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# The Trend Toward the Criminalization and Detention of Asylum Seekers

by Sharon A. Healey

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“SEND ME YOUR TIRED, YOUR POOR, your huddled masses yearning to be free...” When Emma Lazarus penned these words in her famous poem about the Statue of Liberty, she saw the statue as a beacon of welcome for immigrants fleeing religious and ethnic persecution. Today, those who arrive on our shores seeking asylum find not the “golden door” of freedom that Lazarus described, but rather the steel doors of prison. U.S. immigration laws and policies increasingly aim to detain and criminalize asylum seekers. The United States played an integral role in developing the international system of refugee protection. Yet in the last decade, a growing culture of suspicion as to the motives of asylum seekers has led to immigration laws and policies that range from arbitrary to inhumane.

## THE DEVELOPMENT OF U.S. ASYLUM LAW

REFUGEE PROTECTION IN INTERNATIONAL LAW DEVELOPED after World War II in response to the Holocaust and the refugee crisis it produced. The 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention) defined a refugee as a person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution. The Convention also spelled out the responsibilities that States Parties to the Convention had to refugees. A key provision was the stipulation that “no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to...territories where his [or her] life or freedom would be threatened.” The 1951 Convention was limited in time and scope to European refugees from World War II. The 1967 Protocol, to which the U.S. acceded, did away with these limitations, while retaining the same measures for refugee protection.

In 1980, Congress enacted the Refugee Act, which was aimed at bringing U.S. domestic law into compliance with international obligations. The Act expanded the definition of “refugee” to include someone who has been persecuted in the past as well as someone who has a well-founded fear of future persecution. In 1994, asylum regulations were implemented to streamline the process and reduce the number of frivolous claims. Under these regulations, asylum officers have the authority to grant asylum, in an exercise of discretion, to qualified applicants. Those whose applications are not granted are referred to an immigration judge for formal adjudication.

## THE TREND TOWARD MANDATORY DETENTION

OVER THE PAST DECADE, THE U.S. HAS IMPLEMENTED increasingly restrictive measures toward asylum seekers, which have led to the rising detention of those seeking safe harbor in this country. An examination of such measures is undertaken here.

## EXPEDITED REMOVAL

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a number of new restrictions on persons applying for asylum. Among these restrictions, IIRIRA established the process of “expedited removal” of aliens seeking asylum who are found to have no documents or fraudulent documents at a port of entry. The detention of these aliens is mandatory. They are then referred to asylum officers for a “credible fear” determination. An alien found not to have a credible fear of persecution is deported without any opportunity for judicial review. If the alien is found to have a credible fear, or the immigration judge overturns a negative credible fear finding, then the alien is placed in removal proceedings and given the opportunity to have a full asylum hearing before an immigration judge.

The asylum seekers will remain in detention unless found eligible for parole. Parole decisions are entrusted to the Department of Homeland Security (DHS), the detaining authority, rather than to an independent authority. Parole guidelines have never been codified into any enforceable regulations. Some DHS officers have indicated that the use of parole for asylum applicants who had established a credible fear of persecution should be the exception rather than the rule, while others have held that parole should be a viable option for detainees who have passed their credible fear interview. These conflicting views have resulted in widely disparate treatment of asylum seekers. Critics of “expedited removal” complain that it does not contain necessary safeguards to ensure due process and protect against unfair, prolonged, and arbitrary detention.

The “expedited removal” process has resulted in lengthy detentions of aliens who entered the U.S. without valid travel documents. In its 1999 report, *Lost in the Labyrinth: Detention of Asylum Seekers*, Amnesty International reported the stories of numerous asylum seekers who had been detained for months and even years during their asylum proceedings. The report cited cases of several people who were kept in detention *after* receiving asylum when DHS appealed the judge’s ruling. Immigration and Customs Enforcement (ICE), the border security arm of DHS, however, recently confirmed that people granted asylum by an immigration judge should generally be released from detention when ICE appeals the judge’s decision.

