



## **Report on the Follow-up Response of the United States of America concerning Immigrant and Noncitizen Rights**

**Submitted by The Advocates for Human Rights**

a non-governmental organization in special consultative status with ECOSOC

for the 88<sup>th</sup> Session of the United Nations Committee on the Elimination of Racial  
Discrimination

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Pertaining to List of Themes Paragraph 18(a), 18(b), and 18(c).

**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. In March 2014, The Advocates published a groundbreaking report, *Moving from Exclusion to Belonging: Immigrant Rights in Minnesota Today*. This report was the result of more than 200 interviews and 25 community conversations held throughout Minnesota over a two-year period. This current report is based in part on 2015 follow-up interviews drawing on the findings in *Moving from Exclusion to Belonging*.

## EXECUTIVE SUMMARY

1. The U.S. government's one-year follow-up response to the Committee's recommendations in paragraph 18(a)–(c) highlights high-level policy initiatives that have made little or no difference on the ground and that have, in some cases, exacerbated human rights violations against migrants and non-citizens in the United States.
2. In spite of the Committee's recommendation 18 (a) to abolish "Operation Streamline," the United States has retained Operation Streamline as a law enforcement mechanism. The U.S. government continues to prosecute some non-citizens using criminal rather than civil immigration procedures, in violation of the right to due process. Operation Streamline also prevents asylum-seekers from exercising their right to seek asylum. See paragraphs 5–8.
3. The United States' response to the Committee's recommendation 18(b) demonstrates the lack of substantive change made with regard to individual assessments in detention and deportation removals and guarantees of access to legal representation. Mandatory detention laws, as well as "bed quota" and other policies, result in arbitrary detention. The practice of family detention has been reinstated as a result of Central American children and families seeking asylum at the U.S.-Mexico border; in spite of recent policy announcements aimed at curbing long-term detention of families, the number of detainees in for-profit family facilities remains high. Access to legal representation is particularly difficult for non-citizen detainees. See paragraphs 9–27.
4. The United States' response to the Committee's recommendation 18(c) fails to address the lack of effective oversight of labor conditions of migrant workers. In documenting violations of migrant workers' rights in one state (Minnesota) in the United States, The Advocates found significant gaps in protections for migrant workers at the state level. Employers discriminate against migrant workers because of their immigration status, preventing migrants from reporting workplace exploitation. Ignorance of rights and employer-initiated barriers to accessing information result in violations of migrants' human rights. In addition, migrant workers who are trafficking victims are unable to find remedies due to inadequate responses from state and federal authorities. The lack of agency coordination and slow legal responses from state and local agencies fail to combat the discriminatory treatment of migrant workers. See paragraphs 28–50.

### **I. 18 (a) Abolishing "Operation Streamline" and dealing with any breaches of immigration law through civil, rather than criminal immigration system**

5. The Committee recommended in paragraph 18 (a) that the United States abolish Operation Streamline and deal "with any breaches of immigration law through civil, rather than criminal immigration system."<sup>1</sup> In its response, the United States describes Operation Streamline as a "law enforcement initiative" intended as a deterrence mechanism and acknowledges that it prosecutes individuals under 8 U.S. Code § 1325 (Improper entry by alien). Though the United States argues that it is "committed to making sure that this type of enforcement activity is consistent with U.S. human rights obligations," in reality Operation

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<sup>1</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, CERD/C/USA/CO/7-9, ¶ 18, (10 October 2015).

Streamline violates the right to due process and the prohibition against refoulement, preventing individuals from exercising their right to seek asylum.

6. While the United States responds that “individuals subject to Operation Streamline are entitled to and afforded due process in all criminal proceedings under the U.S. Constitution and laws, including rights provided to all criminal defendants, and consistent with applicable international obligations,”<sup>2</sup> Operation Streamline as implemented undermines due process. Adjudications are made en masse; one judge claimed his personal record was sentencing 70 people in 30 minutes, averaging about 25 seconds per person.<sup>3</sup> The U.S. government does provide legal counsel, but attorneys have enormous caseloads, ranging from seven to eighty cases a day,<sup>4</sup> undermining the quality of legal counsel provided. In courts with more Operation Streamline activity, defendants may meet with their attorney in groups rather than receiving individualized attention.<sup>5</sup> A survey of individuals convicted under Operation Streamline found that 40% were told by their lawyer that they needed to sign their deportation order and plead guilty.<sup>6</sup> Not surprisingly, defense attorneys estimate that 99% of defendants in Operation Streamline plead guilty.<sup>7</sup> Only two percent of survey respondents were “informed that they could denounce abuses” and only one percent reported that their “lawyer checked for legal migration options due to family connections.”<sup>8</sup> These responses, coupled with the large caseloads and short trials, cast doubt on the United States’ assertion that Operation Streamline protects the right to due process.
7. Operation Streamline prevents potential asylum-seekers from pursuing their claims. Border Patrol does not have a consistent policy about the inclusion of asylum-seekers in Operation Streamline, prompting the Department of Homeland Security’s Office of the Inspector General to note in a recent report that the inclusion of these vulnerable individuals in the program may violate U.S. obligations under international law.<sup>9</sup> In two of the four districts they visited, the DHS reported that the process for people who express fear of persecution is the same as for those who do not. The speed of the trials often does not give asylum seekers a

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<sup>2</sup> United States, *One-Year Follow-up Response of the United States of America to Priority Recommendations of the Committee on the Elimination of Racial Discrimination in its Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, CERD/C/USA/CO/7-9, ¶ 13, (5 November 2015) [hereinafter, “United States, *One-Year Follow-up Responses*”].

