



## **UNITED STATES OF AMERICA**

### **Stakeholder Submission to the United Nations Universal Periodic Review**

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**The Advocates for Human Rights,**

a NGO holding ECOSOC Special Consultative status since 1996,  
and

**Detention Watch Network**

**The Advocates for Human Rights** (“The Advocates”) is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983, The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. The Advocates is committed to ensuring protection for refugees around the world and provides legal services to asylum seekers in the Upper Midwest region of the United States.

**Detention Watch Network** (DWN) is a national coalition of organizations and individuals working to expose and challenge the injustices of the U.S. immigration detention and deportation system and advocate for profound change that promotes the rights and dignity of all persons.

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## Human Rights of Detained Migrants

### I. Executive Summary

1. International law recognizes that while the United States has the right to control immigration that right is tempered by its obligations to respect the fundamental human rights of all persons. With few exceptions, the United States may not discriminate on the basis of national origin, race, or other status. In designing and enforcing its immigration laws, the rights to seek and enjoy asylum from persecution, due process, fair deportation procedures, freedom from arbitrary and inhumane detention, family unity, and other fundamental human rights must be protected.
2. The United States' immigration system, while generous in many ways, is riddled with systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice.
3. It is important to recognize that detained migrants in the United States may face human rights violations resulting from lack of accountability for individual bad actors; from policies and procedures of the numerous local, state, and federal agencies and private corporations who detain migrants in the United States; and from the underlying federal statutory framework which in various respects fails to take into account and directly violates international human rights standards.
4. The United States, through the federal executive branch, has the ability to take steps to address human rights violations of detained migrants through robust enforcement of accountability mechanisms, including the Office of Civil Rights and Civil Liberties; through the creation or strengthening of accountability mechanisms where they are lacking; and through the issuance or updating of administrative guidance, policies, procedures, or regulations to ensure that they strengthen compliance with international human rights standards. At the same time, the United States must take steps to amend laws which violate human rights standards, including repealing mandatory detention laws, providing counsel to all detained migrants, and ending the mandate to fill detention beds.
5. Detention of migrants at U.S. borders, ports-of-entry, and in the interior is widespread, affecting hundreds of thousands of migrants each year.
6. **The United States fails to ensure that migrants in detention subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights.** Detained migrants, including children and families, lack access to counsel; instead, U.S. law provides that migrants in removal proceedings have “the privilege of being represented,” representation must be “at no expense to the Government.” Provision of information about legal rights is limited and inadequate. The United States continues to impose mandatory removal without a discretionary hearing to consider individualized circumstances in broad

categories of cases. More than 70 percent of all people Immigration and Customs Enforcement (ICE) deported were subject to summary removal procedures.

7. **The United States fails to investigate carefully each case of immigrants' incarceration.** The United States uses automatic prosecution in violation of the right to an individualized, case-by-case assessment of the need to detain, criminally prosecute, and incarcerate migrants who enter the United States illegally. Cooperation between U.S. immigration enforcement and state and local law enforcement throughout the United States circumvents procedural safeguards against constitutional violations and leave migrants vulnerable to incarceration in violation of law.
8. **The United States fails to ensure that detention centers for migrants and the treatment they receive meet the basic conditions and universal human rights law by continuing to subject migrants to arbitrary detention.** Migrants are detained without legal basis; are detained as a result of exercising their right to seek asylum from persecution; are subject to detention without administrative or judicial review; and are detained in violations of international law as a result of discrimination.
9. **The United States fails to ensure that detention centers for migrants and the treatment they receive meet international human rights standards relating to conditions of confinement.** The Detention Watch Network (DWN) reported in 2013 that “the current state of the immigration detention system continues to be plagued by deaths and suicides, subpar medical and mental health care, inedible food, and arbitrary restrictions on visitation and access to legal resources.
10. **The United States fails to protect the human rights of detained migrants, particularly the right to family unity.** U.S. detention of migrants contravenes obligations to protect family unity. Mandatory detention laws require detention of broad categories of migrants without regard to family ties. Migrants in detention may face termination of parental rights simply because they are detained and deported.
11. **The United States continues to rely on detention of migrants and corrections-based programs, rather than on community-based alternatives to detention.**
12. In this submission, U.S.-based civil society organizations provide information under Sections B, C and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.<sup>1</sup> These organizations provide services to or advocate on behalf of the rights of detained immigrants, refugees, and asylum seekers in the United States.

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<sup>1</sup> U.N. Human Rights Council [UNHRC] Dec. 6/102, Follow-up to Human Rights Council Res. 5/1 (Sept. 27, 2007).

## II. Suggested Recommendations

Recommendation 185: The United States should take steps to ensure that migrants in detention subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights.

13. The United States should provide counsel to all detained migrants at government expense. The United States must take immediate action to ensure that detained migrants are afforded meaningful access to counsel by providing adequate and working telephone lines to legal service providers; affording legal service providers with reasonable access to detention facilities during normal working hours; and providing opportunities for detained migrants to consult with legal service providers prior to executing a representation agreement.
14. ICE must immediately implement procedures to ensure that all stipulations of removal are knowing and voluntary, including ensuring that detained migrants have a meaningful opportunity to consult with counsel prior to the expiration of an offer of stipulation.
15. EOIR must immediately implement training of all immigration judges to ensure that stipulations of removal are knowing and voluntary, including informing detained migrants of the potential legal consequences of removal, of potential relief from removal, and of the right under international law to protection from return to torture or persecution.
16. Congress should appropriate funding to provide LOPs to all detained migrants in the United States so that access to legal information does not depend on where a migrant is detained.

Recommendation 183: The United States should investigate carefully each case of immigrants' incarceration.

17. Operation Streamline and other automatic prosecution programs should be terminated immediately.
18. CBP and ICE must develop internal procedures and enforceable standards to ensure that migrants turned over to federal immigration authorities by local or state law enforcement agencies were not initially stopped, arrested, or detained in violation of law.
19. Local and state law enforcement agencies must develop procedures and standards to review the initial stop, arrest, and detention of each migrant prior to turning that individual over to federal immigration authorities to determine that the migrant did not come into local or state custody in violation of law and to release without turning over to federal authorities any migrant who is in state or local custody in violation of law.

The United States Should Ensure that Detention Centers for Migrants and the Treatment They Receive Meet the Basic Conditions and Universal Human Rights Law (Recommendation 164); Adapt the Detention Conditions of Immigrants in Line with International Human Rights Law

(Recommendation 184); and Protect the Human Rights of Migrants, Regardless of Their Migratory Status (Recommendation 210).

