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Freedom of Movement for Asylum Seekers in the U.S. and the T. Don Hutto Detention Center

Refugees and asylum seekers, through international customary law, are afforded the right to freedom of movement. A preponderant number of nations struggle to uphold this right for asylum seekers while also reconciling their own security needs and domestic immigration law. In accordance with the principle of *non-refoulement*[1], states are proscribed from returning people to a territory where they may face persecution; yet, asylum seekers often times cross the border into the second country in an "irregular" fashion, posing certain problems with regard to their immigration status. Thus, asylum seekers are particularly vulnerable to having their freedom of movement violated, most frequently in the form of detention, due to the nature of their tenuous legal status. Detention, while an important entitlement to states as a tool to process newly-arrived migrants, has proven a threat to the freedom of movement for asylum seekers by confining for undue lengths of time significant numbers of people who may ultimately be entitled to protection, and often doing so in inappropriately prison-like conditions.

This paper will examine international customary law including the 1951 U.N. Convention Relating to the Status of Refugees and other such conventions through the lens of the UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. It will focus on the challenges the U.S. faces in terms of its detention practices, taking the T. Don Hutto Detention Center in Taylor, Texas as an example. It will then examine proposed legislation that may serve as a step toward reconciling some of the flaws in U.S. detention policy and practices.

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[1] Article 33, 1951 U.N. Convention Relating to the Status of Refugees; Article 7, International Covenant on Civil and Political Rights.

Upholding Asylum Seekers' Right to Freedom of Movement

The United States is a signatory of the 1967 U.N. Protocol Relating to the Status of Refugees, which upholds the 1951 U.N. Convention Relating to the Status of Refugees, or simply, the Convention. As Article 1 of the Convention states, a refugee is someone who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[2]

Article 31 of the Convention, relating to freedom of movement maintains:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Signatories of the Convention and Protocol are expected to uphold in good faith the principles of these agreements, affording refugees freedoms and rights to the greatest extent possible, as per the 1969 Vienna Convention on the Law of Treaties.[3] While many states do not have legislation in place to guarantee that the principles are upheld, the expectation is that this is to be carried out through "executive discretion."[4]

According to the U.N. Executive Committee, administrative detention may figure as a penalty unless it is employed as a measure of national security.[5] Thus, it would follow that in instances where an asylum seeker has not been identified as a threat to national security, s/he should not be detained. Determining whether detention is necessary for reasons of national security should be codified so as to prevent detention from being "arbitrary" in nature, and it should be ensured that such detention not be "excessive," as per the European Court of Human Rights.[6] Furthermore, detention should be subject to independent review, and it should not impede the asylum seeker's ability to move forward his case for asylum.[7]

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[2] Article 1 of the 1951 Convention Relating to the Status of Refugees.
[3] *Guy S. Goodwin-Gill, Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection,* commissioned by the UNHCR, 2001, p. 188-89.
[4] *Ibid.,* p. 217.
[5] *Ibid.,* p. 195.
[6] *Ibid.,* p. 205.
[7] Note 3 *supra,* p. 205.

Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) both ban arbitrary detention. The U.N. Working Group on Arbitrary Detention has clarified the definition of arbitrary detention to include: (1) detention which cannot be linked to any legal basis, (2) detention which is based on exercising certain fundamental freedoms protected by the UDHR or the ICCPR, and (3) cases where non-observance of the right to a fair trial is such that it confers an arbitrary character to the deprivation of freedom.[8] Arbitrary detention has also been described as detention which is mandatory and non-reviewable.[9]

These requirements indicate that there should exist a codification of the conditions under which detention may be employed, and that those conditions should be followed as a rule and thus not applied arbitrarily, or with discrimination towards a particular group or individual. It also indicates that there should be a means to review the detention periodically to determine if conditions have changed such that detention is no longer valid or necessary. Such review should naturally be conducted by an entity that is not one in the same with the entity responsible for detention, thereby offering "meaningful independent review."[10] In agreement with Article 31(2) of the Convention, Article 12(3) of the ICCPR maintains that freedom of movement should not be restricted, unless defined by law in an effort to "protect national security, public order, […] public health or morals or the rights and freedoms of others…"[11] Furthermore, the U.N. Executive Committee states that in the event that there is no determined likelihood of asylum seekers absconding upon release, detention would be considered arbitrary.[12]

Detention Practices in the U.S.