<sup>3</sup> Fernanda Santos, “Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border,” Feb. 11, 2014, [http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?\\_r=2](http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?_r=2), last visited Nov. 5, 2015.

<sup>4</sup> The large range is in part due to the inclusion of the less active districts that have now been closed. This suggests that today, attorneys’ caseloads likely fall on the higher end of the range. Emily Puhl, *Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol*, 2015, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1263&context=blrlj>, last visited Nov. 5, 2015; Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, Jan. 2010, [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf), last visited Nov. 5, pg. 14.

<sup>5</sup> Joanna Lydgate, *supra* note 4, at 14.

<sup>6</sup> The Center for Latin American Studies, University of Arizona, *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security Preliminary Data from the Migrant Border Crossing Study*, Mar. 27, 2013, [http://las.arizona.edu/sites/las.arizona.edu/files/UA\\_Immigration\\_Report2013print.pdf](http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013print.pdf), last visited Nov. 5, pg. 29.

<sup>7</sup> Joanna Lydgate, *supra* note 4, at 3-4

<sup>8</sup> The Center for Latin American Studies, *supra* note 6, at 29.

<sup>9</sup> Office of the Inspector General, *Streamline: Measuring its Effect on Illegal Border Crossing*, May 15, 2015, [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf), last visited Nov. 5, pg. 16-17.

chance to demonstrate a credible fear of persecution and risks return (refoulement) to a country where they could be persecuted.<sup>10</sup> This practice stands in clear violation of Article 31 of the Convention on the Status of Refugees, which stipulates that countries cannot punish refugees who enter a country illegally while fleeing violence.<sup>11</sup>

8. The U.S. response notes that only the Tucson, Del Rio, and Laredo sectors were part of Operation Streamline as of December 2014. The three sectors that remain in the program, however, represented 84% of the total apprehensions under Operation Streamline from Fiscal Year 2012 through March 2014.<sup>12</sup> Additionally, the three sectors where Operation Streamline has been suspended continue to prosecute illegal entry as a criminal offense under 8 U.S. Code § 1325. The effect of ceasing Operation Streamline in the El Paso, Yuma, and Rio Grande Valley sectors has yielded a minimal effect on the number of people subject to Operation Streamline, and does not alter the legal problems with the program.

## **II. 18(b) Undertaking thorough and individualized assessments for decisions concerning detention and deportation and guaranteeing access to legal representation in all immigration-related matters**

9. In its response to Recommendation 18 (b), the government describes in paragraph 15 individualized assessments for determinations regarding non-citizens who are “not subject to mandatory detention” but fails to discuss the lack of individualized assessments for those who *are* subject to mandatory detention. 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>13</sup> Moreover, these statutory mandates violate norms of proportionality and non-discrimination.<sup>14</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.” UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, Article 31 available at: <http://www.unhcr.org/3b66c2aa10.pdf>, last visited Nov. 5.

<sup>12</sup> Office of the Inspector General, *supra* note 9, at 6.

<sup>13</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>14</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.

10. Further, the United States fails to provide information in its response relating to the country's massive immigration detention system, which detains more than 440,000 men, women and children each year primarily in privately owned prisons. It also fails to describe detention conditions, including those of family facilities detaining women and children from Central America seeking asylum at the U.S.-Mexico border.

### **Immigrant detention in the United States is arbitrary and illegal**

11. In its response to the Committee, the U.S. government states that “decisions concerning detention... are made on the basis of individualized assessments.”<sup>15</sup> The response fails to account for factors that limit individual assessments and keep the number of non-citizens in immigration detention arbitrarily high: mandatory detention laws, an arbitrary “bed quota,”<sup>16</sup> and policies that deter refugees from seeking asylum in the United States.
12. In 1996, the United States expanded statutory authority for mandatory detention without an individualized custody determination by a judicial authority to a broad category of cases, including arriving asylum seekers,<sup>17</sup> non-citizens convicted of certain crimes,<sup>18</sup> and certain refugees awaiting adjudication of their applications for permanent residence.<sup>19</sup> These categorical detention determinations violate norms of proportionality and non-discrimination.<sup>20</sup>
13. Beginning in 2009, the United States has included the cost of providing 34,000 beds per night in the U.S. Immigration and Customs Enforcement (ICE) detention budget, and legislators have encouraged ICE to interpret the budget language to mean that the beds must be filled, as well as paid for.<sup>21</sup>
14. Further, the United States has taken action to deter refugees from Central America from seeking asylum by categorizing “recent border crossers” as top immigration enforcement priorities and by detaining families seeking asylum, including women with minor children. Although the United States reports that immigration officials have recently narrowed their targets for enforcement to individuals who pose a security risk to the United States, the new

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<sup>15</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 15.

