HIV/AIDS Services for Immigrants Detained by the United States

Submitted by
Human Rights Watch
HIV/AIDS and Human Rights Program

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Human Rights Watch respectfully submits this testimony to the House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law as it examines the issue of medical care for immigration detainees. Human Rights Watch, an independent non-governmental organization founded in 1978, has documented human rights abuses around the world. We are the largest human rights organization in the United States, and regularly report on US criminal justice issues including prison conditions, prison medical care, and conditions of confinement for immigration detainees.[1] Our HIV/AIDS and Human Rights Program identifies human rights violations that fuel the HIV epidemic and impede access to life-saving treatment, both in the United States and around the world.[2] Services for immigration detainees with HIV/AIDS in the United States is the subject of a forthcoming report. Copies of our reports are available at www.hrw.org.

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[1] *See*, e.g. Human Rights Watch and ACLU,, *Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls* (New York: September 2006); Human Rights Watch, *So Long As They Die: Lethal Injections in the United States* (New York: April 2006); Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* (New York: September 1998)

[2] See, e.g., Human Rights Watch, *Life Doesn't Wait: Romania's Failure to Protect and Support Children and Youth Living with HIV* (New York: August 2006); Human Rights Watch, *Injecting Reason: Human Rights and HIV Prevention for Injection Drug Users* (New York: September 2003).

HIV/AIDS Services for Detained Immigrants in the United States

Summary

An estimated 30,000 immigrants are held in administrative custody in the United States. These detainees are held in detention centers operated by the Immigration and Customs Enforcement agency (ICE), centers owned by private corporations, and in more than 300 local and county jails. A small number of immigrants are also held in federal facilities operated by the US Bureau of Prisons. US and international legal standards require, at a minimum, that administrative detainees receive HIV/AIDS prevention, care, and treatment services equivalent to those provided in the general community. The US has no uniform national standard that meets this test; and the standards that do exist do not protect the majority of immigrant detainees, who are housed in local jails and contract detention facilities. Government failure to collect data on detainees living with HIV/AIDS and to adequately supervise medical care provided in its "outsource" facilities further undermine its obligation to ensure that proper and appropriate medical care is provided to immigrants. These failures violate immigrant detainees' fundamental right to health protected under US and international law.

Legal Standards

In the United States, courts have consistently held that administrative detainees must be held in non-punitive conditions.[3] Detainees are entitled to "reasonable" medical care which courts have found to be a "demonstrably higher" standard than the Eighth Amendment prohibition on cruel and unusual punishment.[4] The definition of "reasonable" medical care has not been articulated by the judiciary, but national correctional health standards

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[3] *Wong Wing v. United States,* 163 U.S. 228, 237 (1896); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004); *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028 (EDNY, 1993).

[4] *Haitian Centers, supra*, at 1043.

have adopted as policy the "equivalence standard," requiring that prisoners receive medical care at least equivalent to that provided in the general community.[5]

Key international instruments establish that all persons have a right to health. The International Covenant on Economic, Social and Cultural Rights (ICESCR) , which the US has signed, confers an explicit right to "the highest attainable standard of health." [6] The US is a party to the International Covenant on Civil and Political Rights (ICCPR) which incorporates several rights directly and indirectly linked to the right to health, including the right to life, the right to be free from cruel, degrading or inhumane treatment or punishment, the right to be free from discrimination, and the right to privacy. These rights are not forfeited upon incarceration. On the contrary, Article 10 of the ICCPR specifically requires that all persons deprived of their liberty be treated with humanity and respect for their inherent dignity.[7] International guidelines for the treatment of prisoners require that incarcerated persons receive medical care equivalent to that provided in the general community.[8] Standards established by the World Health Organization, UNAIDS and other international health organizations require that HIV/AIDS prevention, care and treatment services in correctional settings be equivalent to that afforded in the community.[9]

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[5] National Commission on Correctional Health Care (NCCHC), Position Statement, "Administrative Management of HIV in Corrections", October 19, 2002, p. 1; American Public Health Association (APHA), Standards for Health Care in Correctional Institutions, (2003) p. 2.