Many countries are obliged to international customary law protecting freedom of movement, but have nonetheless not codified it domestically. Even if they have done so, such legislation may still fail to uphold in practice the right it seeks to protect, leaving critical minimum conditions unmet. The United States, after passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, or simply the 1996 Immigration Law, placed asylum seekers' freedom of movement in jeopardy by means of its

[8] UNHCR Working Group on Arbitrary Detention, 1991.
[9] Note 3 *supra,* p. 208.
[10] Eleanor Acer, "Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers," *Refuge*, Vol. 20, No. 3, May 2002, p. 49.
[11] Note 3 *supra,* p. 223.
[12] *Ibid.,* p. 227.

provisions for expedited removal proceedings and expanded resource allocation for detention.[13] Expedited removal calls for "immediate" removal of those who have no documents or who are in possession of false documents.[14] The only means for asylum seekers to be protected from expedited removal proceedings is for them to indicate their wish to apply for asylum, and subsequently demonstrate "credible fear" that they will be persecuted if returned to their country of origin. After demonstrating credible fear, asylum seekers may go before an immigration judge who will determine whether they will be paroled and thus released from detention.[15]

One obstacle to demonstrating credible fear is that Immigration and Custom Enforcement (ICE), an agency of the Department of Homeland Security (DHS), has articulated the conditions necessary to grant parole through disparate guidelines that are not present in a single, cohesive code.[16] The nature of these guidelines casts doubt on the consistent and regulated application of their provisions. In fact, it has been demonstrated that ICE officers widely vary in their use and application of these guidelines, resulting in inconsistent parole granting and denial from case to case.[17] This brings into serious question whether or not U.S. detention practices are arbitrary, as that classification is largely based on whether and how detention regulations are prescribed by law.

ICE has attempted to justify the mandatory detention afforded by the 1996 legislation by arguing that if asylum seekers were released, they would abscond and take up residence in the U.S. illegally. Statistics in this regard referenced by ICE and those referenced by other bodies such as the U.S. Commission on International Religious Freedom (USCIRF), a government commission, differ widely. While ICE has stated that that 85% of asylum seekers released abscond and miss their hearings, USCIRF counters this in demonstrating that the Executive Office of Immigration Review (EOIR) reported that 78% of asylum seekers released after demonstrating credible fear did *not* abscond.[18] Other EOIR figures

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[13] Human Rights First, *In Liberty's Shadow, U.S. Detention of Asylum Seekers in the Era of Homeland Security,* 2004, p. 7.
[14] Note 3 *supra*, p. 213.
[15] Note 13 *supra,* p. 7.
[16] *Ibid.,* p. 8.
[17] Eleanor Acer, "Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers," *Refuge*, Vol. 20, No. 3, May 2002, p. 49.Note 13 *supra*, p. 12.
[18] Bill Frelick, Amnesty International USA, "U.S. Detention of Asylum Seekers and Human Rights," Migration Information Source, March 2005, p. 3.

put no-show rates even lower, suggesting 93.6% and 94.3% of people appeared for their hearings in 2003 and 2004, respectively.[19]

In any case, ICE stands behind its claims that absconding is a threat sufficient to justify detention, continuing its practice of detention of asylum seekers even *after* they have demonstrated credible fear; in 2002, 95% of those who demonstrated credible fear were detained based on the notion that they would be likely to abscond.[20] The much less common decision to parole individuals who have demonstrated credible fear seems largely based on available detention space and other such factors, rendering detention the norm and release the exception.[21] Additionally, there has been an increase in detention of individuals who have been granted asylum while DHS peruses appeals to those cases.[22]

Basic Human Standards in Detention

As we have seen, uncertainties remain regarding the reasoning behind each detainee's particular case and the questionable nature of ICE's tendency to execute mandatory (and ostensibly arbitrary) detention. In light of this, the conditions in which detainees find themselves has become a major point of concern. The UNHCR Executive Committee has determined that in each case, asylum seekers are to be "treated in accordance with recognized basic human standards until a durable solution is found for them."[23] Specifically, they should not be penalized for being in the country unlawfully, their movement should not be restricted other than as is "necessary in the interest of public health and public order," and that "family unity should be respected."[24] The moment these "basic safeguards" depart the detention scenario, detention amounts to a penal sanction in direct violation of international law.[25]