<sup>16</sup> Detention Watch Network, *Banking on Detention: Local lockup quotas and the immigration dragnet*, 2015, [http://www.detentionwatchnetwork.org/sites/default/files/Banking\\_on\\_Detention\\_DWN.pdf](http://www.detentionwatchnetwork.org/sites/default/files/Banking_on_Detention_DWN.pdf), last visited Oct. 27, 2015.

<sup>17</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>18</sup> [5] 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>19</sup> Human Rights Watch, *Costly and Unfair: Flaws in US Immigration Detention Policy*, May 2010, pg. 8-9.

<sup>20</sup> *See, e.g.*, Frey and Zhao, *supra* note 14, at 310-11.

<sup>21</sup> Detention Watch Network, *supra* note 16.

policy guidance it references includes “recent border crossers” alongside “national security threats, convicted felons, [and] gang members” as immigration enforcement priorities.<sup>22</sup>

15. Inclusion of “recent border crossers” in the new detention priorities is part of a broader strategy by the United States to deter asylum seekers from seeking protection in the United States. Most of the people subject to detention and deportation as a result of having recently crossed the border are from El Salvador, Guatemala, and Honduras. In the past five years, the United States and Mexico have apprehended one million migrants from this region, and have deported 800,000 of them.<sup>23</sup> A majority of the unaccompanied children, mothers with children, and others coming from these countries may have legitimate claims to asylum. The latest statistics from USCIS show that 87.9% of detained families who have been given the opportunity to prove credible fear have been successful.<sup>24</sup> This high “fear found” rate suggests that a large number of people who face detention likely have legitimate grounds for seeking asylum.
16. Until the spring of 2015, the United States invoked general deterrence as a justification for detaining asylum seekers who have demonstrated credible fear. After a court issued a preliminary injunction,<sup>25</sup> ICE announced it would “discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.”<sup>26</sup> Despite this announcement, the practice of detaining families continues. The United States opened a large detention center for mothers with minor children, operated by a private company—the Corrections Corporation of America. A recent Inter-American Commission on Human Rights report found “families for whom there is capacity at an immigration detention center are automatically and arbitrarily being detained for the duration of the immigration proceedings initiated against them, even in cases where the mother has passed an initial asylum screening.”<sup>27</sup>

### **Detention conditions violate fundamental human rights, including access to healthcare and legal representation**

17. The United States is currently operating three family detention centers that house women and their children: the 532-bed Karnes County Residential Center in Karnes City, Texas,<sup>28</sup> the

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<sup>22</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 18.

<sup>23</sup> Rodrigo Dominguez Villegas and Victoria Rietig, *Migrants deported from the United States and Mexico to the Northern Triangle: A statistical and socioeconomic profile*, Migration Policy Institute, September 2015, <http://www.migrationpolicy.org/research/migrants-deported-united-states-and-mexico-northern-triangle-statistical-and-socioeconomic>, last visited Oct. 8, 2015, pg. 1.

<sup>24</sup> U.S. Citizenship and Immigration Services, Asylum Division, “Family Facilities Reasonable Fear,” <http://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-CF-RF-family-facilities-FY2015Q2.pdf>, last visited Oct. 29, 2015.

<sup>25</sup> *RILR v. Johnson*, <https://www.aclu.org/cases/rilr-v-johnson>, last visited Oct. 8, 2015.

<sup>26</sup> U.S. Immigration Customs and Enforcement, “ICE announces enhanced oversight for family residential centers,” May 13, 2015, <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>, last visited Oct. 8, 2015.

<sup>27</sup> Inter-American Commission on Human Rights, *Refugees and Migrants in the United States: Families and Unaccompanied Children*, July 24, 2015, Organization of American States, <http://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>, last visited Nov. 3, 2015, ¶ 148.

<sup>28</sup> GEO Group, “Karnes County Residential Center,” <http://www.geogroup.com/Maps/LocationDetails/23>, last visited Nov. 5, 2015.



