularly takes place. In Los Angeles, for example, INS minors are routinely mixed with the general criminal population. Attempts to correct this situation with the Los Angeles district have been unsuccessful.

## **Fifteen-Year-Old Boy on Vacation, Wrongly Suspected of Having False Documents, Spends More Than a Month in Detention**

"N-," a 15-year-old native of Pakistan, came to the United States to spend his summer vacation with relatives in California. Upon arrival at the Los Angeles International Airport, N- presented a valid passport and tourist visa to immigration officials. The officials asked him why he came to the United States and N- stated the purpose of his visit. The officials did not believe him and suspected that he intended to remain in the United States permanently. They charged him with inadmissibility for possession of improper entry documents. He was transferred to INS custody without an opportunity to speak to the relatives awaiting his arrival.

N- was detained at a state juvenile corrections facility for more than one month. Twelve days passed before his first immigration hearing. No interpreter was provided at the hearing, and another week passed before N- was afforded a second hearing. Not until two additional hearings did the IJ terminate proceedings, finding that his documents were valid and he only intended to visit family temporarily.

Throughout his detention, N- endured deplorable conditions. Officials detained him in a unit for juveniles with criminal convictions. He was confined in a small room. The staff spoke exclusively in English and no interpreters were provided to explain the rules of the facility to him, increasing the boy's confusion and anxiety. Some meals contained pork, which he does not eat due to religious convictions. Dietary options were not provided to N-, and as a result he was often hungry. Daily exercise was mandatory. Undernourished and weak, N- was threatened with pepper spray when he was physically unable to participate. Telephone calls were only allowed sporadically after 5:00 p.m. on weekdays and on Saturdays. This policy inhibited N- from maintaining contact with his relatives and informing his counsel of his treatment and scheduled hearings.

Many minors, although they have no criminal backgrounds, are held at government or privately-run correctional institutions. For example, the INS in Los Angeles places arriving minors with no suspected criminal involvement at Los Padrinos juvenile hall, a correctional facility run by the Los Angeles County Probation Department. Los Padrinos is a locked-

down, secure facility, where juvenile offenders are held separately from the INS minors. Although religious volunteers are present there, the children never leave the facility on field trips or other excursions. When moved into or out of the facility, officials handcuff them. Attorneys may conduct individual visits, but not legal rights presentations. Pepper spray is an official tool of discipline, and the children report problems obtaining access to telephones.

The situation is completely different at Casa San Juan, a converted convent run by Catholic Charities two hours away in San Diego. There, children can remain with their mothers and keep some of their toys. They may venture outside freely after school hours. Attorneys and religious volunteers have access to all rooms in the facility, including the bedrooms and the kitchen.

Unfortunately, the INS does not have nearly enough shelters for families and unaccompanied minors. As a result, in a wholly unacceptable practice, it often separates children from their parents. In Los Angeles, for example, the INS recently held two mothers at an INS detention center, while their children were sent to a juvenile corrections facility. In one case, a Chinese mother arrived with her 10- and 12-year-old boys in January 2000. Instead of placing the three at the San Diego shelter or a similar facility, the INS detained the boys at Los Padrinos juvenile hall and the mother at the INS San Pedro detention facility. Officials did not tell the mother of the whereabouts of her sons, and denied her repeated pleas to contact them. In the end, the woman became so distressed that she had a seizure and was hospitalized for several days. It was not until a month later that the mother and sons were reunited with the boys' father in New York.<sup>111</sup>

### **Torn From Her Mother's Arms: Eight-Year-Old Czech Girl Forced into Juvenile Criminal Corrections Facility**

Eight-year-old "L-" arrived at the Los Angeles airport with both her parents in February 2000. The family had fled the Czech Republic, where their lives had been repeatedly threatened by the Russian mafia.

After they arrived at the airport, they were kept in an INS holding area for three days. INS officials at the airport interviewed the family and determined that they were entitled to a credible fear interview. The INS sent the mother and daughter to a local hotel, and placed the father in INS detention. A CLINIC attorney was asked by

the Anaheim Asylum Office to interview the mother and child for possible legal representation. The attorney reported to the downtown headquarters of the INS, where she first met the terrified little girl. L- was silent, staying close by her mother, clinging to her stuffed animal.

Just a few hours after the interview, the attorney received a desperate phone call from the mother. The mother had been separated from her child and taken to the INS San Pedro detention facility. Even worse, she had not been informed of L-'s fate or whereabouts. Through CLINIC's intervention, the mother learned that her daughter was being held at Los Padrinos, the juvenile corrections hall run by the Los Angeles County Probation Department. At Los Padrinos, L-'s stuffed animal had been taken away from her and she was given vaccination shots without understanding what they were. No one at the facility spoke her language, and most of the other girls were almost twice her age.

Mother, daughter and father were separated for more than six days until their credible fear interviews took place. During that time, they could not see each other, and were only allowed to speak twice on the telephone.

Children should never be separated from their parents. They should never be confined with criminals in juvenile prisons, much less with adults serving their criminal sentences. Detention of children should be avoided whenever possible. If necessary to confine children at all, they should be kept in shelter-care facilities appropriate to their unique needs and vulnerabilities. It represents a national disgrace that, after years of mistreating children in its custody, the INS still separates children from their parents, still places children in facilities for adjudicated delinquents, and still lacks adequate shelter space for all of those in its custody.



Photo Courtesy: INS

## B. INDEFINITE, MANDATORY AND SECRET EVIDENCE DETAINEES

According to INS officials, the United States detains roughly 5,000 immigrants on any given night who cannot be deported because their countries of origin will not take them back.<sup>112</sup> Most indefinite detainees come from countries without diplomatic ties to the United States, with the largest single population coming from Cuba.<sup>113</sup> As of August 1999, there were 1,750 Cubans in detention who arrived in the Mariel boatlift,<sup>114</sup> and almost 600 non-Mariel Cubans.<sup>115</sup> Another large group of indefinite detainees came to the United States as refugees from Vietnam, Laos and Cambodia, countries that now refuse to accept their return. Others are stateless, or come from countries that have no functional or central government. Still others have been granted relief under the Convention Against Torture, which prohibits the return of those who would be at risk of torture at home, but does not necessarily lead to their release. A minority come from a growing list of countries that customarily accept the return of their nationals, but refuse to do so in individual cases.

Not to be confused with indefinite detainees who can be released under our laws, "mandatory" detainees account for most of the growth in the INS system. The 1996 Immigration Act mandates the detention of various categories of immigrants while their removal hearings run their course. The largest group of mandatory detainees consists of non-citizens who have committed criminal offenses, but completed their prison terms. While some should be kept detained because they represent a danger to others, many "mandatory" detainees committed relatively minor crimes, often long ago, and enjoy strong ties to the United States.

## 1. Indefinite Detainees

After a non-citizen receives a final order of removal, the INS normally has 90 days to effect his or her removal from the United States.<sup>116</sup> If the INS cannot remove the immigrant during this time, he or she can be released from detention.<sup>117</sup> However, this decision lies with the local INS district directors who can keep in detention persons that they determine represent a danger or a risk of flight.<sup>118</sup> For many immigrants with final orders of removal, the 90 days come and go and the INS still has not deported or released them. The INS refers to people in this situation as "lifers" or "unremovables." Many spend years in INS custody. Unlike U.S. citizens who cannot be punished twice for the same offense, non-citizens sometimes receive an even harsher punishment by the INS.