UNHCR has made a statement that it officially "deplores that many countries continue to routinely detain asylum-seekers (including minors) on an arbitrary basis, for unduly long periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status."[26] Accordingly, UNHCR has issued guidelines that expound upon the Executive

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[19] *Ibid.,* p. 3.
[20] *Ibid.,* p. 4.
[21] Note 3 *supra,* p. 214.
[22] Note 13 *supra,* p. 27.
[23] Note 3 *supra,* p. 214.
[24] *Ibid.,* p. 215.
[25] *Ibid.,* p. 219.
[26] *Ibid.,* p. 225.

Committee's statements regarding basic human standards.[27] These guidelines can be summarized as follows:

Guideline 1: The guidelines apply to all asylum seekers who are being considered for, or who are in detention or detention-like situations.

Guideline 2: Asylum seekers should generally not be detained.

Guideline 3: Detention may be used as an exception when there are no other options available; detention should be reasonable and proportional, non-discriminatory, and for a minimal time period. (e.g., in the case of a preliminary interview to identify the claim for asylum, where asylum-seekers have no travel documents, or to protect national security and public order). Detention should not be used as a deterrent to discourage other potential asylum-seekers.

Guideline 4: Alternatives to detention should be employed wherever possible. These may include but are not limited to reporting requirements, residency requirements, providing a guarantor, release on bail, and open centers.

Guideline 5: Procedural safeguards should be in place which constitute minimum guarantees, including: prompt and full communication of reasons for detention in a language and terms the asylum-seeker understands; provision of information on legal counsel, and free legal assistance; independent review of the decision that is not performed by the same entity as the detaining authorities; the right to rebut any findings made in such a review; the right to contact and be contacted by UNHCR and other organizations or agencies who may serve as an advocate, including the right to communicate with these entities in private. Detention should not impede an asylum seeker's pursuit of the asylum application.

Guideline 6: Minors under the age of 18 should not be detained. Likewise, children should not be separated from their parents against their will. They should also receive the protection and assistance appropriate for child refugees. Minors must not be held under prison-like conditions. They have a right to education, which should take place outside the detention premises, and they also have a right to recreation.

Guideline 7: Alternatives to detention should be employed for vulnerable persons including the elderly, torture victims, victims of trauma, and people with disabilities.

Guideline 8: Women should be held separately from men unless they are close family. Female staff should be employed in the detention of women. Women should have access to special health services.

Guideline 9: Statelessness cannot be a bar to release or a justification for indefinite detention.

Guideline 10: Conditions of detention should be humane and dignified. Detainees should not be housed in prisons. Detainees should not be held in quarters with criminals. They should have access to visitation by friends, family, and legal counsel regularly. They should receive medical and psychological treatment as appropriate. They should have an opportunity for physical exercise daily, both indoors and outdoors. Education and vocational training should be available. Freedom to exercise religion should be preserved. Basic necessities should be provided such as beds, showers, toiletries, etc. A grievance procedure should be in place and made available in appropriate languages.

The UNHCR guidelines above offer a fairly comprehensive set of parameters to be followed in the event that detention is determined to be unavoidable. They outline basic standards in terms of living conditions, services to be provided to detainees, access to information, legal counsel, privacy, special considerations for women and children, availability of review, and proposed alternatives to detention. International customary law may be viewed as ambiguous, though comprehensive via articles present in

[27] UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999.

various conventions. The UNHCR guidelines, however, can and should be referenced in an effort to formulate national legislation and regulations that shape detention policy.

U.S. Detention: The case of the T. Don Hutto Detention Center

Despite the availability of these guidelines, there is a shocking lack of consistency and quality in detention center operations and conditions, both internationally and domestically. As has been demonstrated, U.S. detention determinations vary from case to case as a result of inconsistent ICE procedures due to the lack of codified regulations governing parole. Additionally, under the auspices of increased national security, the U.S. has seen an increase in the number of detentions since 1996, and even more post-9/11. The result has been increased spending on detention centers as a solution to the perceived threat posed by migrants, including asylum seekers. Conditions in these detention centers have largely gone without standardization, with centers being developed on the grounds of former prisons. Across the board, detention facilities restrict freedom of movement which has been protected by international customary law, including conventions to which the U.S. is a signatory.