2,400-bed South Texas Family Residential Center in Dilley, Texas,<sup>29</sup> and the 96-bed Berks County Residential Facility in Berks County, Pennsylvania.<sup>30</sup> Both the Karnes and Dilley facilities are run by private prison corporations, while the Berks facility is owned and operated by Berks County under a contract with the federal government.<sup>31</sup> A fourth facility, in Artesia, Texas, was open from June to December in 2014 while the larger Dilley facility was under construction. As of October 20, the Berks facility held 56 detainees, the Karnes facility held 461, and the Dilley facility held 1,558.<sup>32</sup>

18. The United States recently announced that it would cease the long-term detention of families, however, after several months, little has actually changed. On June 24, the U.S. Department of Human Services (DHS) announced changes to the family detention system, saying that “once a family has established eligibility for asylum or other relief under our laws, long-term detention is an inefficient use of our resources and should be discontinued.”<sup>33</sup> Despite these policy changes, the number of people held in detention has begun to climb again after initially decreasing after the changes were announced.<sup>34</sup> Additionally, attorneys on the ground indicate that even after these changes were enacted, women they represented who had already demonstrated credible fear had not been released. Their initial bonds were set ranging from \$7,500 to \$9,000—a sum none had the ability to pay.<sup>35</sup>
19. The facilities themselves are secure and prison-like, violating international and federal laws for the detention of children. The U.S. Commission on Civil Rights (USCCR) recently released a report examining the conditions of these family detention facilities. The USCCR highlighted the prison-like appearance of the detention facilities, writing that “immigration detention facilities house detainees in dormitories that are identical to criminal penitentiaries” and that the barbed wire fences surrounding the facility are “identical to the fence lines at criminal penitentiaries.”<sup>36</sup> Karnes is a secure facility that was designed to detain adult men.<sup>37</sup>

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<sup>29</sup> CCA, “South Texas Family Residential Center,” <https://www.cca.com/facilities/south-texas-family-residential-center>, last visited Nov. 5, 2015.

<sup>30</sup> American Bar Association Commission on Immigration, *Family Immigration Detention: Why the past cannot be prologue*, July 31, 2015, [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf), last visited Oct. 8, 2015, pg. 13.

<sup>31</sup> *Id.*, at 19.

<sup>32</sup> Elise Foley and Roque Planas, “Pennsylvania warns family immigrant detention center: change policies or lose your license,” Oct. 23, 2015, Huffington Post, [http://www.huffingtonpost.com/entry/family-immigrant-detention-berks\\_562a8fe6e4b0443bb563fcbd](http://www.huffingtonpost.com/entry/family-immigrant-detention-berks_562a8fe6e4b0443bb563fcbd), last visited Oct. 29, 2015.

<sup>33</sup> “Statement by Secretary Jeh C. Johnson on family residential centers,” June 24, 2015, <http://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>, last visited Oct. 10, 2015.

<sup>34</sup> Interview 1, Oct. 20, 2015.

<sup>35</sup> Human Rights First. *A One-Week Snapshot: Human Rights First at Dilley Family Detention Facility Post-Flores Ruling*, August 2015, <http://www.humanrightsfirst.org/sites/default/files/A%20One-Week%20Snapshot-%20Human%20Rights%20First%20at%20Dilley%20Family%20Detention%20Facility%20Post-Flores%20Ruling%20ob.pdf>, last visited Nov. 5, 2015.

<sup>36</sup> U.S. Commission on Civil Rights, *With Liberty And Justice For All*, Sept. 2015, [http://www.usccr.gov/pubs/Statutory\\_Enforcement\\_Report2015.pdf](http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf), 96-98, last visited Sept. 30, 2015.

<sup>37</sup> *Jenny L. Flores, et al. v. Jeh Johnson, et al.*, CV 85-4544 (C.D. Cal. 2015). <http://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf>, last visited 30 Sept. 2015.

In a recent court case, a U.S. judge ruled that the facilities violated a 1997 court settlement that established minimum guidelines for facilities detaining children.<sup>38</sup>

20. The United States is also not providing adequate healthcare in the detention facilities. Most egregiously, there have been reports of children receiving adult doses of vaccines in the Dilley facility.<sup>39</sup> An attorney who visited the Dilley facility described how mothers aren't given sufficient information about the vaccines their children are receiving but feel as if they cannot complain without fear of retaliation.<sup>40</sup> She also described how mothers with sick children were forced to wait for hours before being able to take their child's temperature and were denied medicine if their child's temperature was not high enough.<sup>41</sup>
21. Non-citizens in U.S. immigration detention do not have access to adequate mental health care. Many women and children in detention centers have experienced severe trauma and suffer from symptoms of PTSD, depression, and anxiety.<sup>42</sup> The lack of control that mothers experience in these facilities exacerbates their own trauma, and the constant fear of deportation evokes heightened levels of anxiety. Attorneys and mothers report that many children stop eating in response to the stress of detention.
22. The United States' response to the Committee's concluding observations fails to address the Committee's concerns about access to legal representation. The response asserts that "many procedural protections for individuals are provided in proceedings before an immigration judge," citing the fact that immigrants must be given a list of free legal services and a legal orientation program provided by the U.S. Department of Justice (DOJ) and nonprofit organizations.<sup>43</sup> According to attorneys who have visited the Dilley facility, information about how to access pro bono legal services is spread through word of mouth.<sup>44</sup> USCCR's report concluded that "the actual procedures ICE uses to process detained immigrants is not conducive to affording them adequate opportunity to obtain counsel."<sup>45</sup> Immigrants are often not able to understand what they are told about their right to legal counsel as a result of communication problems: many of these women and children are native speakers of an indigenous language, and the information can only be provided to them in English or Spanish.<sup>46</sup> The legal jargon used provides further challenges to comprehension.<sup>47</sup> Additionally, while the facilities offer law libraries to the detainees, both the IAHCR and USCCR reports find

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<sup>38</sup> In *Jenny L. Flores, et al. v. Jeh Johnson, et al.* Judge Gee ruled that Border Patrol facilities "have materially breached" terms in the 1997 Flores settlement that requires "that Defendants provide "safe and sanitary" holding cells for class members while they are in temporary custody" and that "children who are not released be housed in non-secure, licensed facilities" pg. 12, 18, 16.