***Ensure that migrants are not subject to arbitrary detention.***

20. State and local governments should develop procedures and enact legislation to ensure that no migrant is detained without legal authority. State and local law enforcement should cease holding migrants in detention solely on the basis of a request from immigration authorities.
21. ICE should cease asking state and local law enforcement to hold migrants in custody beyond the period authorized by law.
22. The U.S. should cease the practice of detaining asylum seekers and should explore community-based alternatives to detention. Until that time, the U.S. must ensure that asylum seekers are not inhibited by their detention from pursuing claims of asylum.
23. The United States should enact legislation to ensure that detained asylum seekers have prompt and continuing review of their custody status by a judicial authority.
24. ICE should exercise discretion to release asylum seekers that consistent with international standards, which allow for detention of asylum seekers as only a last resort.
25. Screening using the Risk Classification Assessment tool should be done by all officers at the time of apprehension, and preferably by a neutral third party.
26. CBP and ICE must ensure through training and policy guidance that asylum seekers are never threatened with continued custody simply because they choose to exercise their right to seek asylum.
27. The United States Government must clearly articulate and demonstrate its commitment to ensuring the right to seek and enjoy asylum from persecution as articulated in Article 14 of the Universal Declaration of Human Rights and must immediately end efforts calculated to deter people from seeking asylum, including expanding capacity to detain mothers and children.
28. The United States should enact legislation to ensure that all detained migrants, regardless of prior criminal convictions, have access to a discretionary hearing before a judicial authority to determine whether continued detention is warranted and to order reasonable conditions of release. U.S. law should be amended to repeal mandatory detention laws.
29. U.S. law should be amended to provide all detained migrants with access to individual review of custody status, consistent with the prohibition against arbitrary detention.
30. Congressional appropriations for detention operations must be consistent with international standards prohibiting arbitrary detention.
31. Federal law should clearly prohibit profiling based on race or national origin by federal immigration enforcement agencies.

32. Federal, state, and local laws should be amended to ensure that the interaction between immigration and law enforcement officials and systems does not provide opportunities for racial or national origin profiling.

***Ensure that detained migrants are held in humane conditions.***

33. The U.S. should immediately implement enforceable, rights-respecting detention standards in all facilities detaining non-citizens, including short-term facilities and contracted private and state and local jails and prisons. Any such detention standards should ensure humane treatment, including access to adequate physical and mental medical care, fresh air, access to family and legal counsel, and rehabilitation and educational services.
34. Customs and Border Protection should promulgate regulations to ensure humane conditions at short-term detention facilities that meet international standards.
35. Customs and Border Protection should immediately ensure that all detained migrants are provided with potable water, appropriate and nutritious food, access to bathroom facilities including private toilets and basic hygiene supplies, a cot and clean linens, and room with adequate and appropriate lighting that does not remain on 24 hours per day.
36. Customs and Border Protection should develop and implement procedures to allow access to NGOs to monitor short-term detention facility conditions.
37. Customs and Border Protection should ensure that detained migrants are informed of and afforded their right to access to a telephone call.
38. ICE should continue to make efforts to develop appropriate facilities for the detention of migrants that are not based on a penal model of confinement.
39. ICE should ensure that decisions to shackle detained migrants during hearings are made on a case-by-case basis, with the presumption being that the individual should not be shackled.
40. ICE should ensure that detained migrants have access to contact visits with family members, to the outdoors, and to affordable telephone access to maintain contact with families in all detention facilities.
41. The Federal Communications Commission should initiate rulemaking to establish a benchmark rate for the cost of interstate, long distance phone calls for people held in prisons, county jails, and immigration detention facilities.
42. State governments should prohibit private telephone companies from paying commissions to state prisons, local jails, and private prisons for revenue generated by detained migrants' telephone calls.
43. All places in which migrants are detained must be subject to legally enforceable standards of detention, must meet or exceed these standards, and must be subject to regular monitoring by ICE and by independent monitors of compliance with the standards.

44. ICE should include detention standards in contracts between ICE and state and local jails and prisons and should not contract or renew contracts with facilities that do not meet the standards.

45. Regulations must not exempt immigration detention facilities from the Prison Rape Elimination Act, as proposed.

***Ensure respect for the right to family unity for detained migrants.***

46. U.S. law should be amended to allow for consideration of family ties and other individual circumstances by ICE, EOIR, and the courts in determining custody status.

47. The ICE Parental Interests Directive should be amended to afford a private right of enforcement.

48. States should enact laws and develop effective procedures, including training, to ensure that detained migrant parents have access to state child protection, custody, and termination of parental rights cases.

49. States should enact laws to prohibit the termination of parental rights solely based on the detention or deportation of a parent.

**Recommendation 212: The United States Should Invest in Alternatives to the Detention of Migrants**

50. Alternatives to detention should be used to reduce the number of migrants held in detention centers, not to expand the number of migrants under custodial supervision.

51. Congress should significantly increase funding for community-based alternatives to detention programs.

52. Decisions to place non-detained migrants under custodial supervision, including ISAP and other monitoring programs, should be made on a case-by-case basis taking into account past and current appearance at court hearings; in no circumstances should migrants be placed under custodial supervision simply because there is capacity in the program.

53. ICE should end reliance on electronic and other correctional models of monitoring migrants who have been released from detention.

**III. Previous UPR Recommendations to the United States**

54. Numerous recommendations related to immigration were made to the U.S. during its first UPR in 2010. The U.S. accepted the following recommendations related to the detention of migrants:

- 185: Ensure that migrants in detention, subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights, even in their own language.
- 183: Investigate carefully each case of immigrants' incarceration.

- 164, 183, 184, and 210: (164) Ensure that detention centers for migrants and the treatment they receive meet the basic conditions and universal human rights law; (184) Adapt the detention conditions of immigrants in line with international human rights law; (210) Protect the human rights of migrants, regardless of their migratory status.
- 212: Reconsider alternatives to the detention of migrants.

#### **IV. Progress Toward Ensuring Protection of Human Rights on the Ground**

##### **A. Authority and Scope of Migrant Detention in the United States**

55. U.S. immigration law, insofar as it mandates detention without individualized custody determinations of migrants who have been convicted of certain crimes, violates international legal standards against arbitrary detention by subjecting migrants to prolonged administrative custody without the possibility of administrative or judicial review or remedy. Federal immigration law mandates detention without an individualized custody determination by a judicial authority of non-citizens convicted of certain crimes.<sup>2</sup> In addition to statutorily mandating arbitrary detention, these categorical detention determinations violate norms of proportionality and non-discrimination.<sup>3</sup>
56. U.S. mandatory detention of asylum seekers violates international legal standards against arbitrary detention by requiring the deprivation of liberty as a result of the exercise of the right to seek asylum from persecution. Federal immigration law requires the detention without an individualized custody determination by a judicial authority of arriving asylum seekers.<sup>4</sup> In addition to constituting arbitrary detention, the mandatory detention of asylum seekers violates the spirit of the Convention and Protocol relating to the Status of Refugees by deterring refugees from seeking asylum and is contrary to the guidance of the UN High Commissioner for Refugees.<sup>5</sup>
57. Detention is widely used for persons apprehended at or within 100 miles of U.S. borders with Mexico or Canada or at ports of entry<sup>6</sup> and for persons apprehended on suspicion of civil

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<sup>2</sup> Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) 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>3</sup> See, e.g., Barbara A. Frey and X. Kevin Zhao, “The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law,” XXIX Law and Inequality: A Journal of Theory and Practice 2, Summer 2011, at 310-11.

<sup>4</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>5</sup> UN High Commissioner for Refugees [UNHCR], Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012. <http://www.unhcr.org/505b10ee9.html>.