[6] International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted December 16, 1966 (G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N. T.S. 3, entered into force January 3, 1976 (Article 12);

[7] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976, ratified by the U.S. on June 8, 1192, arts. 6,7 10(1).

[8] United Nations Standard Minimum Rules for the Treatment of Prisoners, May 13, 1977, Economic and Social Council Res., 2076 (LXII); Basic Principles for the Treatment of Prisoners, UN General Assembly Resolution 45/111 (1990); Body of Principles for the Protection of All Persons Under any form of Detention or Imprisonment, UN General Assembly Resolution 43/173/(1988).

[9] WHO Guidelines on HIV Infection and AIDS in Prisons (1999); UNAIDS International Guidelines on HIV/AIDS and Human Rights (2006); UNODC (With WHO/UNAIDS), HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for Effective National Response (2006).

These standards, based on human rights obligations in both domestic and international law, are applicable to all immigrants detained in the United States, for whom Department of Homeland Security and its enforcement agency, Immigration Customs and Enforcement are ultimately responsible. These obligations may not be delegated or evaded by contracting with third party detention facilities. [10]

The ICE Detention Standard for HIV/AIDS Fails to Meet US and International Legal Standards

ICE has adopted a Detention Operations Manual (DOM) that sets forth 38 standards for conditions in immigration detention. The "Medical Care" standard set forth in the DOM contains a specific section addressing the treatment of detainees with HIV/AIDS.[11] However, the HIV/AIDS provisions fail to establish an acceptable standard of care, in line with national and international criteria and recommended practice. This "standard" makes no reference to counseling, current clinical guidelines (such as those set by the Centers for Disease Control or the American Medical Association), confidentiality, or access to specialty care, as it should according to National Commission on Correctional Health, American Public Health Association, World Health Organization and UNAIDS guidelines.[12] The standard also fails to establish a voluntary testing and counseling program for immigrants with HIV/AIDS, stating that in some cases an immigrant's request for a test may be denied. As a result of these omissions the HIV/AIDS provisions fail to meet community standards of care and fall below national and international recommended standards for the treatment of HIV/AIDS in correctional settings.

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[10] *See, Roman v. Ashcroft*, 340 F3d 314, 320 (6th Cir. 2003).

[11] Department of Homeland Security, Detention Operations Manual, 2006, "Medical Care", para. K, www.ice.gov/partners/dro/opsmanual/index.htm, accessed July 20, 2007.

[12] See, e.g. NCCHC Position Statement, *supra*, pp1-3; APHA Standards, *supra*, , section V; and UNODC, *supra,* pp 10-21.

Further, the Medical Care standard applies in its entirety only to Service Processing Centers (SPC) operated by ICE or official Contract Detention Facilities (CDF) owned by private corporations; many of its provisions apply only as "guidelines" for the hundreds of local jails and other facilities contracting with ICE. The ICE Detention Standards do not apply to immigrants detained by the US Bureau of Prisons. The Bureau of Prisons policy for medical care expressly adopts the "equivalence" standard requiring that medical care in its facilities, including those for prisoners with HIV/AIDS, shall reflect medical care standards in the community.[13] Consequently, the current US government system lacks uniformity and consistency, creating three distinct populations of immigrant detainees depending in whose custody they are, each subject to and with access to differing standards of medical care.

Finally, because the detention standards set forth in the DOM are not formal administrative regulations, they are not enforceable in a court of law. This "voluntary" status leaves immigrants without legal recourse when the standards are violated.