Leaving aside the question of legitimacy in detaining asylum seekers, the conditions of these detention centers are of grave concern. Facilities have been, more often than not, an embodiment of prison conditions, constituting a serious aberration from the UNHCR minimum standards summarized above. As Human Rights First notes, in U.S. detention centers,

> [a]sylum seekers are stripped of their clothing, required to wear prison uniforms, transported in handcuffs or shackles, not allowed to have contact visits with family, and treated like prisoners. In some detention centers, such as Wackenhut Detention Center in New York and in the Elizabeth Detention Center in New Jersey, detainees live in warehouse buildings and their "outdoor" time consists of a visit to a room within the building that has a chain mesh ceiling which allows some fresh air to come in the room.[28]

The practices and standards of The T. Don Hutto Detention Center in Taylor, Texas, have attracted much attention since the facility's opening in 2006. The facility was opened to house families undergoing expedited removal proceedings, awaiting credible fear determinations, or serving continued detention even after establishing credible fear. Hutto was opened on the grounds of a former prison and the prison aesthetic persisted, including bars on windows, locked gates at its entry, razor wire surrounding the perimeter, colorless interior, and institutional furnishings.

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[28] Note 13 *supra,* p. 36.

Six months after opening, Hutto was visited by the Lutheran Immigration Refugee Services and the Women's Commission for Refugee Women and Children in February 2007. They found a group of families, many of them with children under the age of 12, detained in prison-like conditions. Some families with young children had been detained for up to two years. Children and parents were separated from each other at night, even when children cried out for their parents in fear or sickness. Detainees widely displayed signs of unaddressed psychological trauma and a lack of medical care, including pregnant and nursing mothers. Children received a mere one hour of education per day. Meal times were limited to 20 minutes, from the time the line formed at the cafeteria's door to the time detainees were ordered to exit the dining area; many of the detainees had lost a shocking amount of weight since entry to the facility. Many of the children were consistently sick from the food, whether due to poor quality, lack of cleanliness, deviation from dietary norms, or pure stress. Recreation was highly limited, both indoors and outdoors, with detainees frequently being told they could not go outside due to conditions being too hot or too cold. Furthermore, detainees testified that threats of separation were often used to discipline the children. Parents were found to have been stripped of their parenting authorities in numerous regards, resulting in a deterioration of respect from the children and a sense of frustration over theirs and their parents' helplessness.[29]

At the time of the LIRS/Women's Commission report, there existed no family detention standards, and facilities were instead administered on an *ad hoc* basis by combining the Department of Homeland Security's *Detention Operations Manual* and *Flores v. Reno*, a case whose settlement required that children in the immigration system experience the least possible restrictions with regard to their environment. The settlement also made certain stipulations requiring licensing of facilities, suitability of food, clothing, and personal care items, medical care, psychological care, education, recreation, visitation, and provisions for minors.[30] At the time of the LIRS/Women's Commission report, the *Flores* standards had not been codified and were routinely being violated in detention centers, including at Hutto. The report found the conditions at Hutto to be "inappropriate" and "disturbing" and entirely unsuitable for

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[29] LIRS and the Women's Commission for Refugee Women and Children, *Locking up Family Values: The Detention of Immigrant Families,* February 2007, p. 11-35.
[30] *Ibid.,* p. 6-8.

housing families. As a result of its findings, the commission made a series of recommendations[31], which have been summarized below:

Recommendation 1:	Discontinue the detention of families in penal institutions and close Hutto, instead using non-penal facilities for families in the event they cannot be paroled or put into other alternatives to detention.
Recommendation 2:	Release families who do not pose a risk to security who are able to find other accommodations with relatives or friends or community organizations. Codify ICE parole criteria. Move authority to parole under an independent body (i.e. not the same body which detains). Allow temporary work authorization to asylum-seekers. Make bonds for release accessible.
Recommendation 3:	Employ detention alternatives for families who cannot be paroled. Alternatives may include supervised release, living in shelters or in facilities overseen by non-profits and social service agencies that specialize in serving immigrant and refugee populations.
Recommendation 4:	Families who cannot be released and who cannot be put in alternative conditions should be detained in homelike facilities that include considerations for vulnerable persons such as children. Parents should be able to prepare food and care for their children; separation should not be a threat of punishment or a means of punishment; short-term separation should be permitted for the sake of education, recreation, meetings with legal counsel, mental health care counseling, medical care, etc. Detainees should be free to leave the premises to work and participate in occasional field trips outside the premises. Facilities should be licensed by the appropriate body with regard to safety and dignity of the detainees. Standards for detention of families should be codified and overseen by an independent authority. Staff should be experienced with child and family welfare, and not merely criminal justice systems. Detainees should have the right to contact visits and not undergo strip search after visitation.
Recommendation 5:	Children who were previously sent to the Office of Refugee Resettlement (ORR) for various reasons should not be sent to detention after release from ORR as this is a disincentive for parents to reunite with their children.
Recommendation 6:	*Pro bono* legal services should be provided to detainees in a timely fashion that considers the complexities of varying legal needs amongst family members, including for credible fear interviews. Those who conduct credible fear interviews should undergo appropriate training, especially for domestic violence-based claims.

In addition to providing the above-summarized recommendations, the LIRS/Women's Commission report reiterates the alternative options[32] to detention, including electronic monitoring, open centers, placement with community organizations, case management and other forms of monitoring. The report reiterates statistics that have shown high rates of success for such models; for example, the Vera Supervised Release Model was shown to effectively monitor asylum seekers while also reducing costs.[33]

Reaction to the LIRS/Women's Commission Report and the ACLU Suit and Ensuing Settlement

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[31] *Ibid.,* p. 45-47.
[32] Note 29 *supra,* p. 54-55.
[33] Note 13 *supra,* p. 41-42.

Upon its release, the LIRS/Women's Commission report spurred an intense reaction from communities across Texas and the nation due to its unacceptable detention conditions. NGOs and community organizations expressed outrage over the facility's blatant violations of both *Flores* and international customary law to which the U.S. is a signatory. On March 6, 2007, the ACLU filed suit against Michael Chertoff, Secretary of DHS, in addition to six ICE officials, on behalf of numerous children residing at Hutto.[34] On August 27, 2007, the plaintiffs won their case, resulting in a landmark settlement.[35]

The settlement cited that Hutto was in non-compliance with the minimum standards set out by the *Flores* case and called for reform in the policies and conditions under which plaintiffs were living at Hutto. Specifically, it required the facility to comply with living accommodations and other services outlined in two Exhibits as part of the settlement. Those conditions included concrete changes to the facility itself, living arrangements, freedom of movement within the facility, clothing, toys, phone access, schedule of the detainees, food, library access, use of television and music, orientation provision, legal counsel, visitation, recreation for children, mail, medical & dental care, and mental health care, amongst other provisions. All of these stipulations included expansions to the detainees' freedom to use these services and increases in the quality and scope of their provisions. In short, the case took a monumental step forward in adhering to the UNHCR Guidelines pertaining to detention.

The settlement also called for ICE to shorten the length of detention for accompanied minors at Hutto and place only families that are in expedited removal proceedings in the Hutto facility.[36] It also called for a review to be conducted every 30 days to determine whether families should be released on parole, bond, or recognizance, or transferred to another facility. In cases where families have been at Hutto for more than 60 days and where ICE determines the family cannot be released, the Field Office Director (FOD) must issue a summary of the reasons for that determination.[37] Additionally, a Magistrate Judge was authorized to conduct on-site reviews to ensure that the facility complies with the conditions to be upheld in the settlement Exhibits. The

[34] Lisa Falkenberg, "ICE might have to shift," *The Houston Chronicle*, June 14, 2007.
[35] Motion of the Defendant In Re Hutto Family Detention Center v. Chertoff, No. A-07-CA-164-SS (W.D. Tex. filed Apr. 18, 2007).
[36] *Ibid.,* at p. 4-5
[37] *Ibid.,* at p. 6-7

facility was also ordered to hire staff with child care experience and knowledge of issues experienced by survivors of torture, trauma, and other experiences common to refugees.[38]

Hutto After the ACLU Settlement

Opposition to the T. Don Hutto Detention Center has continued even after the settlement. Strong pressure continues from community individuals and NGOs, including the Women's Commission, for the facility to be shut down.[39] In March of 2008, the Texas Democratic Party submitted and adopted a resolution in over 60 precincts calling for alternatives to the detention of immigrant families and children. In June of 2008, the State Democratic Resolutions Committee passed the Hutto Resolution, putting it on the path to be an official part of the party's platform.[40] In October of 2008, Gregory Windham announced his candidacy for the seat of Williamson County Commissioner, and stated his intention to end the county's contract with Corrections Corporation of America, which runs the T. Don Hutto facility.[41] However, Windham lost the election to incumbent Valerie Covey, so the contract will likely go unchanged in the foreseeable future.[42]

National Legislation to Improve Detention Conditions and Regulations in the U.S.