<sup>6</sup> 8 U.S.C. § 1225 and 8 CFR § 235.3 (authorizing detention at ports of entry or within 100 miles of the borders).



immigration status violations in the U.S. interior.<sup>7</sup> This civil detention system is distinct from the authority under federal criminal statute to arrest, detain, and imprison upon conviction persons convicted of certain immigration-related crimes.

58. Aliens apprehended by U.S. Border Patrol are detained in over 700 short-term holding facilities prior to being summarily removed or turned over to Immigration and Customs Enforcement (ICE) for removal proceedings.<sup>8</sup> U.S. Border Patrol apprehensions totaled 420,789 nationwide in FY 2013, including 414,397 people apprehended at the U.S.-Mexico border.<sup>9</sup>
59. Over 478,000 foreign nationals were detained by Immigration and Customs Enforcement (ICE) in FY 2012,<sup>10</sup> more than double the number of people detained in 2001.<sup>11</sup> The United States detains migrants in over 250 jails, prisons, and secure detention centers around the United States,<sup>12</sup> operated variously by ICE, state and local governments, and private prison corporations.<sup>13</sup> The number of beds available for detention on any given day nearly doubled between 2004 and 2014, from 18,000 beds to 34,000.<sup>14</sup> An estimated sixty percent of migrants detained by ICE is housed in privately-operated detention centers.<sup>15</sup>

**B. Ensure that migrants in detention subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights, even in their own language (Recommendation 185).**

60. In violation of ICCPR article 13, migrants in detention, including children and families, **lack access to counsel**; instead, U.S. law provides that migrants in removal proceedings have “the

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<sup>7</sup> INA §§ 1226, 1226A, and 1231.

<sup>8</sup> See Women’s Refugee Commission and Americans for Immigrant Justice, “Recommendations to the Department of Homeland Security to Improve Conditions in CBP detention facilities,” available at <http://www.womensrefugeecommission.org/resources/document/996-recommendations-to-the-department-of-homeland-security-to-improve-conditions-in-cbp-detention-facilities>.

<sup>9</sup> U.S. Dept. of Homeland Security, CPB 2013 Fiscal Year in Review, available at

<http://www.cbp.gov/newsroom/national-media-release/2014-01-17-000000/cbp-fiscal-year-2013-review>.

<sup>10</sup> National Immigration Forum, “The Math of Immigrant Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies,” at 2 (Aug. 2013), available at

<http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

<sup>11</sup> National Immigration Forum, “The Math of Immigrant Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies,” at 2 (Aug. 2013), available at

<http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

<sup>12</sup> See National Immigration Law Center et al., *A Broken System: Confidential Reports Reveal Failures In U.S. Immigrant Detention Centers*, at 4 (2009).

<sup>13</sup> See, e.g., Detention Watch Network, “About the U.S. Detention and Deportation System,” <http://www.detentionwatchnetwork.org/resources> (last visited Aug. 28, 2013).

<sup>14</sup> National Immigration Forum, “The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies,” Aug. 2013, at 2-3 (noting that FY 2014 (Oct 2013-Sept 2014) appropriations required 34,000 daily detention beds), available at

<http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.

<sup>15</sup> Interview with Bob Libel, Grassroots Leadership, Inc., Sept. 10, 2014, on file with author.

privilege of being represented,” representation must be “at no expense to the Government.”<sup>16</sup> One report estimates that approximately 84% of immigration detainees nationwide were unrepresented in their removal proceedings.<sup>17</sup> Representation of detained migrants in removal proceedings, insofar as it is available, is provided by NGOs.

61. Serious concerns have been raised regarding access to counsel for mothers and children seeking asylum from Central America, particularly for families being held at the Artesia, New Mexico, USA detention center.<sup>18</sup> The United States is in the process of opening additional correctional model detention centers to hold mothers and children.<sup>19</sup>
62. In violation of ICCPR article 13, the United States continues to impose **mandatory removal (deportation) without a discretionary hearing** in a broad category of cases involving convictions for aggravated felonies,<sup>20</sup> false claims to U.S. citizenship,<sup>21</sup> illegal reentry following unlawful presence in the United States,<sup>22</sup> reinstatement of prior orders of removal,<sup>23</sup> findings by an immigration judge of a frivolous asylum claim,<sup>24</sup> and other reasons. Immigration judges have no discretion to consider individualized circumstances, including family ties, length of residence, or rehabilitation.
63. In violation of ICCPR article 13, the United States relies on **summary deportation procedures** which fail to guarantee non-citizens’ rights to due process, access to counsel,

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<sup>16</sup> INA § 292. See also, American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Feb. 2010, at 40, (noting that while courts may apply a case-by-case approach to determining whether the assistance of counsel would be necessary to provide fundamental fairness, under the United States Constitution’s Fifth Amendment due process guarantee, appointment of counsel has been denied in every published case).

<sup>17</sup> American Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, Feb. 2010, at 40. Available at

<sup>18</sup> See e.g. N.Y. Times, “Deported From the Middle of Nowhere: At an Immigrant Detention Center, Due Process Denied,” Aug. 25, 2014, available at <http://www.nytimes.com/2014/08/26/opinion/at-an-immigrant-detention-center-due-process-denied.html>

<sup>19</sup> Lauren Gambino, The Guardian, “Huge Family Detention Centre to Open in Texas for Undocumented Immigrants,” Sept. 6, 2014 (describing plans for a 2400-bed facility opening in Dilly, Texas, USA) and Joy Diaz, KWBU Public Radio, “A Private Prison Group Runs Texas’ New Immigrant Detention Center,” Aug. 6, 2014.

<sup>20</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) states that any alien who has been convicted of an “aggravated felony” as defined by 8 U.S.C. § 1101(a)(43) is deportable. Aliens who are unlawfully present in the United States and are convicted of an aggravated felony are deportable subject to expedited proceedings, without a hearing before an immigration judge, pursuant to 8 U.S.C. § 1228. A person convicted of an aggravated felony is barred from seeking cancellation of removal pursuant to 8 U.S.C. § 1229b(a)(3).

<sup>21</sup> 8 U.S.C. § 1227(a)(3)(D) states that any alien who falsely claimed U.S. citizenship is deportable. No waiver of inadmissibility is available for false claims to United States citizenship, effectively rendering individuals unable to qualify for cancellation of removal.

<sup>22</sup> 8 U.S.C. § 1182(a)(9)(C)(i)(I) renders permanently inadmissible an individual who is present in the United States for more than 1 year, subsequently departs the United States, and attempts to or does reenter the United States without being admitted.

<sup>23</sup> 8 U.S.C. § 1231(a)(5) provides that if the attorney general finds that an alien has illegally reentered the United States after having been removed or departed voluntarily under an order of removal, the original order shall be reinstated and is not subject to reopening.