The number of asylum seekers currently detained is not known. DHS has failed to keep accurate statistical information regarding the detention of asylum seekers in defiance of a 1999 congressional mandate that required the Immigration and Naturalization Service (INS), whose functions have been subsumed under DHS, to provide this information. The U.S. government has taken the position that a Supreme Court decision holding that the indefinite detention of a non-citizen is unconstitutional, does not apply to arriving aliens, and thus they can be held indefinitely.

This past August, ICE announced that it would expand the removal program to areas within 100 miles of the U.S. borders with Canada and Mexico. The expansion will give border patrol agents the power to issue deportation orders without any independent review and mandate the detention of more asylum seekers. The new program applies only to immigrants who have been in the U.S. fourteen days or less, but there is no indication of how that determination will be made.

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## OPERATION LIBERTY SHIELD AND OPERATION ABLE SENTRY

On March 17, 2003, DHS announced a new program called Operation Liberty Shield. This program, among other requirements, mandated the detention of all asylum seekers from 33 countries where al Qaeda or related terrorist groups were thought to operate. Under this program, asylum seekers were not permitted to have their cases reviewed on a case-by-case basis, but were required to remain in detention until their asylum claims were finally adjudicated, a process that could take in excess of a year.

The program ended only two months later, on April 17, 2003. That same day, Attorney General John Ashcroft issued a decision in the case, *Matter of D.J.* *Matter of D.J.* involved David Joseph, a Haitian teenager who was one of a boatload of Haitians taken into INS custody after landing in Miami. An immigration judge originally ordered him released on a \$2,500 bond after finding that he had a credible fear of persecution in Haiti. DHS appealed this decision to the Board of Immigration Appeals (BIA), which upheld the judge's decision. Attorney General Ashcroft then certified the case to himself and reversed the BIA decision, ordering that Mr. Joseph and *all* Haitians in expedited removal be held without bond throughout the duration of their asylum cases. Ashcroft cited national security concerns in his deci-

years. Mr. Diallo came to the United States in 2002 and applied for asylum, hoping to find the security that had eluded him for the prior eleven years. Instead, following the immigration judge's denial of his application, he found himself handcuffed and incarcerated with criminals in an immigration detention facility where not one person spoke his native language.

Under Operation Compliance, immigrants, including asylum seekers, who lost their cases before immigration judges were immediately taken into custody until they exhausted their appeals or posted bond. Prior to the implementation of the program, most respondents who lost their hearings before immigration judges were allowed to remain free while their cases were on appeal. Officials from DHS claimed that the program was necessary to reduce the number of illegal aliens who absconded after receiving a deportation order. ICE estimates that approximately 325,000 to 400,000 immigrants remain living in the country illegally after receiving final deportation orders.

Operation Compliance was originally implemented in Hartford, Connecticut, where it ran for 60 days with inconclusive results. If an analysis of the Denver and Atlanta programs indicates that the project's goals are being met, it could be expanded to larger cities and eventually implemented on a national level. There are only 20,000 beds avail-

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"[T]hose who arrive on our shores seeking asylum find not the  
'golden door' of freedom . . . but the steel doors of prison."

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sion, claiming Pakistanis, Palestinians, and others might enter the United States posing as Haitian asylum seekers. Although the Attorney General's decision is currently being applied only to Haitians, its precedent could be expanded to aliens from other countries.

The Attorney General's decision in the *Matter of D.J.* is one of a number of governmental decisions that specifically target Haitians. One such program, Operation Able Sentry, was launched by DHS in February to prevent Haitian refugees from reaching U.S. shores. Operation Able Sentry allows for the interception at sea and repatriation of Haitian refugees, and rarely allows them an opportunity to seek asylum. Since the program came into force, approximately 2,000 Haitians have been repatriated to Haiti. Ninety percent of them have been summarily repatriated without the opportunity to explain their reasons for leaving the country. In a 1993 decision, *Sale v. Haitian Centers Council*, the U.S. Supreme Court held that the prohibition against *refoulement* in both the 1987 Protocol and domestic immigration law did not pertain to refugees intercepted at sea.