### One Conviction, Two Sentences

In 1993, "Mr. R-" arrived in the United States after fleeing Cuba. He was granted parole in the United States. Under current immigration law, Cuban nationals paroled into the country are allowed to apply for permanent residence after one year.<sup>119</sup> Although Mr. R- never completed this process, he resettled in the United States and began work as a mechanic, sending money on a regular basis to his three children, ages 9, 12, and 17, in Cuba.

Mr. R- was arrested at a party with friends. The host of the party had cocaine at his apartment. Unfamiliar with the criminal justice system here, Mr. R- followed the instructions of his attorney and pled no contest to a cocaine trafficking charge to avoid spending time in jail. In September 1996, he was sentenced to three years of supervised probation.

In November 1996, when Mr. R- reported for probation, the INS took him into custody. As a result of his conviction, the IJ ordered him

“excluded” (deported) a month later. However, because the United States does not have diplomatic relations with Cuba, Mr. R- could not be deported. Instead he remained in detention for more than three years. During the summer of 1999, he received his first custody review. Despite assurances from his permanent resident brother that he would help Mr. R- find employment, Mr. R- was denied release. Not until March 2000 did the INS finally release him under an order of supervision. Although Mr. R- served no jail time for his criminal offense, he spent more than three years in detention because the INS could not deport him.

In recent years, the issue of indefinite detention has become more widely publicized as strict immigration laws force more people into INS custody. On August 6, 1999, the INS took the important step of establishing a national policy regarding the provision of regular custody reviews for all indefinite detainees.<sup>120</sup> However, characteristically, certain district directors did not implement the instructions from INS headquarters. Advocates reported that in many sites INS detainees did not receive notice of their custody reviews, precluding their ability to marshal evidence in support of their release.<sup>121</sup> In other districts, the attorneys of record did not receive notice. In several sites, the INS did not provide notice of custody decisions within 30 days, as required by the instruction. In some places, notices denying release included cursory or inadequate explanations. Worst of all, in some cases, “indefinite detainees” did not receive custody reviews at all.

### **INS Fails to Comply with Its Own Instructions**

In 1995, “Mr. U-,” a 22-year-old Cuban, came to the United States to start a new life. After resettling in the United States, he obtained work for a telephone company. In 1996 he was convicted of trafficking cocaine. He was sentenced to three years in prison but was released early, after about two-and-a-half years, for good behavior. He was transferred to INS detention. While in detention, the INS reviewed Mr. U-’s file to determine whether he should be released. Mr. U- received a denial letter (without any rationale) from the INS in mid-July 1999, which informed him that he would have a custody review interview in six months. Under the new INS policy, Mr. U- should receive a written notice 30 days before his interview. To date, though, more than six months have passed and he has still not received a notice of an interview. Mr. U- has a construction job waiting

for him as soon as he can be released. He wants to get back to work and continue his life.



Photo Courtesy: INS

In July 2000, the INS published a proposed rule to codify an amended version of its policy regarding review of indefinite detention cases.<sup>122</sup> The proposed rule creates for all indefinitely detained immigrants a review process that tracks the one that has been in place for Mariel Cubans since 1987. The apparent objective of the proposed rule is laudable — that is, to transfer authority for custody reviews from the local district directors to a newly established “Headquarters Post-Order Detention Unit” (“HQPDU”) if the detainee has not been removed six months after receiving a final order of removal. However, the rule decreases the frequency of reviews from every six months (as stipulated in the August 6, 1999 policy instruction) to once a year. In addition, the rule eliminates review of custody decisions by the BIA, completely insulating the process from non-INS review.

The proposed rule also adopts the current policy of sending written notices to the detainees at least 30 days in advance of each custody review. Although the 30-day time-line is intended to provide detainees with time to gather documentation in support of their release requests, in practice 30 days is not enough time to obtain legal counsel or letters from often uncooperative prisons regarding their institutional records. After the INS custody review takes place, the detainee may still remain in detention for months without receiving a response.

### **While He Waits, His Family Suffers**

“Mr. D-” originally came to California as a refugee when he was four years old, fleeing the communist government of Yugoslavia. His family in the United States includes two children, his



father, and 11 siblings who are U.S. citizens. All of Mr. D-'s major life experiences (his education, employment history and family life) have taken place in the United States. Unfortunately, in the early 1990s, when his mother became terminally ill, Mr. D- turned to drugs. Between 1994 and 1996, he was convicted four times for drug possession. In 1996, Mr. D- also pled guilty to petty theft. As a result, the INS placed Mr. D- in deportation proceedings.

Mr. D- completed his criminal sentence in 1998, but the INS immediately took him into custody. Since Mr. B- was classified as an "aggravated felon," he was required to be detained until his deportation hearing. At that hearing, in July 1999, Mr. D- made a claim under the Convention Against Torture, arguing that as a virtually assimilated American he would be subject to torture in the former Yugoslavia. At the time, anti-American feelings raged there due to the conflict in Kosovo. An IJ granted the application. Unfortunately for Mr. D-, while persons convicted of crimes who receive relief under the Convention Against Torture cannot be deported, neither are they necessarily eligible to be released from INS custody.

Mr. D- applied for release, but the INS rejected his request. This denial particularly hurt Mr. D-'s family, since he had been the principal source of financial support for his two children. In addition, his father suffered a stroke and paralysis on the right side of his body during Mr. D-'s detention. Mr. D-'s absence during this critical illness was keenly felt. Eventually, in February 2000, seven months after he was granted deferral of removal, Mr. D- was finally released.

As it stands, an indefinite detainee seeking to be released must prove by clear and convincing evidence that he or she is not a threat to society.<sup>123</sup> In practice, this can be an impossible burden to meet, since INS officials often treat past criminality (a condition the detainee cannot change) as non-rebuttable evidence that he or she will be a danger in the future. In California, a federal district court appropriately reversed this burden, holding that the INS must demonstrate by clear and convincing evidence that a detainee poses a threat to the community or a flight risk in order to continue detaining the individual.<sup>124</sup> In fact, numerous courts have found indefinite detention, particularly for long-term permanent residents, to be unconstitutional on due process grounds.<sup>125</sup> However, it should not take a law suit to release an indefinitely detained immigrant. There should be a fixed ceiling

on the duration of detention for those who cannot be deported.

Making matters worse, the INS has failed to pursue reintegration programs that would address some of the concerns related to the release of indefinitely detained immigrants. Such programs could significantly mitigate any risk of danger to the community or of flight. They also cost far less than detention. Indeed, a refugee resettlement agency in New Orleans has begun to provide this service without any government funding.