<sup>24</sup> 8 U.S.C. § 1158(d)(5) states that if the attorney general finds that an applicant for asylum has made a frivolous asylum application, the alien shall be permanently ineligible for any immigration benefits in the United States.

presentation of their case before a judge, and other fundamental safeguards of fairness.<sup>25</sup> These summary procedures include stipulations of removal negotiated directly between detention officers and detained migrants, while in custody and without access to counsel. Summary procedures also include reinstatement of prior removal orders. In Fiscal Year 2013, more than 70 percent of all people Immigration and Customs Enforcement (ICE) deported were subject to summary removal procedures.<sup>26</sup>

64. **Provision of information about legal rights is limited and inadequate.** Currently formal Legal Orientation Programs (LOP) funded through the U.S. Department of Justice Executive Office for Immigration Review (EOIR) operate at 25 detention centers.<sup>27</sup> While EOIR should be commended for developing the LOP program and continuing to include the program in its budget, the program does not ensure that all detained migrants in the United States receive information about their legal rights. The LOP program is not adequately funded to provide information at all detention centers and, because it operates under the authority of EOIR, focuses on providing legal information only to those detained migrants who appear before the immigration courts. Detained migrants subject to summary expulsion proceedings and all migrants detained by Customs and Border Protection fall outside the scope of this effective but limited program.

### C. Investigate Carefully Each Case of Immigrants' Incarceration (Recommendation 183).

65. The United States uses **automatic prosecution** in violation of the right to an individualized, case-by-case assessment of the need to detain, criminally prosecute, and incarcerate migrants who enter the United States illegally. Begun in 2005, Operation Streamline operates in five of the nine southwestern U.S. border patrol sectors.<sup>28</sup> The *en masse* procedures courts use in implementing Operation Streamline have been held as deficient under the Federal Rules of Criminal Procedure.<sup>29</sup>

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<sup>25</sup> These programs include stipulated orders of removal. Stipulated orders are essentially plea agreements negotiated directly between the detaining officer and the detained alien, without access to counsel, in which the alien admits to deportability, waives all rights to a hearing on any defenses to deportation, and agrees to be removed from the United States. While ICE and EOIR do not release statistics on the number of stipulated removals, an estimated 100,000 stipulated removal orders were issued between 2004 and 2008 according to the Migration Policy Institute. Migration Policy Institute, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

<sup>26</sup> Immigration Policy Center, "Removal Without Recourse: The Growth of Summary Deportations in the United States" (April 28, 2014), available at <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>.

<sup>27</sup> <http://www.vera.org/project/legal-orientation-program>

<sup>28</sup> See, e.g., Donald Kerwin and Kristin McCabe, "Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes," Apr. 29, 2010, <http://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes/>.

<sup>29</sup> *United States v. Arqueta-Ramos* (9th Cir. Sept. 20, 2013).

66. Cooperation between U.S. border and interior immigration enforcement agencies and state and local law enforcement agencies throughout the United States **circumvents procedural safeguards against constitutional violations** and leave migrants vulnerable to incarceration in violation of law. The U.S. criminal justice procedures which allow persons accused of crimes to challenge the legality of arrests, searches, and seizures and to exclude evidence, including testimony, from trial if found to have been obtained in violation of law routinely are bypassed when migrants are turned over to federal immigration authorities after arrest but prior to conviction. Border Patrol and ICE officers regularly interview and take custody of migrants who have been arrested or detained by state or local law enforcement. This means that migrants have no opportunity to challenge the legality of their initial arrest.
67. Undocumented youth are susceptible to racial profiling through aggressive school discipline policies that punish and exclude minority children, including undocumented Latinos, in disproportionate numbers. While juvenile delinquency adjudications generally do not make a child deportable, contact with the juvenile justice system can result in an undocumented child being turned over to ICE officers for deportation.<sup>30</sup>

**D. Ensure that Detention Centers for Migrants and the Treatment They Receive Meet the Basic Conditions and Universal Human Rights Law (Recommendation 164); Adapt the Detention Conditions of Immigrants in Line with International Human Rights Law (Recommendation 184); and Protect the Human Rights of Migrants, Regardless of Their Migratory Status (Recommendation 210).**

**1. Violations of the Right to Freedom from Arbitrary Detention**

68. **Detention without legal basis:** State and local governments throughout the United States detain thousands of people without any legal basis upon informal “detainer requests” from Immigration and Customs Enforcement (ICE) officials. Detainers routinely result in people who are suspected of being in the United States without permission being held without any charge or being held after the completion of their criminal sentences.<sup>31</sup>
69. **Detention resulting from the exercise of the right to seek asylum from persecution:** Asylum seekers routinely are deprived of their liberty as a result of the exercise of their right to seek asylum from persecution guaranteed by article 14 of the Universal Declaration of Human Rights. Arriving asylum seekers in expedited removal proceedings are subject to mandatory detention and may not be released while awaiting their initial “credible fear” review to determine whether they may apply for asylum before an immigration judge.<sup>32</sup>

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<sup>30</sup> The Advocates for Human Rights, *Moving from Exclusion to Belonging: Immigrant Rights in Minnesota Today*, Apr. 2014, at 137-38.

<sup>31</sup> Immigration Policy Center, “Immigration Detainers: A Comprehensive Look,” <http://immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look> (last visited Aug. 28, 2013).

<sup>32</sup> INA § 235(b)(1)(B)(iii)(IV).

Although asylum seekers may be released following a finding of credible fear, discretion to release rests solely with ICE; regulations prevent administrative review of the custody decision.<sup>33</sup> ICE revised its parole guidelines effective January 2010, but has not put these guidelines into regulations.<sup>34</sup> While this revised guidance that requires ICE to assess each asylum seeker for the possibility of parole is welcome, ICE continues to have sole authority to release asylum seekers and asylum seekers continue to lack access to prompt review of their custody status by a judicial authority in violation of international standards.

70. The United States has used detention to deter asylum seekers from seeking protection in direct contravention of international obligations.<sup>35</sup> In 2014, Central American mothers and children seeking asylum have been subject to arbitrary detention at the newly opened family detention center in Artesia, New Mexico, USA, in a stated effort by the United States to deter asylum seekers from coming to the United States.<sup>36</sup> Other centers are planned to expand the capacity to detain, deport, and deter asylum seekers from seeking safety in the United States.<sup>37</sup>

71. **Prolonged administrative custody without administrative or judicial review:** Migrants are subjected to prolonged administrative custody without the possibility of administrative or judicial review under mandatory detention laws. U.S. law imposes mandatory detention without an individualized custody determination by a court in a broad category of cases, including non-citizens convicted of certain crimes.<sup>38</sup> Individuals subject to “mandatory

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<sup>33</sup> See Human Rights First, “Renewing U.S. Commitment to Refugee Protection: Recommendations for Reform on the 30<sup>th</sup> Anniversary of the Refugee Act,” (Mar. 2010) at 10 (noting that while Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points under regulations located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3). See also U.S. Commission on International Religious Freedom, “ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States” (Dec. 23, 2009) (noting low rates of release on parole and citing that New Orleans released only 0.5 percent of asylum seekers, New Jersey less than four percent, and New York eight percent following a finding of credible fear), available at [http://www.uscirf.gov/index.php?option=com\\_content&task=view&id=2891&Itemid=126](http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126).