## OPERATION COMPLIANCE

Amadou W. Diallo was the first person taken into custody under Operation Compliance, a pilot program that ran for 120 days from April 1 to August 31, 2004, in Denver and Atlanta. Mr. Diallo, a farmer from Mauritania, was a victim of his country's violent ethnic cleansing campaign against its black minorities in the late 1980s and early 1990s. He lost half of his family and he was violently beaten, jailed, and then forced to flee his country to neighboring Senegal. There, he did not have legal status and, as a consequence, was unable to work. He remained destitute for many

able in immigration detention facilities, however, and most of these are reserved for criminal aliens. Adding space for foreigners who lose their cases will likely overburden facilities in high immigrant areas such as New York City and Los Angeles. Critics of the program argue that it is a poor use of government resources; the cost of incarcerating someone in an immigration detention facility or contracted prison is roughly \$85 per day. They instead advocate a parole system that would track foreigners with pending immigration cases who have not committed any crimes. They also claim that threatening immigrants with incarceration after they lose their hearings will drive them underground and unfairly punish them for coming forward with their cases.

Additionally, critics of Operation Compliance point out that just because a removal order has been issued does not mean a case is over. News releases issued by ICE inaccurately claimed that applicants who had been "issued final orders of removal" would be taken into custody. Yet applicants who are denied relief by an immigration judge are not issued "final orders." They can appeal to the BIA and are legally permitted to remain and work in the U.S. while the appeals are pending. If the BIA denies their case, they can further appeal through the federal court system and request a stay of deportation. Opponents of the program claim that it causes significant hardship, not just to the immigrant, but also to his or her family members, including spouses and children who may be U.S. citizens and rely on the immigrant's financial support.

## H.R. BILL 10

On October 8, 2004, the House of Representatives passed H.R. 10, the "9/11 Recommendations Implementation Act." This measure proposes to massively expand the expedited removal program by

allowing immigration enforcement officers to deport, without a hearing, any non-citizen who was not admitted to the U.S. by immigration authorities and who has been here for less than five years. This could result in the summary deportation of people who could face serious harm if deported, including battered spouses and children, and victims of human trafficking.

The bill also substantially increases the burden of proof that asylum seekers must meet by requiring them to prove that the persecutor's *central* reason for harming them was on account of one of the protected categories. It requires them to provide corroborating evidence for their claims, despite the fact that refugees who are fleeing their countries often find it impossible to bring corroborating information. The provisions of the bill could also permit an applicant to be denied asylum if Department of State country reports do not substantiate the type of abuse suffered. State Department reports do not exhaustively document all forms of human rights abuse and are sometimes inaccurate.

Finally, the measure would eliminate stays of removal, permitting refugees to be removed to their countries while their appeals remain pending in federal court, and end judicial review for certain categories of torture victims. The provisions of H.R. 10 violate the prohibition against *refoulement* in the Refugee Convention and domestic law, as well as the UN Convention against Torture and its domestic implementing legislation, which prohibit returning persons to countries where they may face torture.

#### ADVERSE CONSEQUENCES OF DETAINING ASYLUM SEEKERS

NUMEROUS STUDIES HAVE DOCUMENTED wide-ranging adverse consequences to asylum seekers who are detained, both in terms of their mental and physical well-being, and in their ability to pursue their legal cases. Studies conducted by Physicians for Human Rights and the Bellevue/New York University School of Medicine Program for Survivors of Torture in New York City have documented extremely high levels of anxiety, depression, and post-traumatic stress disorder among detainees interviewed. These studies showed that the symptoms were exacerbated by continued incarceration. The studies further noted that access to mental health services is limited. Counseling is not provided and many detainees do not obtain medication for their problems. The studies indicate that continued detention causes re-traumatization for detainees who had previously been jailed and persecuted in their homeland. Isolation and confinement also contribute to the detainees' worsening mental health.