Photo Courtesy: INS

### **An Alternative to Indefinite Detention and to the Detention of Asylum-Seekers**

In September 1998, Human Rights Watch published a stinging report on the mistreatment of immigrants placed by the INS in local jails.<sup>126</sup> The report highlighted the particular problems faced by immigrants in Louisiana parish jails. In response to the report, in October 1998, community based organizations in Louisiana established a working group to advocate for the just treatment of INS detainees. Participants have included the President of the Louisiana Hispanic Chamber of Commerce, the State Coordinator for the American Immigration Lawyers Association, the State Refugee Coordinator, the Executive Director of the Hispanic Apostolate, representatives from Loyola University Law School and the Twomey Center for Peace and Justice, Amnesty International, Mary Queen of Vietnam Church, and Catholic Charities of New Orleans.

The group has met, on a quarterly basis, with the local INS district director and local prison officials to discuss concerns regarding INS detainees at the New Orleans Parish Prison. As a result of this dialogue, in August 1999, the INS agreed to

release certain indefinite detainees to Catholic Charities of New Orleans.

To qualify for release, an indefinite detainee must have a sponsor. If no family member can be identified, the INS determines whether it would be appropriate to release the detainee to a halfway house. If space is not available, the INS contacts Catholic Charities of New Orleans which schedules an appointment to interview and screen the detainee. The agency reviews the detainee's criminal background, and explains its services and expectations. Once a decision has been made to accept a detainee, the INS and Catholic Charities coordinate a release date.

Catholic Charities arranges for housing prior to the detainee's release. It then picks up the immigrant and gives him an orientation to the program and to the community. Due to a lack of funding for the program, Catholic Charities initially housed participants in shelters for the homeless until they could afford their own apartments. Subsequently, Catholic Charities was able to rent rooms from the local YMCA for program participants. Catholic Charities' staff assists the participants in finding employment and accessing social services.

Since August 1999, the INS has released 21 indefinite detainees to this program. Of these, only one has been rearrested. This occurred because he attacked his roommate. Catholic Charities reported the attack to the INS, who then arrested the detainee. Of the 21 indefinite detainees who have been released, all but three are employed. The unemployed include two disabled men and one 72-year-old man. The program's coordinator characterizes the former indefinite detainees as independent and resourceful. Their prior life and work experiences in the United States make their transition into society a smooth one. In general, Catholic Charities' staff have found the released "lifers" to be among their easiest clients.

The program recently helped Mr. R-, a Nigerian national, to re-establish himself after seven years in INS detention. Mr. R- came to the United States in 1986. Although married to a U.S. citizen and the father of a nine-year-old U.S. citizen child, Mr. R- never became a permanent resident. In 1989, he was convicted of possession and delivery of a controlled substance. After serving seven months of a seven year sentence, he was transferred to INS custody. Because the INS could not secure travel

documents for his deportation to Nigeria, he spent seven years in six different INS detention centers.

Finally, in September 1999, the INS released Mr. R- to Catholic Charities. He spent his first two weeks in a homeless shelter until Catholic Charities found him an affordable hotel. Catholic Charities assisted Mr. R- with his housing expenses until October 1999, when he secured a full time job as a steward at a local hotel. Three and a half months after his release, Mr. R- moved into his own apartment. His family has relocated from Texas to rejoin him, and his wife is currently pregnant with their second child. Mr. R- recently enrolled in a program to study management at the hotel.

Since May 1999, the INS has also released 18 asylum-seekers to the Catholic Charities program. Former Catholic Charities clients have acted as sponsors for some of these persons, providing them with housing and even helping them to find employment. Two of the 18 asylum-seekers were granted asylum prior to their release and referred to Catholic Charities for resettlement assistance.

Programs for released lifers, like the one run by Catholic Charities of New Orleans, should be expanded nationally and federally funded. Unfortunately, the one federally-funded program that existed for released indefinite detainees has been defunded. This program enjoyed a multi-year track record of success with one of the INS's most historically difficult populations, Mariel Cubans. Not surprisingly, the program cost significantly less to operate than the continued detention of these immigrants.

### **Successful Program to Reintegrate Mariel Cubans Defunded**

From 1987 to 1999, Migration and Refugee Services (MRS) of the United States Catholic Conference (USCC) administered a successful program to reintegrate and resettle "Mariel" Cubans who had been released from confinement. Prior to admitting detainees into the program, MRS verified housing arrangements for them and, as necessary, determined the suitability of these arrangements through home studies. The program carefully reviewed all the information available about potential participants, including psychiatric and psychosocial evaluations, and criminal justice history. It did not accept persons with excessively violent or sex-related criminal histories.

Participants received a range of intensive services that included: individualized, goal-driven planning; orientation and reception into the community; orientation of the sponsor (normally family members); follow-up with employers; weekly monitoring meetings; substance abuse and other counseling; and assistance with vocational school enrollment. The program could and did recommend parole revocation for clients who violated the conditions of their parole, failed to meet the program's requirements, engaged in illegal activity, or otherwise posed a threat to the community. This feature significantly reduced the potential risk of recidivism by participants.

In its final years, the program served an average of 50 to 60 Cubans a year, with a success rate of roughly 75 percent. Not surprisingly, the program cost significantly less than detention. Its success argued for expansion to other populations. Yet, in July 1999, the program was suspended on the grounds that the INS could meet the needs of released detainees through contracts with half-way houses. In fact, INS "indefinite detainees" approved for release often remain detained for months or even years while they wait for openings in half-way houses.<sup>127</sup> Nor do half-way houses offer programs tailored to the unique needs of these populations.

Beyond the hardship it causes, indefinite detention may also violate the international obligations of the United States. In 1992, for example, the United States became a party to the United Nations' International Covenant on Civil and Political Rights (ICCPR), a document that many legal scholars assert has risen in its entirety to the level of "customary" international law.<sup>128</sup> As such, it may have the force of being binding even on countries that have not ratified it. Article 9 of the ICCPR provides that "[n]o one shall be subject to arbitrary arrest or detention." The current practice of detaining "lifers" indefinitely, without binding regulations or laws regarding standards for release, could be considered arbitrary under international standards.

The United Nations' Human Rights Committee, which exists to monitor compliance with the ICCPR, has explicitly stated that immigration control is covered by Article 9.<sup>129</sup> Under U.S. law, this interpretation may be viewed as authoritative, perhaps even binding.<sup>130</sup> The Committee has also recently ruled that the detention of a Cambodian in Australia for more than four years was "arbitrary," stating "detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investi-

gation and there may be other factors particular to the individual such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal...."<sup>131</sup> Such statements by the Committee should be taken as evidence that the United States may be violating both Article 9 and its customary law obligations.<sup>132</sup>



Photo Courtesy: INS

## 2. Mandatory Detention

In theory, mandatory detention serves as a tool to prevent immigrants from absconding or endangering society. In practice, it has stripped the INS and IJs of the discretion to consider the particular circumstances of the detainee and his or her family. Under the 1996 Immigration Act, for example, IJs cannot release a detainee in order to allow him or her to support a U.S. citizen spouse or child, even if the detainee has been rehabilitated. The law incorrectly assumes that all people with criminal convictions are a danger to society and, as a result, forces the INS to detain many who pose no threat. In effect, the law formalizes what has long been the practice of many INS district directors to deny release based on the detainee's past criminality, whatever the factors favoring release.<sup>133</sup>

The law now requires the INS to arrest and detain almost all non-citizens with criminal convictions, regardless of when the conviction occurred. It also does not take into account how long ago the immigrant finished his or her jail sentence. After a non-citizen pays his or her debt to society, the INS must arrest and detain them, often for periods that exceed their prison sentence.