<sup>39</sup> Seth Robbins, "Immigrant children given adult dose of Hepatitis A vaccine", Associated Press, Jul. 4, 2015, <http://bigstory.ap.org/article/624dc4122cf34d9e82a1f2d195e86845/feds-immigrant-kids-given-adult-dose-hepatitis-vaccine>, last visited Oct. 1, 2015.

<sup>40</sup> Interview 1, Oct. 20, 2015.

<sup>41</sup> *Ibid.*

<sup>42</sup> American Immigration Lawyers Association (AILA), "Traumatizing impact of family detention on mental health of children and mothers," June 30, 2015, <http://www.aila.org/advo-media/press-releases/2015/impact-family-detention-mental-health>, last visited Oct. 13, 2015. See affidavits for specific cases.

<sup>43</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶¶ 19-20.

<sup>44</sup> Interview 1, Oct. 20, 2015.

<sup>45</sup> U.S. Commission on Civil Rights, *supra* note 36, at 120.

<sup>46</sup> *Id.*, at 83-84, 109-110.

<sup>47</sup> *Id.* at 110.



that the resources in these libraries are primarily in English and that, as a result, the detained women are not able to use them.<sup>48</sup>

23. While ICE and the immigration detention system create barriers for mothers to access legal representation, children have an even more difficult time. Children are frequently denied their own opportunities to demonstrate credible fear and are considered instead as dependents under their mother's asylum case. By not allowing children the opportunity to demonstrate credible fear of their own, the United States is violating their right to seek asylum.
24. Along with making it difficult for detainees to access counsel, the detention facilities create challenges for attorneys attempting to provide them legal services. According to the USCCR, "[e]vidence indicates federal employees are interfering with an attorney's ability to represent clients."<sup>49</sup> Attorneys who have volunteered at the Dilley facility say that they are held to a set of seemingly arbitrary policies that are enforced sporadically, changing from officer to officer and from day to day: hand lotion and hotel soap have been confiscated, and open-toed shoes are sometimes banned.<sup>50</sup> When attorneys have tried to obtain the list of policies, Dilley officials have refused to provide it.<sup>51</sup> The USCCR reported similar practices at the Karnes facility, where attorneys were not allowed to bring office supplies into the facility.<sup>52</sup>
25. The rural location of these detention centers also impedes detainees' access to legal counsel. When the Artesia facility opened, the nearest immigration lawyer was 3.5 hours away.<sup>53</sup> Any progress that has been made in ensuring access to legal representation has been the result of a concerted effort of pro bono attorneys around the country who travel to these facilities.
26. Recently, the United States has begun offering to release detained women at family detention facilities on the condition that they wear electronic ankle monitors with GPS monitors. While alternatives to detention for asylum seekers are preferred, the requirement that they wear ankle monitors 24 hours a day unfairly stigmatizes asylum seekers. Ankle monitors are also burdensome and need to be charged frequently, a process that takes two hours to complete.<sup>54</sup> The ankle monitors are manufactured by a company that is a subsidiary of the private prison company in charge of the Karnes facility.<sup>55</sup>
27. Further, many detainees who have successfully demonstrated credible fear and are eligible for release remain detained because they are unable to pay high bonds.<sup>56</sup> Following the ICE and DHS policy changes (see paragraphs 14 and 16) that were intended to shorten the time

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<sup>48</sup>U.S. Commission on Civil Rights, *supra* note 36, at 42, 109; Inter-American Commission on Human Rights, *supra* note 27.

<sup>49</sup>U.S. Commission on Civil Rights, *supra* note 36.

<sup>50</sup>Interview 1, Oct. 20, 2015.

<sup>51</sup>*Ibid.*

<sup>52</sup>U.S. Commission on Civil Rights, *supra* note 36, at 114.

<sup>53</sup>American Bar Association Commission on Immigration, *supra* note 30.

<sup>54</sup>Molly Hennessy-Fiske, "Immigrants object to growing use of ankle monitors after detention," Los Angeles Times, Aug. 2, 2015, <http://www.latimes.com/nation/immigration/la-na-immigrant-ankle-monitors-20150802-story.html>, last visited Nov. 3, 2015.

<sup>55</sup>According to its website, the company that manufactures the ankle monitors is a subsidiary of GEO. <http://bi.com/immigration-services/>.