Detained asylum seekers also face numerous problems in attempting to prepare for their legal cases. Many are ignorant of the legal process and have inadequate access to legal materials. They have difficulty maintaining contact with the outside world and, therefore, in obtaining legal counsel, particularly if they are unable to speak English. Additionally, asylum seekers in detention are often detained with criminal aliens and subject to frequent, unannounced transfers between facilities, making it difficult for them to maintain contact with their attorneys. In one particularly egregious case reported by *Amnesty International*, an asylum seeker from Ghana was deported without the notification of her attorney and before her immigration proceedings had been completed. She was eventually returned from Africa and jailed again prior to finally receiving asylum.

Because they are fleeing persecution, asylum seekers who are detained often cannot meet the criteria usually considered for bond, including long standing community ties, employment, the presence of close family members, and of course the money to pay a bond. Under Operation Compliance in Denver, bonds for asylum seekers set by

ICE have ranged between \$15,000 and \$20,000, although judges often reduced them by two-thirds in subsequent bond hearings. Many asylum seekers may not know anyone in the U.S. Under immigration law, they are not eligible to work legally until roughly five months after they file their asylum application. Due to their circumstances, they often are indigent and cannot afford bond.

Sometimes the physiological trauma of prolonged or indefinite detention may lead asylum seekers to give up their right to appeal and face deportation to their home countries. This can have devastating results, as the case of Edgar Chocoy reveals. Edgar was only sixteen when he appeared for his asylum hearing, claiming that he feared persecution from a notorious Guatemalan street gang that he had left. His asylum application was denied and his attorney filed an appeal. At the time of his hearing, he was in a juvenile DHS detention facility after completing a sentence for juvenile delinquency. Although he sought release to an aunt in the U.S. who had agreed to take him, DHS refused to relinquish him from custody. Edgar grew increasingly despondent over his incarceration and eventually decided to forgo his appeal and be deported back to Guatemala. On his first trip out of his house, only ten days after arriving in Guatemala, members of his former street gang murdered Edgar.

#### ALTERNATIVES TO DETENTION

A number of programs have been designed as alternatives to detention. The Vera Institute for Justice developed one such program under contract with the INS from 1997 to 1999. According to a report released by *Human Rights First*, this program reported a 93 percent appearance rate for asylum seekers. Under the program, aliens were required to report regularly in person and by phone so that their whereabouts could be monitored. Participants were also provided with information on the consequences of failing to comply with immigration laws. It cost the INS \$3,300 per asylum seeker in the supervised release program, as opposed to \$7,300 for detained aliens. Another alternative model coordinated by Lutheran Immigration and Refugee Services involved the release of asylum seekers to community shelters. The shelter staff reminded participants of their hearings, scheduled check-in phone calls with the INS, and accompanied the asylum seekers to their appointments. The project boasted a 96 percent appearance rate.

In June of this year, ICE implemented its Intensive Supervision Appearance Program (ISAP). The program is available to up to 200 aliens in each of eight cities who are not subject to mandatory detention and are either in pending immigration court proceedings or awaiting removal from the U.S. The program is voluntary and participants must comply with conditions of their release. These may include electronic monitoring through ankle bracelets, regular meetings with ICE officers, confinement to halfway houses, and the use of voice recognition technology. The cost of the supervision program is estimated to be 55 percent less than the cost of detention, but some organizations have expressed concern that the program will be applied to aliens who would have been released from detention anyway, rather than provide a true alternative to detention.

#### CONCLUSION

THE FUNDAMENTAL TENANT OF THE 1951 REFUGEE CONVENTION and 1967 Protocol is the prohibition against the forced return of a refugee to a place where his or her life or freedom would be threatened. Yet the U.S. has returned asylum seek-

ers after using screening standards that differed according to the time they were applied and the nationality of the people to which they were applied. Freedom from arbitrary detention is a right enshrined in a number of international treaties that have been ratified by the U.S. The United Nations High Commissioner for Refugees has repeatedly stated that the detention of asylum-seekers is inherently undesirable and that current U.S. policies violate international standards.