<sup>34</sup> U.S. Dept. of Homeland Security, Immigration and Customs Enforcement, “News Release: ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives,” (Dec. 16, 2009), available at <http://www.ice.gov/pi/nr/0912/091216washington.htm>.

<sup>35</sup> Convention relating to the Status of Refugees, art. 31, para. 2.

<sup>36</sup> See e.g. Juan Carlos Llorca, Associated Press, “DHS secretary visits Artesia, N.M, facility; warns immigrants ‘we will send you back.’” (quoting Secretary of Homeland Security Jeh Johnson: “Our border is not open to illegal immigration,” he said. “Our message to those who come illegally is we will send you back.”) [http://www.elpasotimes.com/latestnews/ci\\_26128803/dhs-secretary-visit-artesia-nm-migrant-detention-center](http://www.elpasotimes.com/latestnews/ci_26128803/dhs-secretary-visit-artesia-nm-migrant-detention-center).

<sup>37</sup> See, e.g. Grassroots Leadership, Inc., “Facts About Family Detention,” <http://grassrootsleadership.org/facts-about-family-detention>. The Obama administration has requested funds to expand family detention from under 100 beds to over 6,300 beds. <http://www.appropriations.senate.gov/sites/default/files/hearings/SAC%20Hearing%20S1%20Testimony%207-10-14.pdf>.

<sup>38</sup> Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien

detention” in the United States are not entitled to a bond hearing before an immigration judge.<sup>39</sup> Migrants who are not mandatorily detained are still subject to detention solely at the discretion of the Department of Homeland Security and have no right to judicial review of their custody status.<sup>40</sup> While the U.S. Supreme Court has imposed limits on the length of detention of migrants following a final order of removal,<sup>41</sup> there is no limit on how long a migrant may be detained while his or her case removal case is pending.

72. The United States, as mandated by appropriations authorization for detention operations, detains a minimum of 34,000 migrants each day,<sup>42</sup> resulting in detention of migrants to meet this quota rather than an individualized assessment of whether custody of a particular individual is warranted.<sup>43</sup>

73. **Detention in violation of international law for reasons of discrimination:** CBP and other law enforcement agencies in the border region practice race-based enforcement against Latino residents on a regular basis, using checkpoints that often result in the questioning of drivers about their immigration status occur throughout the border region.<sup>44</sup> The “transportation checks” occur more frequently in communities with high numbers of Latino immigrants.<sup>45</sup> Racial profiling also may result in detention of non-citizens in the interior of the United States. Enforcement programs, including the 287(g) program, the Criminal Alien Program, the Secure Communities program, the use of detainer requests by ICE, and informal cooperation between federal immigration authorities and local law enforcement all have drawn substantial criticism for engendering racial profiling practices.<sup>46</sup> Cases of local

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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>39</sup> See *Id.* § 236(c).

<sup>40</sup> 8 U.S.C. §1226(e).

<sup>41</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005); 8 U.S.C. §1231.

<sup>42</sup> Department of Homeland Security, “Departmental Management and Operations, Federal Funds, The Budget for Fiscal Year 2013,” at 553, available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-APP/pdf/BUDGET-2013-APP-1-12.pdf>.

<sup>43</sup> See, e.g. National Immigrant Justice Center, “Eliminate the Detention Bed Quota,” at <http://www.immigrantjustice.org/eliminate-detention-bed-quota#.VBG942O8E5k>; Center for American Progress, “Congress’s Costly Detention Quota,” at <http://www.americanprogress.org/series/congress-costly-detention-quota/view/>.

<sup>44</sup> See Border Network for Hum. Rights, “Human Rights Abuse Documentation Report 2009: El Paso, Texas – Southern New Mexico,” (Dec. 9, 2009).

<sup>45</sup> In a survey conducted with over 300 families in Arizona border communities, the Border Action Network found that a startling majority of residents (41% in Pirtleville, 66% in Naco, 70% in Nogales, and 77% in Douglas) felt that Border Patrol Agents stopped people for simply having brown skin.

<sup>46</sup> See, e.g. American Civil Liberties Union of Georgia (US), *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)* (Mar. 2010) (demonstrating impact of the 287(g) program on the Gwinnett County, Georgia community and documenting exacerbation of racial profiling that has taken place after the implementation of 287(g)); Migration Policy Inst., “A Program in Flux: New Priorities and Implementation Challenges for 287(g)” (Mar. 2010); Univ. of N.C. at Chapel Hill, “The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities,” (February 2010) (examining available data on the 287(g) program related to public safety, financial cost, and the relationship between immigration and crime and examining effects on community relationships between police and Hispanic populations); Cardozo Immigr. Justice Clinic, *Immigration on ICE: A Report on Immigration Home Raid Operations* (July 2009) (analyzing ICE arrest records from home raids in NY and NJ, finding a far-reaching pattern

law enforcement officers taking Latino drivers and passengers into custody without criminal charges following traffic stops and turning them over to ICE officials who are present in local jails through these programs have been documented.<sup>47</sup>

## 2. Violations of the Right to Humane Conditions of Detention

74. The Detention Watch Network (DWN) reported in 2013 that “the current state of the immigration detention system continues to be plagued by deaths and suicides, subpar medical and mental health care, inedible food, and arbitrary restrictions on visitation and access to legal resources.”<sup>48</sup>
75. Conditions of detention for migrants, including children, detained by Customs and Border Protection (CBP) in short-term custody facilities (which hold people for up to 72 hours) are of urgent concern. CBP apprehension and detention policies and practices lack transparency and accountability. Of particular concern is the practice reported in 2013 of holding detained immigrants in refrigerated or very cold cells.<sup>49</sup>
76. Immigration and Customs Enforcement (ICE) detains migrants in detention centers, prisons, and jails using a penal model inappropriate for individuals detained on alleged civil status violations. Because of the penal nature of the facilities, detainees routinely are

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of misconduct and constitutional violations by ICE agents); Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (April 2009) (discussing implications of state and local police enforcing federal immigration laws through the ICE 287(g) program, and the effect this enforcement has on the ability of local police to maintain trust and cooperation with immigrant communities); ACLU of N.C. Legal Foundation and Immigr. & Hum. Rgts. Policy Clinic, University of N.C. at Chapel Hill, “The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina,” (Feb. 2009); (finding shortcomings in complaint mechanisms, designation of functions, nomination of personnel, training of personnel, certification and authorization, ICE supervision, civil rights standards and provision of interpreters, required steering committee, community outreach, media relations/discretion, modification, and duration); Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement* (Feb. 2009) (finding 287(g) programs were not targeted at high-crime areas but did target race); Migration Policy Inst., *Collateral Damage: An Examination of ICE’s Fugitive Operations Program* (Feb. 2009) (examining the National Fugitive Operations Program (NFOP), run by ICE, comparing apprehension and detention data from Fugitive Operations Teams (FOTs) to stated program objectives and finding that 73 percent of FOT apprehensions from the beginning of the program in 2003 to FY 2008 had no criminal conviction); U.S. Govt. Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Jan. 2009) (finding that 287(g) program lacks “documented program objectives,” that 4 of 29 287(g) participants reviewed used the agreement to process minor crimes, such as speeding; that ICE does not describe in detail its supervision over 287(g) participants, creating a “wide variation in the perception” of supervisory responsibilities for ICE field officials; and that over half of the 29 agencies surveyed reported concerns from community members that local law enforcement would engage in racial profiling and intimidation).