<sup>56</sup>As the IAHCRC report states, "the practical effect of setting the bond amount very high is to deny the possibility of release through the posting of bond." Inter-American Commission on Human Rights, *supra* note 27, ¶ 138.

families spend in detention, bonds were set at lower amounts for a few months. As of October 2015, however, they have increased again.<sup>57</sup> These higher bonds may correspond with the push to use ankle monitors as an alternative to detention. In interviews by the American Immigration Lawyers Association, several women describe interactions with ICE officers who pressured them into taking an ankle monitor rather than posting bond.<sup>58</sup> Some report being told to sign papers that will get them out of detention without understanding what they were signing. Attorneys were not present at these meetings.

**III. 18(c) Reviewing its laws and regulations in order to protect all migrant workers from exploitative and abusive working conditions, including by raising the minimum age for harvesting and hazardous work in agriculture under the Fair Labor Standards Act in line with international labour standards, and ensuring effective oversight of labour conditions**

28. In response to Recommendation 18 (c), the United States does not acknowledge its failure to review relevant laws or regulations that protect migrant workers. Further, the government does not adequately acknowledge that migrant workers often face exploitive and abusive working conditions. General legislation aimed at protecting all U.S. workers is ineffective for migrant workers. Other policies set forth in the U.S. response are deficient with respect to particular categories of migrant workers.<sup>59</sup> While the U.S. should be commended for taking steps forward to ensure protection for workers, the response to the Committee fails to account for the on-the-ground realities that migrant workers face. These gaps include: (1) employer discrimination; (2) barriers to exercising rights and reporting; (3) lack of adequate remedies for trafficking; and (4) deficient intergovernmental agency coordination.<sup>60</sup>

**Employers discriminate against migrants with impunity, creating barriers to employment, jeopardizing workers' health, and deterring workers from reporting workplace abuses**

29. In its response to the Committee, the U.S. government asserts that “federal labor and employment laws *generally* apply to all workers located in the United States, regardless of immigration status,”<sup>61</sup> yet migrant workers’ status—and employer manipulation of that status—undermines the efficacy of those laws.
30. Migrant workers face discrimination in the hiring process. Employers commonly request a potential employee’s immigration status. Employers say they ask potential employees for their social security number as a vetting process, but most migrants do not realize that

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<sup>57</sup> Interview 1, Oct. 20, 2015.

<sup>58</sup> AILA, “Coercion and intimidation of mothers and children,” <http://www.aila.org/advo-media/press-releases/2015/coercion-intimidation-detained-mothers-children>, last visited Oct. 13, 2015. See individual affidavits for many specific reports of coercion.

<sup>59</sup> For instance, ¶ 25 of the U.S. response to CERD recommendations refers to temporary foreign workers brought into the country who acquire protection under visa programs, however fails to address violations against refugee and immigrant workers unaware of these safety measures or undocumented workers without such protection.

<sup>60</sup> This section is based on interviews with low-wage immigrant workers, worker advocates, service providers, and government officials in Minnesota, conducted between March and November 2015.

<sup>61</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 24.

requiring such documentation is illegal.<sup>62</sup> As a result, it is not uncommon for immigrants not to be hired after interviews, even though they are legally present in the United States.<sup>63</sup>

31. Migrant workers who find employment are often victims of wage theft. In a recent survey of nearly 200 low-wage migrant workers in the Twin Cities, nearly 40 percent of respondents reported their wages being stolen.<sup>64</sup>
32. Access to effective remedies for on-the-job human rights violations is particularly important for migrant workers. For example, migrant workers face higher rates of sexual harassment than other workers,<sup>65</sup> and reports of sexual assault and harassment are especially high for Central American farmworkers.<sup>66</sup>
33. Yet undocumented workers face employer intimidation, deterring workers from reporting workplace human rights violations. One health care provider explained, “Employers like employees to believe they have a direct line to ICE [(Immigration & Customs Enforcement)], and employees are threatened with this frequently.”<sup>67</sup> One advocate from the National Employment Law Project cited the use of immigration status to manipulate employees as a frequent form of retaliation.<sup>68</sup>
34. Service providers explain that lack of legal status is the biggest barrier to reporting abusive practices in the workplace. “There are many undocumented workers at dairy farms and hog farms. Many live in fear of immigration officials showing up. They will not complain because they do not want to lose their jobs. They get no breaks and work long hours. One worker did complain and got deported. No one else at the plant complained after that. When people call me with these complaints I give them the number for the Department of Labor [(DOL)], but I don’t know if people follow up on that.”<sup>69</sup> As one advocate stated, “They are willing to endure harassment” to protect their “precarious lives.”<sup>70</sup>
35. Even documented immigrants fear losing their status.<sup>71</sup> As one worker said, “We are afraid of who will take care of our family, what will happen if we get fired. Hispanics are the most afraid. There is a lot of fear.”<sup>72</sup>
36. Employer threats and discriminatory treatment also create barriers to accessing the right to health care. One woman brought a doctor’s letter to her employer to discuss necessary reductions in workload for her health, but her employer pressured her to ignore her doctor’s recommendations.<sup>73</sup> Healthcare providers report weekly visits from immigrant patients who

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<sup>62</sup> Interview 2, May 27, 2015.