Immigrants convicted and released from prison before October 9, 1998 are eligible to request release from INS detention.<sup>134</sup> All non-citizens released from jail or prison on or after October 9, 1998, however, are ineligible for bond. They must be detained throughout their immigration proceedings, which can drag on for months and even years.

Mandatory detention tears families apart. Permanent residents who have lived in the United States for years languish in detention, apart from their families, while their cases pass through the immigration court system. Exacerbating matters, the INS can detain foreign nationals in any location it chooses. Accordingly, if it arrests a non-citizen in Florida, it can transfer that person to Louisiana, regardless of the fact that his or her family is in Florida. As a result, the immigrant will be effectively denied visitation by his or her family, who cannot afford to make the trip from Florida to Louisiana. Separation from loved ones can lead to depression, anxiety, and loneliness for the detainee, as well as for his or her family. It can also lead to the family's impoverishment.

### **Nonviolent Detainee Separated From Family**

"Mr. B-," a 59-year-old from Mexico, has lived in the United States as a permanent resident for more than 33 years. He has a permanent resident wife, an adopted U.S. citizen son, two U.S. citizen daughters, and six U.S. citizen grandchildren. In 1994, Mr. B- was convicted of failing to prevent a felony, in this case the distribution of less than 50 kilograms of marijuana. The judge sentenced him to three years of probation, but did not consider the crime serious enough to sentence him to prison time.

In 1998, while Mr. B- was returning to the United States from a visit abroad, the INS discovered his 1994 conviction. He was allowed to enter the country as a parolee, but after a check of his records, the INS terminated Mr. B-'s parole and instituted removal proceedings against him. The agency charged Mr. B- with conspiring with others to traffic in a controlled substance and attempted to remove him from the United States. Ultimately, the IJ terminated proceedings against him, finding that his prior conviction did not make him an illicit drug trafficker under the law. However, the INS appealed the decision. As a result of mandatory detention, Mr. B remained detained throughout the pendency of his case, five months in total.

During the first two months of his detention, Mr. B-'s daughter drove his wife two hours to visit him and to attend his court hearings. In order to make these weekly trips, Mr. B-'s daughter had to miss several days of work. As a result, the daughter, who is married and has two children, lost her job in October 1998. She remained unemployed for four months. During this time, the family's financial responsibilities fell solely on her husband who could not find full-time work.

While detained, Mr. B- missed the birthdays of five of his six U.S. citizen grandchildren, as well as Thanksgiving and Christmas with his family. In addition, Mr. B- suffered severe pain from arthritis. He had previously undergone two operations: one to insert a piece of metal to connect his hip to his leg; the other to treat his severe carpal tunnel syndrome. Although Mr. B- posed no threat to anyone, had not been convicted of a violent crime, and had completed his probation, the INS did not release him until early 1999, and only then as the result of his medical condition. In April 1999, the INS withdrew its appeal and Mr. B-'s case was closed.

Mandatory detention forces the INS to arrest and detain petty offenders who represent neither a threat to their communities or flight risks.

### **Mandatory Detention Fills INS Detention System with Nonviolent People**

"Mr. F-" is a 29-year-old from Sudan. In 1993, he came to the United States as a refugee. His father held a prominent position in a political group that opposed the government in Sudan; Mr. F- was in danger of persecution because of his father's activities. After resettling in Tennessee, Mr. F- worked steadily as a laborer in warehouses. He filed tax returns each year. Almost three years after his arrival, Mr. F- was convicted of simple possession of crack cocaine and sentenced to probation. In early 1998, the INS placed him in removal proceedings for having violated a controlled substance law. Although Mr. F- was not a danger, the INS detained him in rural Louisiana throughout the proceedings. In September 1999, the BIA granted Mr. F- withholding of removal, but the INS did not release him until December 1999. In total, he spent 21 months in custody.

## No Jail Time, but More Than a Year in INS Detention

"Mr. G-", a 26-year-old Tanzanian, fled his homeland after finding his father, a prominent member of an opposition political movement, brutally murdered by the government. After his father's death, his mother went into hiding; Mr. G- has not heard from her since. A relative helped Mr. G- escape the country on a student visa and he arrived in the United States in January 1998. Unfortunately, after he resettled in Maryland, his relatives in Tanzania encountered financial difficulties and could no longer afford to pay his tuition. Desperate for tuition money, he accepted the offer of two men to open a bank account and deposit phony checks for them. He knew his actions were wrong, but believed they would earn him enough money to cover his college tuition and comply with his student visa. Instead, he was arrested. Mr. G- was convicted of attempted theft of less than \$300 and received a one year suspended sentence and 11 months of probation. After his conviction in December 1998, the INS arrested Mr. G- and placed him in detention. He applied for withholding of removal and relief from removal under the Convention Against Torture. His case is currently on appeal. To date, he has been in INS detention for more than one year.

Mandatory detention straight-jackets the INS, precluding it from making common-sense decisions on the best use of its scarce detention space. It has contributed mightily to the crisis in the INS detention system. At the same time, the INS has failed to manage the new mandatory detention regime in a way that minimizes its damage.

Under the law, "mandatory detention" for those facing removal on criminal and national security grounds takes place "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."<sup>135</sup> By its plain language, this provision would seem to apply only to persons released from criminal custody on or after October 9, 1998, when this provision went into effect. Instead, the INS initially interpreted the "released" language, triggering mandatory detention, to refer to INS custody. Under this interpretation, immigrants picked up by the INS on or after October 9, 1998, even if they had long before been released from criminal custody, would have been subject to mandatory detention. The fact that the INS advanced

so counter-intuitive and expansive a reading of this law apparently surprised federal jurists, who consistently rejected the INS's position.<sup>136</sup> In response to more than a dozen adverse decisions by federal courts, the INS reversed course in July 1999, reading "mandatory detention" to apply only to those released from criminal custody on or after October 9, 1998.<sup>137</sup> Up to that point, it had wasted its scarce detention resources on hundreds of immigrants it did not need to detain.

In addition, the INS has failed to pursue alternative forms of detention that have proven to be effective in the criminal justice system. "Mandatory detention," for example, need not preclude a rigorous system of home detention through electronic monitoring. Not only would expanded use of such a system be cost-effective, it would be a humane alternative for non-citizens who enjoy strong family ties in the United States, while accomplishing the same goals as "hard" detention.

Although not a direct analogy to "civil" confinement, the federal pre-trial release program has enjoyed significant success in assuring court appearances and protecting the community. These are the same goals served by immigration detention. In FY 1998, only 4.5 percent of criminal defendants, who had been conditionally released under this program, failed to appear for their trials.<sup>138</sup> Only one percent committed a violation while released.<sup>139</sup> The Department of Justice ("DOJ") defines "conditional release" as "any combination of restrictions that are deemed necessary to guarantee the defendant's appearance at trial or the safety of the community."<sup>140</sup> Thus, as DOJ officials have informed CLINIC, "conditional release" could include home detention. In fact, at least one federal court has made this connection, ordering the INS to transfer a "mandatory detainee" into the tethering program of U.S. Pretrial Services.<sup>141</sup> In effect, the court found that "home detention" satisfied the mandates of immigration detention. Unfortunately, the INS has failed to pursue successful alternative forms of detention, despite unprecedented pressure on its struggling system.