ICE Failure to Identify or Monitor Detainees with HIV/AIDS Impedes its Ability to Meet its Obligations to Protect Immigrants' Right to Health

Human Rights Watch filed a Freedom of Information Act request seeking statistical information about immigrants with HIV/AIDS in immigration custody, including the number of detainees tested, diagnosed and treated for HIV/AIDS in the last five years. [14] The documents received from ICE in response to this request indicate that the agency largely fails to track this information, or that the information tracked is incomplete, failing to account

[13] Bureau of Prisons Policy 6010.03, www.bop.gov/datasource/execute/dspolicyloc, accessed October 2, 2007.

[14] Letter from Human Rights Watch to ICE FOIA Office dated April 4, 2007.

for the hundreds of facilities throughout the country contracting with ICE to hold detainees.

ICE responded "not tracked" to the following questions:

- The number of detainees receiving treatment for HIV/AIDS
- The number of detainees tested for HIV
- The number of HIV cases reported to federal, state, county or municipal public health agencies
- The number of detainees receiving off site specialty HIV/AIDS care
- The number of detainees with HIV/AIDS ordered deported or removed
- The number of detainees reported or removed with a supply of HIV/AIDS medication

ICE reported that *"the numbers below reflect all reported HIV cases to the DIHS Epidemiology Unit including those diagnosed per(sic) -ICE custody":*

- *2002- not tracked*
- *2003- 30*
- *2004- 42*
- *2005- 40*
- *2006- 54*
- *2007 (through April 2007) 47*

ICE also reported the number of on-site "clinic visits" related to HIV/AIDS:

- *FY 2003- 1162 (12 sites)*
- *FY 2004- 2577 (13 sites)*
- *FY 2005- 1125 (14 sites)*
- *FT 2006- 478 (14 sites)*
- *FY 2007 (October 2006 through April 2007) 233 (20 sites)*

The relationship, if any, between these two categories of statistics (cases reported to the Epidemiology Unit and on-site clinic visits) is unclear. Nor is it clear which facilities report, or are obligated to report, to the DIHS Epidemiology Unit (the Detention Standards contain no such reporting requirement.) [15] The limitation of the clinic visit statistic to between 12 and 20 sites suggests that the HIV/AIDS cases reported to the Epidemiology Unit originate from a limited number of sites, probably the Service Processing Centers and the Contract Detention Facilities. It is unlikely that these statistics reflect HIV/AIDS cases among detainees at the more than 300 jails and regional detention centers throughout the country. Human Rights Watch asked officials at jails in Alabama, Virginia and New Jersey if they reported detainee HIV/AIDS cases to ICE; they did not. [16]

ICE's response to the Human Rights Watch FOIA request indicates that it has limited and incomplete information regarding how many immigrants in its custody have been tested, diagnosed or treated for HIV/AIDS. The failure to collect and analyze this vital information undermines ICE's ability to meet its obligation to ensure appropriate medical care for this very vulnerable population.

ICE Fails to Provide Adequate Oversight of Medical Care in Detention

ICE's current mechanism for ensuring compliance with the National Detention Standards consists of one site visit per year to each of the 300 facilities housing immigrants in the United States. [17] Inspections are conducted by the Detention Standards Compliance Unit, which employs 8 inspectors and three

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[15] The DIHS Epidemiology Unit declined Human Rights Watch's request for an interview.

[16] HRW interview with Warden David Streiff, Perry County Correctional Facility 5/3/07; HRW interview with Superintendent Lewis W. Barlowe, Piedmont Regional Jail 6/20/07; HRW interview with Lt. James Howell, Monmouth County Correctional Institution 5/1/07.

[17] "Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities, December 2006, (OIG Report).

support staff. [18] Inspections typically last 3 days and cover all 38 detention standards. [19] Recent audits of detention centers by the Department of Homeland Security Office of Inspector General (OIG) and the US General Accounting Service (GAO) criticized the ICE inspection system as inadequate, finding that it had failed to identify violations of the detention standards discovered in these audits.