<sup>47</sup> The Advocates for Human Rights, *Moving from Exclusion to Belonging: Immigrant Rights in Minnesota Today* (Apr. 2014) at 61-64, available at

[http://theadvocatesforhumanrights.org/uploads/ahr\\_moving\\_from\\_exclusion\\_to\\_belonging\\_final\\_2.pdf](http://theadvocatesforhumanrights.org/uploads/ahr_moving_from_exclusion_to_belonging_final_2.pdf).

<sup>48</sup> Detention Watch Network, *Expose & Close: One Year Later*, November 2013, at 2, available at [www.detentionwatchnetwork.org/ExposeandClose2013](http://www.detentionwatchnetwork.org/ExposeandClose2013).

<sup>49</sup> See “Immigrants Held in Border Deep Freezers,” at <http://www.thedailybeast.com/articles/2013/11/19/immigrants-held-in-border-deep-freezers.html>.

subject to degrading conditions.<sup>50</sup> ICE detainees are kept in a punitive setting;<sup>51</sup> they wear prison uniforms, are regularly shackled during transport and in their hearings.<sup>52</sup> Detainees may be confined alone in tiny cells for up to twenty-three hours a day<sup>53</sup> and held for prolonged periods of time without access to the outdoors.<sup>54</sup> Phone privileges, access to legal counsel, and recreational time are often restricted or completely denied.<sup>55</sup> Telephone calls may be extremely expensive because they are placed through independent telephone companies that pay the state, the county jail, or the for-profit prison a commission that ranges from 15 percent to 60 percent either as a portion of revenue, a fixed upfront fee, or a combination of both.<sup>56</sup> Depending upon where they are detained, they may not be permitted contact visits with family.<sup>57</sup> In some cases the United States fails to adhere to guarantees in ICCPR articles 10(1) and 10(2)(a).<sup>58</sup>

77. The United States holds all detained migrants in facilities with no legally enforceable detention standards. Non-binding detention standards are in force only in those facilities operated by ICE, and provide no private right of action for violations of the standards to any detained migrant. The facilities are not subject to sufficient independent monitoring and oversight and appear to face no penalties for violating standards.<sup>59</sup>

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<sup>50</sup> See, e.g., Letter from American Civil Liberties Union of Georgia (USA) to the Inter-Am. Commission on Human Rights, *Submission re. Racial Profiling in Gwinnett and Cobb Counties, Georgia, and Conditions of Detention at Stewart and Irwin County Detention Center* 5 (Mar. 24, 2011), available at [https://www.aclu.org/files/assets/ACLU\\_of\\_Georgia-submission\\_to\\_IACHR.pdf](https://www.aclu.org/files/assets/ACLU_of_Georgia-submission_to_IACHR.pdf) (reporting that detainees were given dirty underwear at the Irwin County Detention Center).

<sup>51</sup> UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 28, U.N. Doc.

A/HRC/7/12/Add.2, (Mar. 5, 2008) (prepared by Jorge Bustamante, Mission to the United States of America).

<sup>52</sup> The Advocates for Human Rights regularly represents people detained in Minnesota and has observed that people routinely remained shackled when appearing before the Immigration Judge.

<sup>53</sup> Immigration Equality, *Conditions of Detention*, <http://immigrationequality.org/issues/detention/conditions-of-detention/> (last visited Aug. 28, 2013).

<sup>54</sup> County jails, designed for short periods of detention, do not necessarily have outdoor recreation facilities. The Ramsey County Adult Detention Center in St. Paul, Minnesota, for example, has no outdoor recreation access. People in detention have very limited access to a small room with window near the high ceilings which can be opened to let fresh air into the room. Notes on file with the author.

<sup>55</sup> Clement Lee, Legal Fellow, Immigration Equality, Address at the New York City Council Hearing (Dec. 13, 2011) (transcript available at <http://www.scribd.com/doc/75669146/Testimony-on-LGBT-Detention-Issues>).

<sup>56</sup> See Phone Justice for Immigrants in Detention; <http://nationinside.org/campaign/endisolation/who-we-are/>

<sup>57</sup> County jails holding immigrant detainees in Minnesota have “video visits” with family members, where detainees see and speak with their family members via closed circuit television. Notes on file with the author.

<sup>58</sup> ICCPR, art. 10(1) (guaranteeing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2)(a) (providing that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

<sup>59</sup> Brittney Nystrom, National Immigration Forum, Written Testimony before U.S. House of Representatives, House Homeland Security Committee, Border, Maritime, and Global Counterterrorism Subcommittee, Moving Toward More Effective Immigration Detention Management, Dec. 10, 2009, <http://chsdemocrats.house.gov/SiteDocuments/20091210105703-50708.PDF>.



78. Sexual abuse of migrants in detention is a serious concern.<sup>60</sup> Detained women may be victims of trafficking, survivors of sexual assault and domestic violence, pregnant women, and nursing mothers.<sup>61</sup> Detained LGBTI migrants face particular vulnerability. Lack of governmental transparency,<sup>62</sup> as well as obstacles and disincentives to victim reporting, make it difficult to accurately assess the magnitude of this problem, but human rights organizations have documented incidents of sexual assault, abuse, and harassment from across the ICE detention system.<sup>63</sup> Frequent transfers of people between detention centers increase the likelihood that sexual abuse will remain unaddressed.<sup>64</sup> While the federal Prison Rape Elimination Act (PREA) is in effect, proposed rules would exempt immigration detention facilities from PREA.<sup>65</sup>
79. Since 2003, 146 migrants have died in detention.<sup>66</sup> Highly publicized cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity. Shocking reports of the United States' failure to screen for illness and failure to provide care to ill or injured persons in its custody abound.<sup>67</sup> Medical and mental health issues are exacerbated by the lengthy and indefinite detention endemic in the immigration detention system.

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<sup>60</sup> See American Civil Liberties Union, *Sexual Abuse in Immigration Detention Facilities*, <http://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities> (last visited Aug. 28, 2013) (detailing findings of a Freedom of Information Act request relating to complaints of sexual abuse); see also Carrie Johnson, "All Things Considered: Immigration Detainees Seek Prison-Rape Protection" (Nat'l Public Radio broadcast Dec. 13, 2011), available at <http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection>.

<sup>61</sup> *Ibid.*

<sup>62</sup> The Department of Homeland Security is not mandated under law to publish data on sexual violence, and has not done so. *Id.* at 4.

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.* at 19.