<sup>63</sup> *Ibid.*

<sup>64</sup> Interview 3, Mar. 10, 2015.

<sup>65</sup> Interview 4, May 26, 2015.

<sup>66</sup> Interview 5, Mar. 10, 2015.

<sup>67</sup> Interview 6, Jul. 14, 2015.

<sup>68</sup> Interview 7, Jun. 5, 2015.

<sup>69</sup> The Advocates for Human Rights, *Moving from Exclusion to Belonging*, Apr. 2, 2014, at 109.

<sup>70</sup> Interview 8, Aug. 4, 2015.

<sup>71</sup> Interview 2, May 27, 2015.

<sup>72</sup> Interview 9, Apr. 7, 2015.

<sup>73</sup> Interview 6, Jul. 14, 2015.

are “very reluctant to report injuries and to file worker’s compensation claims”—injuries that include sexual harassment and physical abuse.<sup>74</sup> One nurse summarized a common occurrence at her clinic: if the patient was born in the United States, they can tell immediately that they want a letter for time off. But if the patient is an immigrant worker, they almost always want a letter to tell them they can go back to work.<sup>75</sup> A recent survey of nearly 200 low-wage migrant workers found that over 50 percent worked when they were sick because they were not allowed to take time off.<sup>76</sup> A pregnant undocumented worker’s employer not only denied her request (based on her doctor’s recommendation) for a slight reduction in responsibilities, but increased her responsibilities as punishment.<sup>77</sup> One health worker spoke about a man who cut off the end of his finger while at work, but was forced to pay out of pocket or use personal insurance for care for the injury.<sup>78</sup>

37. Contrary to assertions in the U.S. government’s follow-up report, labor enforcement agencies do not always protect migrant workers during litigation.<sup>79</sup> One attorney described particular frustration when it came to protecting his clients from deportation after they reported their employers: “I have had no success on getting EEOC [(Equal Employment Opportunity Commission)] or the Department of Labor to sign off on U-visas (protecting crime victims from removal). In one case, the employee was raped multiple times by her supervisor. When the victim asked for U-visa certification, the EEOC refused to sign.”<sup>80</sup>
38. Moreover, the U-visa program and other legal barriers undermine migrant workers’ ability to obtain remedies for human rights violations. One advocate recognized that “if the National Labor Relations Board knows a person is undocumented, they cannot get back pay from the employer, but the organization must know the employee’s status in order to certify for a U-visa.”<sup>81</sup> The NLRB therefore cannot ensure that migrants receive wages they are rightfully owed, because it requires migrants to disclose their immigration status in order to be eligible for a U-visa. The employer cannot discover the worker’s status during the liability phase, but the Department of Labor does not prevent disclosure of status during the award phase.<sup>82</sup> In *Hoffman Plastics Compounds, Inc. v. NLRB*, the Supreme Court limited the remedies undocumented immigrants can receive if they are illegally fired for union organizing.<sup>83</sup> This decision specifically and legally treats undocumented workers differently from all other workers under U.S. laws.<sup>84</sup>

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Interview 3, Mar. 10, 2015.

<sup>77</sup> Interview 6, Jul. 14, 2015.

<sup>78</sup> *Ibid.*

<sup>79</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 24.

<sup>80</sup> The Advocates for Human Rights, *Moving from Exclusion to Belonging*, Apr. 2, 2014, at 110.

<sup>81</sup> Interview 7, Jun. 5, 2015.

<sup>82</sup> *Ibid.*

<sup>83</sup> National Employment Law Project, “Understanding the US Supreme Court’s Decision in *Hoffman Plastics Compounds v. NLRB*,” <http://www.nelp.org/content/uploads/2015/03/Understanding-US-Supreme-Courts-Hoffman-Decision.pdf>, last visited Nov. 10, 2015.

<sup>84</sup> *Ibid.*

### **The government fails to ensure that workers know their rights, and employers impede access to information**

39. The U.S. government is not investing sufficient resources toward outreach and educating migrants on their rights. The government asserts that officials are conducting outreach to migrant communities,<sup>85</sup> and the Department of Labor has had an outreach specialist since 1997, working to establish relationships with existing community organizations.<sup>86</sup> Yet workers and advocates commonly cite ignorance of rights as a barrier.
40. One government employee acknowledged that “[i]mmigrants don’t know their rights and are possibly undocumented, so industries that are low skill and heavily immigrant are problems.”<sup>87</sup> For example, workers are unaware of their right to worker’s compensation.<sup>88</sup>
41. Many workers lack familiarity with what labor rights are, how abuse is defined in the United States, or where to voice concern without retaliation. Some workers fail to report instances of physical or emotional harassment for they do not know what counts as harassment or who they can trust to disclose the information.<sup>89</sup> One advocate points out that, “people don’t know what minimum wage is and how to advocate for themselves or even if something happened.”<sup>90</sup> Those working in construction or domestic service are consistently reported to be less aware of wage and health laws.<sup>91</sup> When submitting a complaint to EEOC, many workers do not know that the affected person does not have to be the one to bring the claim. “There is a very low bar for giving information to the [government agency] but we need an initiating outside source.”<sup>92</sup>
42. Migrant workers report that employers prevent them from seeking more information about their rights. As one worker explained, “I was speaking to an organizer and a co-worker reported it to the supervisor and the supervisor tried to record me, asking ‘What did that girl say to you?’”<sup>93</sup> Employers harass and threaten migrant workers who educate themselves about their rights or who interact with union representatives.<sup>94</sup> In some cases, local law enforcement actively discourages dissemination of information about worker’s rights.<sup>95</sup>