The Detention Standard for Medical Care does not require that facilities contracting with ICE be accredited by correctional health organizations; rather, the standard recommends that contracting facilities be "accredited or accreditation-worthy." Numerous prisons and jails contracting with ICE for immigration detention are accredited by the National Commission on Correctional Health Care (NCCHC) or the American Correctional Association (ACA). Neither NCCHC nor ACA, however, requires on-site inspections of accredited facilities on either an annual or a semi-annual basis. Once accreditation is achieved (requiring an initial on-site visit), it can be maintained by submitting documentation of existing policies and procedures.[20] Thus for many facilities housing immigration detainees, a 3 day visit from ICE that includes medical care among 37 other issues will be the only means of determining whether detainees with HIV/AIDS are receiving reasonable care.

Detainees are often not informed of their right to complain to ICE, the Department of Justice or other government agencies. The GAO report found that although some facilities posted a "hotline" number for complaints to the Office of the Inspector General, the number was non-functional from many facilities. Detainee complaints that were received were not processed or analyzed by DHS in any coherent manner.

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[18] General Accounting Office Report GAO-07-875 (GAO Report): Alien Detention Standards, July 2007.

[19] Ibid; Human Rights Watch interview with Warden David Streiff, *supra*.

[20] *See,* Accreditation Procedures" at www.ncchc.org and www.aca.org, accessed October 2, 2007.

Conclusion

The current system of "standards" for medical care in detention lacks clarity, uniformity and consistency, creating three different groups of immigration detainees, distinguished simply by reference to whose custody they happen to be in, each subject to and with access to differing standards. The ICE detention standards for the treatment of HIV/AIDS fail to meet national and international standards requiring that prison health care be equivalent to that provided in the community. The standards are voluntary and unenforceable, leaving immigrant detainees without legal recourse when the standards are violated.

ICE willfully ignores the incidence of HIV/AIDS among immigration detainees by failing to require programs for voluntary testing, counseling, and education that would identify cases of HIV/AIDS. Treatment may not be required, or appropriate, in every case, but identification and diagnosis would provide potentially life-saving information to individuals seeking that information and would facilitate appropriate medical response and planning. ICE further fails to monitor the testing, diagnosis or treatment of HIV/AIDS that is occurring in the majority of its detention facilities. The ICE inspection system is currently inadequate to ensure appropriate medical care in the hundreds of facilities utilized to hold detainees.

Providing only emergency and short term medical care may be more convenient for ICE and more profitable for county jails, but immigrants with HIV/AIDS, often for procedural reasons, may spend longer in detention than other immigrants and require more complex levels of care.[21] Providing medical care equivalent to that in the community to detainees with HIV/AIDS is a matter of public health, a requirement of federal law, and a fundamental principle of human rights.

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[21] Human Rights Watch research indicates that immigrant detainees with HIV/AIDS in comparison to other detainees, may seek to challenge their deportation on health grounds, entailing a prolonged process and detention, while their claims are adjudicated.

On Independence Day 2007, John P. Torres, Director of ICE Detention and Removal Operations published a letter in the *New York Times* acknowledging ICE's "moral obligation" to provide medical care for immigrant detainees, "which we uphold each and every day in a manner of which the American people can be proud." ICE's obligation to provide adequate medical care, however, is a legal one. And the US government must take serious steps to address the shortcomings in its policies and procedures relating to immigrant health care before it can claim any pride in them on the part of the American people.

Accordingly, Human Rights Watch recommends that the United States government increase executive and legislative branch oversight of conditions of detention for immigrants, including:

- The General Accounting Office should follow up on its recent report to ensure that ICE has taken appropriate action in response to its recommendations.

- Congress should establish a monitoring body independent of the Department of Homeland Security with the responsibility and the expertise to ensure that each facility housing immigration detainees complies with national correctional health care standards by providing medical care equivalent to that afforded in the community.

- The detention standards should conform to national and international standards and should be converted to enforceable administrative regulations.