<sup>65</sup> See, e.g., Women's Refugee Commission, "Docket No. OAG-131; AG Order No. 3244-2011 National Standards to Prevent, Detect, and Respond to Prison Rape," Apr. 4, 2011, (commenting on proposed regulations on implementation of the Prison Rape Elimination Act which would exclude immigrant detention facilities), available at <http://womensrefugeecommission.org/programs/detention/1142-national-standards-to-prevent-detect-and-respond-to-prison-rape>. See also Carrie Johnson, "Immigration Detainees Seek Prison-Rape Protection," Nat'l Public Radio, Dec. 13, 2011, available at <http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection>, Michelle Brane, "It's Time to Protect Women and Children in Immigration Detention From Rape," available at [http://www.huffingtonpost.com/michelle-bran/women-ice-rape\\_b\\_1130756.html](http://www.huffingtonpost.com/michelle-bran/women-ice-rape_b_1130756.html).

<sup>66</sup> Interview with Jennifer Chan, National Immigrant Justice Center, Sept. 10, 2014 (on file with the author).

<sup>67</sup> Nina Bernstein, "Hong Kong Emigrant's Death Attracts Scrutiny of U.S. Detention System," N.Y. Times, Aug. 13, 2008 (reporting that "[i]n April, [Hiu Lui] Ng began complaining of excruciating back pain. By mid-July, he could no longer walk or stand. And last Wednesday, two days after his 34th birthday, he died in the custody of Immigration and Customs Enforcement in a Rhode Island hospital, his spine fractured and his body riddled with cancer that had gone undiagnosed and untreated for months."). See also Katherine Fennelly and Kathleen Moccio, U of Minn. Hubert H. Humphrey Inst. Of Pub. Affairs, "Attorneys' Perspectives on the Rights of Detained Immigrants in Minnesota," (Nov. 2009).

80. Reports of poor food quality and limited amount of food are common.<sup>68</sup> Detention Watch Network received reports of maggot- and worm-infested food, water that tastes like urine, small portions and lengthy times between meals, and expired food and drink.<sup>69</sup> Moreover, religious and medical dietary restriction are not frequently followed, leading individuals with the option of eating what is served – which either violates their faith or aggravates their health – or going without food.<sup>70</sup>
81. Use of solitary confinement is, sometimes for prolonged periods of time, is permitted and routine. In 2012, 300 people on average were held in solitary confinement in detention, 11 percent of whom had mental health issues.<sup>71</sup> Transgender individuals may be placed into “administrative segregation” without any individualized assessment or may face administrative segregation after being attacked or expressing fear for personal safety.<sup>72</sup>

### 3. Violations of the Right to Family Unity

82. **U.S. detention of migrants contravenes obligations to protect family unity.** Mandatory detention laws require detention of broad categories of migrants without regard to family ties.
83. U.S. law does not protect families at the time of detention. On August 23, 2013, ICE issued the Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities Directive,<sup>73</sup> but this internal policy guidance is not statutory and provides no private right of enforcement.<sup>74</sup>
84. Parents detained in ICE facilities may sometimes be involved in complicated child custody disputes. These parents, however, are unable to participate—either telephonically, by video, or in person—in family court hearings and therefore are unable to fight for their parental rights.<sup>75</sup>
85. In addition to obstructing participation in ongoing child protection or custody cases, ICE detention itself too often forms the basis of child protection claims, resulting in placement of

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<sup>68</sup> See, e.g., Georgia Detention Watch, *Report on the December 2008 Humanitarian Visit to the Stewart Detention Center*, at 5-6. Available at [http://www.acluga.org/Georgia\\_Detention\\_Watch\\_Report\\_on\\_Stewart.pdf](http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf); letter from IRATE & First Friends to the author summarizing key complaints received by volunteers during their visits with people detained in New Jersey, Jan. 26, 2012, on file with author.

<sup>69</sup> Detention Watch Network, *Expose & Close: One Year Later*, at 8.

<sup>70</sup> *Id.*

<sup>71</sup> Urbina, Ian and Catherine Rentz, “Immigrants Held In Solitary Confinement,” *New York Times*, 23 March 2013, available at <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>.

<sup>72</sup> Immigration Law & the Transgender Client 90 (Victoria Neilson ed., 2008).

<sup>73</sup> U.S. Department of Homeland Security, Immigration and Customs Enforcement, “Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities Directive,” Aug. 23, 2013. [https://www.ice.gov/doclib/detention-reform/pdf/parental\\_interest\\_directive\\_signed.pdf](https://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf).

<sup>74</sup> See U.S. Department of Homeland Security, Immigration and Customs Enforcement, “Overview of the Parental Interests Directive,” at <https://www.ice.gov/about/offices/enforcement-removal-operations/parental-directive.htm>.

<sup>75</sup> Women’s Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention* (Dec. 2010), available at [http://www.womensrefugeecommission.org/resources/doc\\_download/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention](http://www.womensrefugeecommission.org/resources/doc_download/667-torn-apart-by-immigration-enforcement-parental-rights-and-immigration-detention).

children in foster care and even termination of parental rights as a result of the parents' immigration detention or deportation.<sup>76</sup>

### **E. Reconsider Alternatives to the Detention of Migrants (Recommendation 212)**

86. The U.S. has failed to adequately fund or use community-based alternatives to detention, despite findings that alternatives to detention cost significantly less<sup>77</sup> and “yield 93% to 99% appearance rates before the immigration courts.”<sup>78</sup> While ICE’s limited scope pilot program with Lutheran Immigration and Refugee Services to refer certain individuals to community-based case management is a welcome step, ICE continues to primarily rely on private prison corporations to operate inappropriate corrections-based monitoring programs for migrants released from detention centers,<sup>79</sup> and to disproportionately invest in detention operations rather than alternatives to detention programs.<sup>80</sup> These programs appear to operate more as an expansion of custodial capacity rather than as true alternatives to detention; migrants who are not in detention and who are complying with the terms of their release by appearing at scheduled hearings subsequently have been enrolled in the ISAP program and subjected to electronic surveillance, home monitoring, and other arbitrary conditions unrelated to appearance at court.

## **V. CONCLUSION**

87. The United States immigration system fails to protect fundamental human rights to due process, fair deportation proceedings, freedom from arbitrary detention, humane detention conditions, freedom from *refoulement* to persecution or torture, and family unity. The vast apparatus of the U.S. immigration system, including the oft-amended Immigration and

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<sup>76</sup> Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, at 6 (Nov. 2011), available at <http://arc.org/shatteredfamilies>.

<sup>77</sup> ACLU of Georgia & Georgia Detention Watch, *Securely Insecure: The Real Costs, Consequences, and Human Face of Immigration Detention*, [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/1.14.11\\_Fact%20Sheet%20FINAL\\_0.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/1.14.11_Fact%20Sheet%20FINAL_0.pdf) (last visited Aug. 28, 2013).

<sup>78</sup> ACLU of Georgia & Georgia Detention Watch, *Securely Insecure: The Real Costs, Consequences, and Human Face of Immigration Detention*, [http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/1.14.11\\_Fact%20Sheet%20FINAL\\_0.pdf](http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/1.14.11_Fact%20Sheet%20FINAL_0.pdf) (last visited Aug. 28, 2013).

<sup>79</sup> See, e.g. BusinessWire, “The GEO Group Awarded Contract By U.S. Immigration And Customs Enforcement for the Continued Provision of Services under Intensive Supervision and Appearance Program,” Sept. 10, 2014, (announcing award of a five year contract expected to generate approximately \$47 million in annualized revenues), available at <http://www.businesswire.com/news/home/20140910005643/en/GEO-Group-Awarded-Contract-U.S.-Immigration-Customs#.VBG292O8E5I>.