Photo Courtesy: INS

### 3. Detention Based on Secret Evidence

It is a bedrock principle of our constitutional democracy that persons accused of a crime must be afforded the opportunity to examine and explain the evidence against them. Under our criminal justice system, it would be unthinkable to arrest, convict, and imprison a person based on secret evidence. Yet, our immigration laws provide for the removal and “administrative” detention of non-citizens — sanctions which can be every bit as severe as a criminal sentence — based precisely on such evidence.

As it stands, an immigrant may be excluded from admission to the United States on national security grounds if the INS or a consular officer has “reason to believe” that he or she intends to engage in espionage or sabotage, has engaged in terrorist activity or intends to engage in terrorist activity.<sup>142</sup> Immigrants “suspected” of being inadmissible for espionage activities, terrorist activities, or other foreign policy considerations can also be excluded.<sup>143</sup>

The law also allows the INS to remove an individual from the United States based on secret evidence. In general, persons in removal proceedings must be given a “reasonable opportunity to examine evidence” submitted by the INS. This right, however, does not entitle them to examine “national security information.”<sup>144</sup> Once an individual is found to be “removable,” the INS may use classified evidence to deny his or her application to remain in the United States.<sup>145</sup>

Finally, the laws allow for the use of an “Alien Terrorist Removal Court” to remove suspected terrorists from the United States through the use of secret evidence.<sup>146</sup> The court is comprised of five

federal judges. To begin such a proceeding, the INS must first submit an application that establishes probable cause that an individual is an “alien terrorist” and that the use of the normal removal proceedings would pose a risk to national security. The individual is entitled only to an unclassified “summary” of the secret evidence. Even if such a summary is not provided, however, the proceedings can still go forward, and the person will be forced to present a defense without knowledge of the INS’s case.

The INS detains all non-citizens who are subject to these provisions. As of this writing, more than 20 immigrants, mostly of Middle-Eastern descent, are facing deportation on the basis of secret evidence.<sup>147</sup>

#### **Jailed for 19 Months on Ex-Wife’s Undisclosed Allegations**

Hany Kiarledeen, a 31-year-old Palestinian, was detained for 19 months without being charged with any crime. Rather, he was charged with being “removable” on the basis of secret evidence. Mr. Kiarledeen was arrested on March 26, 1998 for overstaying his visitor’s visa. He had married a U.S. citizen who had petitioned for him to become a permanent resident. Ordinarily this filing would have allowed Mr. Kiarledeen to live and work in the United States during the many years that such applications can take to process. Mr. Kiarledeen was employed as a manager of an electronics store. However, the INS detained him based on allegations by his ex-wife that in 1993 he hosted a meeting at his home in Nutley, New Jersey, which was attended by one of the World Trade Center bombing co-conspirators. Several acquaintances, however, testified that Mr. Kiarledeen was apolitical.

In Mr. Kiarledeen’s case, the INS refused to produce witnesses to support its allegations of terrorism, even when ordered to do so by the IJ. Upon reviewing the summary of the evidence, the federal district court found it “lacking in either detail or attribution to reliable sources which would shore up its credibility. More important however, is the apparent conclusion that even the government does not find its own allegations sufficiently serious to commence criminal proceedings.”<sup>148</sup>

Ultimately, in April 1999, an IJ who reviewed the secret evidence concluded that Mr. Kiarledeen did not live in Nutley at the time, and that the government had not shown that he was inadmissible on national security grounds. The INS appealed and the BIA affirmed the IJ’s decision.

In October 1999, a federal court ordered the INS to release Mr. Kiareldeen. He was finally released from detention on October 25, 1999.<sup>149</sup>

### **Arrested at Mosque - Three Years in Detention**

Nasser Ahmed, an Egyptian immigrant, spent more than three years in INS detention based on secret evidence. For most of that time he was in solitary confinement. Mr. Ahmed, a devout Muslim, was arrested at his mosque in April 1996. The only evidence against him that the INS disclosed was a one-sentence statement that he belonged to an unnamed terrorist organization. His attorneys could not defend him against such a vague allegation and Mr. Ahmed was ordered deported.

When the attorneys filed a federal lawsuit, the INS was forced to turn over some of its secret evidence. The INS alleged that Mr. Ahmed had sent a message to the international press from Sheik Rahman, who was convicted of conspiring to commit acts of terrorism in the United States. His attorneys demonstrated that there was no evidence Mr. Ahmed ever transmitted such a message.<sup>150</sup> Mr. Ahmed was released on a bond in November 1999, but he said that he “still ha[s] no idea who accused [him] or why they accused [him].” Although he had worked as an electrical engineer before he was detained, he lost his job and will have to find new employment.<sup>151</sup> The INS is still seeking to deport him. Mr. Ahmed is married and has three children.

### **Teacher Separated from Wife and Daughters for Three Years**

Mazen Al-Najjar, a Palestinian, is married and has three U.S. citizen daughters. He worked as a teacher and translator in Florida for 18 years before the INS detained him based on secret evidence. His attorneys believe that the secret evidence showed that he worked at the same university think-tank as prominent supporters of the Palestinian cause. His wife has suffered greatly during this time, and his daughters are growing up without him.<sup>152</sup> The children must talk to their father through glass; they cannot touch him. The family has no money and is being supported by Mr. Najjar’s sister and brother-in-law. Mr. Najjar’s wife is ashamed to tell co-workers where her husband has been for almost three years, and she worries that the FBI will get her fired from her job.<sup>153</sup> In late May, 2000, a U.S. District Court Judge ruled that Mr. Najjar must be given a new hearing. Although

the judge found that Mr. Najjar had been subject to an “unfair” and “tainted” process, she declined to order Mr. Najjar released on bond.<sup>154</sup> His next bond hearing is scheduled for late August, 2000.<sup>155</sup>

Although federal courts have increasingly found the use of secret evidence unconstitutional,<sup>156</sup> and there are efforts in Congress to pass legislation that would repeal the law,<sup>157</sup> this is scant comfort to the people who remain detained and to their families who struggle in their absence.



Photo Courtesy: Alan Pogue

## **C. CONCLUSION**

The legislation imposing mandatory detention has caused immense — and unnecessary — suffering. But even in those areas where the INS retains the discretion to release individuals, it has failed to do so in a consistent or generous manner. It has been particularly remiss in its failure to explore alternatives to detention for vulnerable detainees and others who, particularly with appropriate supervision, would represent neither a flight risk or a danger to the community. It has also failed to explore cost-effective,

alternative forms of detention for those subject to mandatory detention.

Just as the problems in the INS detention system have been exhaustively documented, a strong consensus has emerged among human rights and immigrant advocacy groups on the steps necessary to fix the system.