In order to comply with international human rights standards, the U.S. must fundamentally alter its perception of asylum seekers as criminals or security threats and instead view them as victims of human rights abuses. Numerous changes must be made within the current system to ensure that asylum seekers are afforded due process and do not endure arbitrary, prolonged, or unnecessary detention. These changes include: the opportunity for asylum seekers in expedit-

ed removal proceedings to have their detention reviewed by a judge; the formation of regulations regarding parole criteria; the creation and implementation of regulations governing the treatment of alien children and other special groups; and the creation of an office within DHS charged with ensuring that regulations and policies regarding the detainment of asylum seekers are consistent with both domestic and international law. The detention of asylum seekers based solely on their national origin should be abolished and detention should be viewed as the exception, rather than the rule. Alternatives to detention should be pursued and, for those in detention, safeguards must be put in place to ensure aliens are informed of their rights and have access to legal counsel. The current system must be restructured with a foundation based on compassion and fairness, rather than fear. **HRB**

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**Human Rights for All Workers:** continued from page 7

of rights to acts of third parties and the Court's enumeration of those rights, which went well beyond the substantive rights it had historically addressed. The Court took specific note of the affirmative obligation of the State to protect against discrimination, even when committed by third party employers, stating:

104...States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.

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Non-compliance with these obligations gives rise to the international responsibility of the State, and this is exacerbated insofar as non-compliance violates peremptory norms of international human rights law. Hence, the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status.

The Court then noted that States' obligations to workers arise from both domestic legislation and international instruments and acknowledged the role of the judiciary in ensuring due process and other guarantees. The Court recognized the following rights, noting their "inalienable nature" and relationship to the "fundamental principle of human dignity embodied in Article 1 of the Universal Declaration": prohibition of obligatory or forced labor; prohibition and abolition of child labor; special care for women workers; freedom of association and to organize and join a trade union; fair wages for work performed; social security; and a working day of reasonable length with adequate working conditions (safety and health). In just one paragraph of its lengthy opinion, the Court effectively extended obligations incorporated in the American Convention and the Optional Protocols (including the Protocol of San Salvador) to all OAS Member States that have signed the OAS Charter, the American Declaration, or the Universal Declaration, or that have ratified the International Covenant on Civil and Political Rights. The Court did so by employing the principles of equal-

ity and non-discrimination as the basis for recognizing the applicability of enumerated economic, social, and cultural rights to unauthorized migrant workers.

### CONCLUSION

AS STATED ABOVE, OC-18 PROVIDES CRITICAL GUIDANCE vis-à-vis the rights of migrant workers, both documented and undocumented. It establishes as fundamental human rights the rights of all workers to benefit from the fruits of their labor, free from exploitation and dangerous working conditions. It remains to be seen, however, how OC-18 will affect the lives of the millions of migrant workers it sets out to protect. To date, the United States has taken no steps to reinstate direct remedies for undocumented workers fired in violation of labor laws. Anti-immigrant forces continue to send up their rallying cry that undocumented workers should not benefit from breaking the law, and therefore should not be entitled to recover when employers violate their fundamental human rights in the workplace. At the same time, workers' advocates have been successfully fighting the efforts of employers and others to expand the scope of the *Hoffman Plastics* decision and continue to work fervently so that international human rights standards find a place in domestic law.

At the regional level, there is movement toward greater and more systematic protections for the fundamental human rights of all migrant workers, regardless of their immigration status. On September 30 and October 1, 2004, an OAS Working Group met to prepare the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, bringing together the Inter-American Commission on Human Rights' Special Rapporteur and others from throughout the Americas. This coordinated effort, taken in light of the standards set forth in OC-18, seeks greater protection of all migrant workers' fundamental human rights, regardless of their immigration status.

As migrant workers cross borders, so do issues of exploitation, health and safety, and the need for social security—all relating directly back to the underlying reason workers cross borders in search of work: economic survival. Unless and until a truly coordinated effort at the local, regional and global levels is launched to address these issues, undocumented migrant workers will continue to suffer in the shadows. **HRB**