Despite continuing concerns surrounding Hutto, Congress introduced bills in recent months that would dramatically alter the landscape of detention standards in the U.S. In June of 2008, the Senate introduced S. 3114. This bill, entitled the "Secure and Safe Detention and Asylum Act," outlines provisions on both the process and conditions of detention.

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[38] Note 35 *supra.,* at p. 10

[39] Juan Castillo, "Rights Group Investigates T. Don Hutto immigrant detention center," *The Austin-American Statesman,* October 2, 2008; Stephanie Mencimer, "Why Texas Still Holds 'Em," *Mother Jones*, July 21, 2008; Barbara Hines, "New ICE Family Detention Centers, a step in the wrong direction," *Dallas Morning News*, June 17, 2008; Tessa Moll, "Crime Without Punishment: Sexual assault at T. Don Hutto falls through cracks of Justice System," *Taylor Daily Press,* January 21, 2008.

[40] Texas Prison Bid'ness blog, "State Democratic Resolutions Committee Passes Hutto Resolution," June 18, 2008.

[41] David C. Doolittle, "Two seats up for grabs on commissioners court," *The Austin-American Statesman*, October 2, 2008.

[42] Williamson County 2008 Election Results (unofficial). <http://eyeonwilliamson.org/wp-content/uploads/2008/11/2008countywide.txt>

With regard to process, S. 3114 provides for:

- protection for vulnerable populations;
- requirement of adequate interpretation for those detained;
- a time limit of 72 hours for the establishment of credible fear;
- a requirement that the Attorney General consider whether the individual in question poses a risk to security and what is the likelihood of absconding before making a determining on the need for detention;
- the right to appeal to an immigration judge within two weeks from the time a detention decision is made without the option of bond or parole;
- legal orientation, the facilitation of *pro bono* counseling and legal assistance for asylum seekers awaiting a credible fear of persecution interview.

With respect to detention conditions, S. 3114 provides for:

- full compliance and enforcement of standards by the Secretary;
- improvement of existing standards to be developed;
- guarantee that detainees are not subject to degrading or inhumane treatment;
- limitation of harsh disciplinary procedures such as shackling and strip searches;
- access to telephones and free calls to legal counsel;
- preference for placement of facilities near low-cost or free legal counsel;
- employment of staff with languages spoken by detainees;
- daily access to indoor and outdoor recreational programs and activities;
- prompt, adequate, and free medical care including dental, eye and mental health care;
- recognition of unique needs of asylum seekers who may be suffering from trauma;
- specialized training of staff to deal with such populations;
- the establishment of an Office of Detention Oversight within the Department of Homeland Security;
- frequent and unannounced inspections of all detention facilities and a procedure for written complaints regarding ICE to the Office, the findings of which should be sent in a report to the Secretary and Assistant Secretary of Homeland Security, and an annual report to Congress on detention conditions and the results of investigations. Those reports should also contain a description of actions to remedy noncompliance and follow-up information on whether those actions were successful in remedying non-compliance;
- proliferation of various secure alternatives to detention and less restrictive detention facilities.[43]

Should this bill be enacted into law and appropriated sufficient funding, it will represent a significant improvement in the codification of standards for detention and accountability for such.