- The INS detention system, long plagued by the inability of INS headquarters to enforce its policies at the local district level (much less in its contract detention facilities) must be centralized. Strict accountability must be established for violations of INS detention policies. Release decisions should not be subject to the whims, biases, and idiosyncracies of INS district directors.
- Bona fide asylum-seekers, particularly those who establish a “credible fear” in the expedited removal process, should not be detained. The INS should develop and implement uniform release policies for these cases. It should also develop supervised release and alternative-to-detention programs for all asylum-seekers in its custody. If asylum-seekers must be detained at all, this should only be on a short-term basis in facilities appropriate to their unique needs and vulnerabilities. Asylum-seekers should never be confined in prisons.
- Children should never be detained in facilities for juvenile offenders and should never be separated from their parents. If necessary to detain them at all, they should be kept in shelter care facilities which offer programs tailored to their unique vulnerabilities and developmental needs. The INS should significantly expand its shelter-care facilities for immigrant families and unaccompanied minors. Every unaccompanied minor in INS custody should be assigned a “special guardian” to shepherd them through the immigration process. The “best interests” of the child should govern all placement decisions.
- The INS should abide by its own gender guidelines and avoid detaining women who make gender-based asylum claims.
- The great majority of indefinite detainees should be released within the 90 day statutory removal period. While it may be necessary to detain certain non-citizens beyond 90 days, an absolute time limit should be established for the release of all detainees. Intensive reintegration and supervised release programs, to include parole revocation for those failing to meet the programs’ terms, should be provided for all indefinite detainees.

- Mandatory detention, which strips from the INS and IJs the ability to make custody determinations based on the totality of a person’s situation, should be eliminated in all but the most egregious criminal and national security cases.
- The INS should aggressively pursue alternative forms of detention for those subject to mandatory detention, including home detention through electronic monitoring and “tether” programs.
- All INS detention facilities — whether INS Service Processing Centers, federal prisons, for-profit prisons, or local jails — should be subject to the same minimum standards related to conditions of confinement. These standards should be appropriate to “civil” detainees, rather than to prisoners serving criminal sentences. The model standards developed by the American Bar Association constitute a good starting point and should be uniformly applied.
- The INS should adopt and implement an effective system of oversight to assure the appropriate treatment of detainees it has placed in for-profit prisons and local jails. If INS contractors resist implementation of appropriate standards or rigorous oversight, their facilities should not be used.
- Detention based on the use of secret evidence violates bedrock constitutional principles and should never occur.
- The EOIR should follow up on its successful pilot project and fund “legal rights” presentations for all persons in INS custody. Such presentations would benefit detainees, increase the efficiency of court proceedings, and reduce the burdens on the INS detention system. “Rights presentations” would be a humane and cost-effective feature of a reformed detention system.

As the population of administrative detainees continues to increase, the United States must decide if it can afford – economically and morally – to lock up persons who could be reunited with families and live as productive members of society. At this point, the need for the system’s reform can scarcely be disputed. For too long, the INS detention system has dishonored our heritage as a nation of immigrants.



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2. Human Rights Watch, "Slipping through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service" (April 1997) [hereinafter "Slipping through the Cracks"].
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7. Kerwin, "Detention: Our Sad National Symbol," *In Defense of the Alien*, Vol XX (1997) at 128-142.
8. Florida Immigrant Advocacy Center, Inc, "Cries for Help: Medical Care at Krome Service Processing Center and in Florida's County Jails" (December 1999) [hereinafter "Medical Care at Krome Service Processing Center and in Florida's County Jails"].
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11. This seems an obvious point, but one blurred by the language used to describe the INS system. For example, courts view removal proceedings as "civil" in nature, though their end (banishment to often dangerous countries) and means (imprisonment) can be every bit as harsh as criminal sentences. The largest category of detainees, pejoratively labelled "criminal aliens," encompasses long-term permanent residents who committed relatively minor transgressions, like shop-lifting, and long ago served whatever criminal sentence they may have received. INS "processing" or "detention" centers connote short-term custody, but hold thousands of foreign-born persons for indefinite periods of time, often for years.
12. Pub L. No. 104-208, 110 Stat. 3009 (September 30, 1996).
13. INA § 236(c)(1); 8 CFR § 236.1(c).
14. INA § 235(b)(1)(B)(ii)-(iii)(IV); 8 CFR § 235.3(b)(2)(iii) and (4)(ii).
15. INA § 235(b)(2)(A); 8 CFR § 235.3 (c).
16. INA § 241(a)(1)(C)(2); 8 CFR § 241.3.
17. Pub L. No. 104-132, 110 Stat. 1214 (April 24, 1996).
18. Kerwin, Acer, and Leopold, "The Detention of Noncitizens: An Overview of the Law, Its Implementation, and Legal Strategies", 1999-2000 Immigration and Nationality Law Handbook, Volume II, Advanced Practice (American Immigration Lawyers' Association 1999) at 34, 35-38.
19. INA § 101(a)(43).
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21. United Nations' Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, opened for signature January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
22. Pub L. No. 96-212, 94 Stat. 103 (1980).
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24. The 1996 Immigration Act, § 604 (1996).
25. *Id.*

26. 8 CFR § 208.4(a)(5) (1997).
27. Musalo, Gibson, Fingert, and Taylor, "Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal" (May 2000), Analysis of INS Office of Policy and Planning Data as of 11/24/99, Tables 1-26.
28. *Id.*
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31. *Id.*
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33. Articles 31 and 26 respectively, Vienna Convention on the Law of Treaties, Nov. 1, 1969, 1155 U.N.T.S. 331. [hereinafter Vienna Convention]. The United States has not ratified this convention, but the concepts described in these two clauses have long been asserted by scholars as rising to the level of customary international law.
34. United Nations' Universal Declaration of Human Rights, Article 14(1), GA. Res. 217A(III), U.N. GAOR, 3d. Sess., at 71, U.N. Doc. A/810 (1948).
35. UNHCR Guidelines on Detention of Asylum Seekers (1995); "Detention Of Asylum Seekers And Refugees: The Framework, The Problem And Recommended Practice," Executive Committee, Standing Committee, United Nations High Commissioner for Refugees, 15th Meeting, UN. Doc. EC/49/SC/CRP.13 (1999).
36. *Id.* at ¶ 1.
37. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (expressing deference to UNHCR's interpretations of the Refugee Convention.).
38. See, eg., "Lost in the Labyrinth."
39. The Vera Institute of Justice, "The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision (1998).
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43. *Id.*
44. "The Varick Street Immigration Detention Center" at 15-16.
45. Interview with Natalie Audage, Asylum Network Coordinator, Physicians for Human Rights (January, 2000).
46. "Lost in the Labyrinth" at 51.
47. McChesney, "The Mother Teresa of Immigration Detention," *America Magazine* (April 24, 1999).
48. *Associated Press*, "New York INS Detention Site Accused of Safety Violations" (February 24, 2000).
49. Memorandum from Michael A Pearson, INS Executive Associate Commissioner, Office of Field Operations, to INS Regional Directors, "INS Detention Guidelines" (October 7, 1998).
50. INA § 212(d)(5)(A)
51. See, Wheeler and McClenahan, "CLINIC Report #5 on Credible Fear/Expedited Removal," 3 *Bender's Immigration Bulletin* 417 (May 1, 1998); Wheeler and McClenahan, "CLINIC Reports on Implementation of Expedited Removal and Credible Fear Screening Process," 2 *Bender's Immigration Bulletin* 949 (November 15, 1997); Wheeler and Morris, "The Credible Fear/Expedited Removal Process," 2 *Bender's Immigration Bulletin* 627 (August 1997); Wheeler, "INS's Implementation of Expedited Removal: The Credible Fear Interview Process," 2 *Bender's Immigration Bulletin* 487 (June 15, 1997).
52. Kerwin and Wheeler, "The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill," 75 *Interpreter Releases* 1433, 1439 (October 19, 1998).
53. *Id.*
54. *Id.*
55. At a March 30, 2000 INS liaison meeting, the New Jersey district director reported that in FY 1999, there were 995 detained cases at the Elizabeth Detention Center. The district director clarified that the vast majority were asylum-seekers arriving at airports without proper documents, who had passed their credible fear interviews. Of these, 90 were granted parole for a release rate of approximately nine percent in 1999.