<sup>80</sup> Written testimony of ICE Deputy Director Daniel Ragsdale for a House Committee on Appropriations, Subcommittee on Homeland Security hearing on ICE’s FY 2015 Budget Request, Mar.13, 2014 (requesting \$2.6 million for alternatives to detention versus \$1.3 billion for detention operations). <http://www.dhs.gov/news/2014/03/13/written-testimony-ice-house-appropriations-subcommittee-homeland-security-hearing>

Nationality Act and the gargantuan bureaucracies which enforce, interpret and administer the law, do not fundamentally reflect the United States' commitment to human rights protection. As the United States implements existing laws and develops new statutes, regulations, and policies, it must turn to its international human rights obligations as the starting point for policy development. Without a commitment to human rights implementation at the core of immigration policy, the United States will continue to struggle to meet its obligation to ensure that the human dignity of every person within its borders is respected.

**APPENDIX:**

**U.S. LEGAL FRAMEWORK RELATING TO MIGRANT DETENTION**

1. In the United States, Congress holds the authority to make the laws that govern admission, protection, and removal of non-citizens. Federal immigration law, however, must be understood in its context within the U.S. tripartite system of government. The Executive branch agencies, including the Department of Homeland Security, the Department of Justice, and the Department of State, promulgate regulations that directly govern the application of U.S. immigration law. Myriad public and internal policy guidance spells out how the U.S. immigration system operates in practice. Federal courts also play a role in providing a final review of individual decisions made in removal proceedings in administrative courts.
2. Federal immigration law in the U.S. continues to be based on the Immigration and Nationality Act of 1952 (INA)<sup>81</sup>. Reforms to the INA were made in 1965, which amended the INA to set a permanent annual worldwide level of immigration divided into categories for family-related immigrants, employment-based immigrants, and diversity immigrants. Refugees are excluded from these numerical limits; the Refugee Act of 1980 defines the U.S. laws relating to refugees.<sup>82</sup>
3. In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to toughen sanctions against employers who hired undocumented persons and limit access to federally funded welfare benefits.
4. In 1988, Congress created the “aggravated felony” category of deportable crimes which it dramatically expanded in 1990.<sup>83</sup> Immigrants who were convicted of one of the newly defined “aggravated felony” crimes were subject to mandatory detention.<sup>84</sup> In 1996, the

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<sup>81</sup> The INA of 1952 also created the Immigration and Naturalization Service (INS), the federal agency responsible for administering immigration law and policy until the creation of the Department of Homeland Security in 2003. *See* Immigration and Nationality Act, 8 U.S.C. § 1187 (2006).

<sup>82</sup> The term “refugee” means “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42).

<sup>83</sup> *See* INA § 101(a)(43). *See also* The Anti-Drug Abuse Act of 1988, Pub. L. 100-690, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating a separate ground of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices), Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1999) (substantially expanding the category of aggravated felony).

<sup>84</sup> *See* Anti-Drug Abuse Act of 1988; *see also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 610-11 (2010), available at <http://harvardcrcl.org/wp-content/uploads/2009/06/601-6341.pdf> (describing enactment of mandatory detention into U.S. law in 1988 and the dramatic expansion of the class of migrants subject to detention).

Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>85</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>86</sup> added additional crimes to the aggravated felony ground for deportation and reduced the term of imprisonment threshold requirement to one year.<sup>87</sup>

5. IIRIRA also expanded statutory authority for mandatory detention without an individualized custody determination by a judicial authority in a broad category of cases, including arriving asylum seekers,<sup>88</sup> non-citizens convicted of certain crimes,<sup>89</sup> and certain refugees awaiting adjudication of their applications for permanent residence.<sup>90</sup> These categorical detention determinations violate norms of proportionality and non-discrimination.<sup>91</sup>
6. The 1996 IIRIRA also created the “expedited removal” system for arriving aliens without proper documentation for admission<sup>92</sup> which has resulted in the routine detention of arriving asylum seekers and the summary expulsion of 111,000 people in 2010 alone.<sup>93</sup>
7. The USA PATRIOT Act of 2001,<sup>94</sup> passed just weeks after the 9/11 terrorist attacks, and the REAL ID Act of 2005<sup>95</sup> expanded the class of individuals who are inadmissible to the U.S. for having provided “material support” to terrorism.
8. The Department of Homeland Security (DHS) was created in 2003 as part of federal agency reform following the 9/11 terrorist attacks, shifting immigration enforcement into the arena of anti-terrorism policy. The Immigration and Naturalization Service (INS) was replaced with three different agencies within DHS: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE). The Executive Office of Immigration Review (EOIR), which has

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<sup>85</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>86</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>87</sup> See INA § 101(a)(43).

<sup>88</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>89</sup> Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) 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>90</sup> Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 2010, at 8-9.

<sup>91</sup> See, e.g., Barbara A. Frey and X. Kevin Zhao, “The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law,” *XXIX Law and Inequality: A Journal of Theory and Practice* 2, Summer 2011, at 310-11.

<sup>92</sup> INA § 235.

U.S. Dept. of Homeland Security, Office of Immigration Statistics, Policy Directorate, “Annual Report,” June 2011, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

<sup>94</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>95</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005).

jurisdiction over the immigration courts, is left within the Department of Justice (DOJ). In other words, two federal agencies in the U.S. – DHS and DOJ – are responsible for immigration enforcement and the adjudication of immigration cases.

9. Federal law gives the Department of Homeland Security, which includes both ICE and CBP, the authority to apprehend and detain aliens under the Immigration and Nationality Act (INA) §232 (Detention of Aliens for Physical and Mental Examination), §235 (Inspection by Immigration Officers; Expedited Removal of Inadmissible Arriving Aliens; Referral for Hearing); §236 (Apprehension and Detention of Aliens; §236A (Mandatory Detention of Suspected Terrorists; Habeas Corpus; Judicial Review), and §241 (Detention of Aliens Ordered Removed) and by corresponding federal regulations.
10. Because immigration is a matter of federal law, state and local governments in the U.S. have historically played a very limited role in immigration enforcement. Recent policies, however, expanded responsibility for enforcing civil immigration laws to state and local police through formal DHS programs such as the 287(g) program, the Criminal Alien Program (CAP), and Secure Communities<sup>96</sup> and informal cooperation between immigration authorities and public safety officials.

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<sup>96</sup> Local enforcement of immigration laws has resulted in problems with racial discrimination and profiling. See generally U.S. Dept. of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements* (Mar. 2010); ACLU of N.C. Legal Found. and Immigration and Hum. Rights Policy Clinic at the U. of N.C. at Chapel Hill, “The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina,” (Feb. 2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; Gov’t Accountability Office, *Report to Congressional Requesters, Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Jan. 2009), available at <http://www.gao.gov/new.items/d09109.pdf>; Trevor Gardner II & Aarti Kohli, The Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity at the U.C. Berkeley L. Sch., *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, (Sept. 2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).