Another piece of legislation recently introduced is House Resolution 7255, the "Immigration Oversight and Fairness Act."[44] This bill in the House would require:

- Three hours of play per day in indoor and outdoor recreational programs for children;
- Video orientation and written and oral notice of children's' rights under the INA in English and in the five most common native languages spoken by the unaccompanied children held in custody at that location during the preceding fiscal year;
- Reliable age-determination of children that does not employ the use of forensic testing of children's bones and teeth;
- Free access to phones and legal counsel and government agencies;
- Provision of the facility's rules governing telephone access and information on how to make calls in English, Spanish, and two other languages spoken by a substantial population of the detainees; if there is a population of 5% or more that speaks a certain language, documents must be translated into that language;
- Reasonable rates on telephone calls; calls cannot be limited in frequency or duration when pertaining to legal counsel;
- There should exist one phone for every 25 potential users;
- Calls should be private and monitoring or recording of calls without prior notice is prohibited;

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[43] S.3114 Secure and Safe Detention and Asylum Act, 100th Congress, 2nd Session, introduced June 11, 2008.

[44] H.R. 7255, A Bill to Reform Immigration Detention Procedure, and for Other Purposes," 100th Congress, 2nd Session, introduced October 3, 2008.

- Messages should be relayed to detainees twice a day and detainees should be allowed to return the call within eight hours if they are legal in nature;
- Medical care should be prompt and high quality, including dental, eye, mental, dietary, and other specialized care as appropriate;
- The facility should be accredited by the National Commission on Correctional Health Care and the Joint Commission on the Accreditation of Health Care Organizations, and such accreditation should be obtained within one year; if not, DHS will cease to use the facility;
- All facilities should have an on-site health authority and health screenings must be provided upon arrival;
- Any care, including the use of psychotropic drugs, must be provided with informed consent of the individual, and in the case of such drugs, they must be prescribed only with written recommendation of a physician and should be prescribed so as not to adversely affect the hearing of the detainee;
- Deaths must be reported within 48 hours;
- Facilities should take all measures possible to prevent sexual abuse of detainees and ensure prompt medical intervention in instances of such abuse, and counseling and long-term follow-up;
- The notice to appear must be filed by DHS within 48 hours of detention; aliens in custody longer than 48 hours must see the immigration judge for custody determination within 72 hours of detention;
- In general, conditions should be humane and in the least restrictive setting possible;
- Detainees should receive a copy of the grievance policy within 24 hours of admission;
- Facilities should preferably be established near low-cost or *pro bono* legal services;
- Facilities shall accommodate visits by media and non-governmental organizations no longer than a week after such requests are made;
- There is a preference for secure detention alternatives that are designed to be the least restrictive setting possible and based on a continuum of methods, contracting social service agencies as appropriate;
- Within 72 hours of detaining an alien, DHS must conduct a vulnerability screening to determine if the alien falls in a designated group of vulnerable individuals; if that is determined to be the case, the individual must be released on parole, a reasonable bond, or the alien's own recognizance. This may include people who have serious medical or mental needs or disabilities, pregnant or nursing women, aliens detained with one or more of their children, aliens who provide support for dependents, aliens over the age of 65, children, victims of abuse, violence, crime, or trafficking, torture survivors and anyone who has demonstrated a credible fear of persecution or reasonable fear of torture. Those who are determined to fall within this category are to be sent to an alternative detention program.[45]

Between these two pieces of legislation, H.R. 7255's provision requiring that a vulnerability assessment be conducted upon arrival holds the most gravity. After the assessment, individuals who are found to be vulnerable, including women and children, are to be removed from detention facilities and transferred to other secure alternative detention programs, such as open centers, electronic monitoring programs, and case management.

Improvements have been made in codifying and enforcing processing and conditions in detention centers, yet much work remains to be done. The U.S. is a signatory to various pieces of international customary law that require human decency in detention and prescription of detention by law only as a last resort. The 1996 Immigration legislation has afforded DHS and ICE the opportunity to shirk responsibility for the basic human rights of asylum seekers in an effort to summarily process migrants through deportation proceedings. These practices and the conditions in which detainees are being held are egregious violations of human rights law. Legislation needs to be enacted expeditiously to correct these flaws in U.S. immigration policy and practice. Hutto stands out as one of the most glaring examples of inappropriate detention and non-compliance

[45] Note 44 *supra,* p. 1-48.

with human rights as they relate to asylum seekers. Due to investigation by refugee advocates and pressure from community groups, Hutto has made significant progress in improving conditions for asylum seekers and other detainees in the facility. The next crucial step in protecting the freedom of movement is to minimize the use of detention as a solution to migration, and move towards other alternative means of monitoring migrants whilst they await normalization of their legal status.