56. *Id.*; At a June 16, 1999 liaison meeting, the New York INS district provided statistics that indicated that, since the Queens Wackenhut detention facility had opened, 285 of the 1054 asylum seekers (27 percent) determined to have a credible fear had been paroled by the the district office.
57. "Lost in the Labyrinth" at 25.
58. *Id.*
59. Statistics provided by the Executive Office for Immigration Review (December 13, 1999).
60. INA § 292; 8 USC § 1362.
61. INS Office of General Counsel, "Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings" (December 21, 1995). [hereinafter "No Cost to the Government Memorandum"].
62. 5 USC § 3106 (1996).
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64. *Id.*
65. Hinken, Program Analysis Staff, Executive Office for Immigration Review, "Evaluation of the Rights Presentations" (December 1999).
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67. "The Florence Project Report," Florence Immigrant and Refugee Rights Project, Vol 3, Issue 1 (February 2000) at 1.
68. INA § 240(b)(2)(A)(iii).
69. "Medical Care at Krome Service Processing Center and in Florida's County Jails"; "Lost in the Labyrinth" at 64; "Immigration Detainees in Jails" at 56-63; "Liberty Denied" at 19-23; "The Elizabeth, New Jersey Contract Detention Facility" at 21-24; "The Varick Street Immigration Detention Center" at 44-48.
70. "Immigration Detainees in Jails" at 56.
71. *Id.*
72. Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, to Mr. J. Milton Pittman, Chair of the Board of County Commissioners, Jackson County, Florida (March 30, 2000).
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75. Viglucci, "Immigration Law Packs Detainees into Krome," *Miami Herald* (October 17, 1999).
76. See generally, "The Elizabeth, New Jersey Contract Detention Facility"; "Immigration Detainees in Jails" at 60-63.
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78. *The Associated Press*, "Jury Convicts One Jail Guard, Acquits Another in Detainee Abuse," (April 28, 1998); Smothers, "Three Jail Guards Guilty of Abusing Immigrants," *New York Times* (March 7, 1998).
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80. "The Elizabeth, New Jersey Contract Detention Facility" at 5.
81. *Id.* at 6. See also, "Liberty Denied" at 15 ("Detainees reported physical and verbal abuse, frequent strip searches, and excessive use of prolonged isolation, as punishment for minor infractions.")
82. "Immigration Detainees in Jails" at 61-63.
83. 8 CFR § 208.6.
84. 8 CFR § 236.1(e).
85. Mr. B- requests that his country of origin not be printed. It is not one of the countries whose consulates the United States is required to notify pursuant to 8 CFR § 236.1(e).
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100. UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997).
101. *Id.* at ¶ 5.7.
102. "Detention Of Asylum Seekers And Refugees: The Framework, The Problem And Recommended Practice," Executive Committee, Standing Committee, United Nations High Commissioner for Refugees, 15th Meeting, UN. Doc. EC/49/SC/CRP.13 (1999) at 26i.
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# G L O S S A R Y   O F   T E R M S

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**Aggravated Felony.** A term that initially appeared in the Anti-Drug Abuse Act of 1988 (Public Law No. 100-690). At that time, the term included murder and certain drug and firearm trafficking crimes. Since 1988, the definition of aggravated felony has been expanded numerous times. Today, it encompasses a wide range of crimes including crimes for which a term of imprisonment of one year or more is imposed. If a one-year sentence is imposed but suspended (i.e., no jail time is served by the person who commits the crime), such crime is still considered an aggravated felony. The definition appears at INA §101(a)(43).

**Anti-Terrorism and Effective Death Penalty Act (AEDPA)** (Public Law No. 104-132). Enacted in 1996, a law that broadened crimes leading to removal, eliminated relief from removal for many crimes, and attempted to limit judicial review. It served as a precursor to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which supplemented many of its provisions and replaced others.

**Asylee.** A person who has been granted asylum in the United States because he or she is unable or unwilling to return to his or her country of origin due to past persecution or a well-founded fear of future persecution.

**Asylum.** A form of protection available to persons physically present in the United States or at a port-of-entry seeking admission to the United States, who fear returning to their native country due to past persecution or a well-founded fear of future persecution. The persecution must be based on one of five grounds: race, religion, nationality, membership in a particular social group or political opinion. Except in limited circumstances, an application for asylum must be filed within one year of an individual's arrival in the United States. Asylum status is granted in the United States, after an application for asylum is approved under INA §208(a). One year after being granted political asylum, an asylee may apply for permanent residence in the United States.

**Board of Immigration Appeals (BIA).** The administrative appeals court for decisions made by Immigration Judges, INS District Directors and other immigration officials.

**Code of Federal Regulations (CFR).** A compilation of the rules that govern the agencies of the Federal Government. The CFR is divided into 50 titles that represent broad areas subject to federal regulation. Title 8 pertains to immigration and nationality and is composed of all regulations issued by the INS.

**Convention Against Torture (CAT).** An international agreement protecting a person from return to a country where he or she is more likely than not to be tortured. The Convention is formally known as the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment. There is no filing deadline for protection and no one is barred from seeking protection under the CAT. Protection under the CAT does not confer the right to lawful permanent residence or the right to immigrate family members to the United States. In addition, a person granted protection under the CAT may be removed to a country where he or she will not face torture.

**Credible Fear.** The standard an asylum-seeker subject to expedited removal proceedings must meet in order to avoid immediate removal from the United States. The credibility of one's statements and other facts known to the immigration officer must demonstrate a 'significant possibility' that the person could establish eligibility for asylum. Persons who are determined to have a credible fear of persecution will not be removed in the expedited removal process and can seek political asylum in the United States.

**Deferral of Removal.** The form of relief granted to persons who receive protection under the Convention Against Torture (CAT). Certain persons who would likely face torture but who are ineligible for other types of relief from removal, may be granted deferral of removal under the CAT. Deferral of removal may be terminated if the individual is no longer likely to be tortured in the country of removal. In addition, persons granted deferral may be subject to INS detention.

**Executive Office for Immigration Review (EOIR).** The division within the Department of Justice responsible for interpreting and administering federal immigration laws and regulations. EOIR accomplishes its tasks

through immigration court proceedings, appellate reviews, and administrative hearings of individual cases. The EOIR has three main divisions: the Board of Immigration Appeals, the Office of the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer.

**Expedited Removal.** A process that provides for the immediate removal from the United States of individuals who arrive without valid travel documents, such as a passport and visa. Persons removed in expedited removal proceedings are barred from re-entering the United States for a minimum of five years. In order to avoid immediate removal, asylum-seekers who arrive without proper entry documents must demonstrate a credible fear of returning to their native country.

**Humanitarian Parole.** A form of admission, granted by the Attorney General, for persons who are otherwise ineligible to enter the United States. Humanitarian parole is only granted in cases involving urgent and compelling factors, such as medical emergencies, or in cases involving significant public benefit. This status is temporary and only issued to coincide with the duration of the relevant emergency or humanitarian situation. There is a maximum time limit of one year for a humanitarian parole. Under U.S. immigration law, the term “parole” carries no criminal implications.

**Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).** (Public Law No. 104-208). Enacted on September 30, 1996, a law that dramatically altered U.S. immigration law. It created several new grounds of inadmissibility, restricted the ability to apply for asylum, changed inspections and removal processes, and altered provisions relating to public benefits, document fraud and the detention of immigrants.

**Immigration and Nationality Act (INA).** The statute encompassing U.S. immigration law. The INA is found in the United States Code (U.S.C.), a complete collection of federal laws. Title 8 of the U.S.C. pertains to immigration and nationality.

**Inadmissible.** The legal term applied to a person who is not eligible to enter the United States or adjust status to lawful permanent residence in the United States. A person who is inadmissible to the United States may not be issued an immigrant visa. Common inadmissibility grounds include health-related problems, previous criminal activity, the possibility of becoming a public charge, fraud, prior removal from the United States, or previous unlawful presence in the United States.

**Indefinite Detention.** An undetermined period of INS confinement faced by immigrants who are removable, but whose countries of origin will not accept them. Generally, the INS must remove an immigrant with a final order of removal within 90 days of the date of issuance of that order. Natives from countries with whom the U.S. government does not have diplomatic relations or that will not cooperate in the repatriation of their nationals, such as Cuba, Vietnam, China, Cambodia, Laos, Iran, Iraq and Somalia, cannot be removed. In addition, immigrants who are unable to obtain travel documents cannot be removed. In such cases, prior to the conclusion of the 90-day period, a review of the individual's continued detention must be conducted. This review is conducted by an INS District Director who has discretion to grant or deny release. If not released from detention after a review, indefinite detainees face prolonged detention for uncertain periods of time. Lawful permanent residents of the United States may be subject to indefinite detention.

**Lawful Permanent Resident (LPR).** A lawful permanent resident is a foreign-born resident of the United States, who has the right to live and work in the United States. Lawful permanent residents do not have the right to vote and are subject to deportation if they are convicted of certain crimes. Lawful permanent residents are ‘green card’ holders.

**Mandatory Detention.** The detention of certain categories of immigrants without the possibility of release, as mandated by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Persons subject to mandatory detention include those subject to expedited removal proceedings (including asylum seekers, until they establish that they have a “credible fear” of persecution in their home country); persons who have final orders of removal for (normally) 90 days; and many immigrants convicted of crimes. However, immigrants convicted of crimes who completed their criminal sentences prior to October 9, 1998 may be exempted from mandatory detention.

**Non-immigrant.** A person holding a visa limited for a certain period of time and activity. Non-immigrant visas are available for tourism, business, temporary work, religious work, farm work, educational and other purposes. While the non-immigrant is residing in the United States, his or her activity must be consistent with the provisions of his or her visa.

**Refugee.** A person who has fled his or her country of origin because of past persecution or a well-founded fear of future persecution based on one of five grounds: race, religion, nationality, political opinion, or a membership in a particular social group. Refugee status is granted outside the United States. The United Nations High Commissioner for Refugees (UNHCR) interviews refugees outside their country of origin to determine eligibility for UNHCR protection. If UNHCR decides a refugee cannot be safely returned to his or her home country or cannot remain in a country of first asylum, he or she is referred by the UNHCR for resettlement in another country. If a refugee is referred to the United States for resettlement, an INS officer interviews the person outside the United States in order to determine whether he or she may be granted refugee status under U.S. law. If granted refugee status, the refugee may enter the United States. One year after entry into the United States, a refugee can apply for lawful permanent residence.

**Removal Proceedings.** The process during which an Immigration Judge determines whether a non-citizen may remain in the United States or must be removed. Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, these proceedings were referred to as deportation or exclusion proceedings.

**United Nations Convention on the Rights of the Child (CRC).** Adopted by the United Nations General Assembly on November 20, 1989, an international human rights treaty that recognizes the vulnerability of children and their need for special care and protection. The Convention identifies the following rights as fundamental to children: education, health services, and legal assistance; protection from abuse, neglect, and labor that threatens health or education; and special protections for children who are refugees, abandoned, or without family. With 191 signatories, the CRC is one of the most widely ratified human rights treaties. The United States and Somalia are the only United Nations members who have not ratified the convention.

**United Nations Universal Declaration of Human Rights.** Adopted by the United Nations General Assembly on December 10, 1948, a declaration that defines equal rights as the foundation of freedom, justice, and peace. The Declaration sets forth multiple rights and freedoms, to which all persons, regardless of race, sex, language, religion, political opinion or nationality, are entitled. Such rights include the right to: leave any country; to return to one's own country; to seek asylum in other countries; to remain free from cruel, inhuman or degrading treatment, arbitrary arrest, detention, and exile.

**Visa.** The official document issued by the U.S. Department of State at a U.S. Embassy or Consulate abroad that grants an individual legal permission to enter the United States for a particular purpose.

**Voluntary Departure or Return.** A form of relief from forcible removal that allows a person in removal proceedings to depart the United States at his or her own expense. By agreeing to depart the United States voluntarily, one avoids the consequences of a formal order of removal, which normally prohibits a person from re-entering the United States for ten years.

**Withholding of Removal.** A form of relief from forcible removal available to persons who prove that it is more likely than not that their life or freedom would be threatened in their country of origin, as a result of their race, religion, nationality, membership in a particular social group or political opinion. (INA § 241(b)(3)). Like asylum, persons ineligible for withholding of removal include certain criminals, terrorists, and persecutors. Withholding of removal differs from asylum in several respects. First, asylum is a discretionary form of protection, but the U.S. government is bound to offer withholding of removal in accordance with Article 33 of the United Nations 1951 Convention relating to the Status of Refugees. Second, persons who seek asylum must make an application within one year of arrival in the United States, whereas there is no such deadline for withholding of removal. Third, only persons in removal proceedings may seek withholding of removal. Fourth, unlike asylum, withholding of removal does not serve as a step to lawful permanent residence nor does it prevent removal to a country where a person is not at-risk. Finally, withholding of removal does not extend protection to derivative family members.



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