### **State and federal authorities fail to provide adequate remedies for migrant workers who are trafficked**

43. Labor trafficking of migrant workers is a pervasive and hidden problem in the U.S.<sup>96</sup> Federal and state trafficking laws are rarely invoked to challenge the practice of labor trafficking.<sup>97</sup>

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<sup>85</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 25.

<sup>86</sup> Interview 10, Mar. 19, 2015.

<sup>87</sup> *Ibid.*

<sup>88</sup> Interview 6, Jul. 14, 2015.

<sup>89</sup> Interview 2, May 27, 2015.

<sup>90</sup> *Ibid.*

<sup>91</sup> Interview 7, Jun. 5, 2015.

<sup>92</sup> Interview 5, Mar. 10, 2015.

<sup>93</sup> Interview 9, Apr. 7, 2015.

<sup>94</sup> Interview 11, May 6, 2015; Interview 12, May 19, 2015.

<sup>95</sup> Interview 12, May 19, 2015.

<sup>96</sup> Interview 8, Aug. 4, 2015.

<sup>97</sup> *Ibid.*

Power over a migrant's movements and livelihood ensures control. One undocumented construction worker's boss "insisted" on picking him up to take him between job sites.<sup>98</sup> "The boss would never show up on time to take the client home, forcing the employee to work long hours and, ultimately, not to get paid."<sup>99</sup> One woman arrived from her country of origin with a passport, visa, and contract to be a housekeeper, yet her employer took her documents and forced her to work without pay.<sup>100</sup> In another example, a contractor directly recruited former union members from Mexico, arranging their housing and then forcing them to work off the debt they incurred.<sup>101</sup>

44. A trafficked victim's fear of coming forward, lack of adequate legal protections for victims, and the length of the legal process impede any possibility of redress. According to one advocate, "There is no safety net available unless workers are confirmed as trafficking victims."<sup>102</sup> This process can take around six months.<sup>103</sup> The system under the federal trafficking law (TVPA) provides some level of protection for trafficking victims through T-visas, but federal law enforcement agencies in Minnesota impose strict requirements before they will consider someone under the program.<sup>104</sup> Victims are also denied sufficient support both during the waiting period and when rebuilding their lives afterward, and the already limited funds are scheduled to be reduced even further.<sup>105</sup> If the perpetrator decides to flee the state, the victim has much more difficulty obtaining a T-visa and later being certified for public benefits.<sup>106</sup> Victims cannot receive credit for assisting a prosecution that never takes place.<sup>107</sup>
45. Moreover, worker advocates, employment law enforcement agencies, and law enforcement officials do not always recognize trafficking or what to do when they find it.<sup>108</sup> Despite growing evidence of trafficking, the State of Minnesota takes on very few trafficking cases.<sup>109</sup>

**Lack of agency coordination and slow responses prevent migrant workers from obtaining remedies for discriminatory treatment**

46. In its response to the Committee, the U.S. government contends that an Interagency Working Group created in November 2014 for federal agencies will secure future agency coordination to help workers cooperate without fear of retaliation.<sup>110</sup> This federal policy is insufficient,

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<sup>98</sup> Interview 6, Jul. 14, 2015.

<sup>99</sup> Interview 6, Jul. 14, 2015.

<sup>100</sup> Interview 8, Aug. 4, 2015.

<sup>101</sup> Interview 12, May 19, 2015.

<sup>102</sup> Interview 8, Aug. 4, 2015.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Interview 13, Sept. 9, 2015.

<sup>110</sup> United States, *One-Year Follow-up Responses*, *supra* note 2, ¶ 30.



mandating only one “six-month action plan”<sup>111</sup> and ignoring the difficulties migrants face in accessing the system.

47. Within federal agencies, policies do not always trickle down to field offices. Advocates frequently report a gap of policy implementation between local ICE offices and its national headquarters, which fails to ensure protocol is followed.<sup>112</sup> According to one union leader, “D.C. says one thing, but the local people just do not obey and are not held accountable.”<sup>113</sup>
48. At the local level, the City of Minneapolis is working to combat exploitative and abusive efforts of employers through working families’ packages, to ensure sick leave, fair scheduling, and wage theft provisions by 2016.<sup>114</sup> But local officials note that most enforcement agencies do not know the extent of their own authority and those of other agencies.<sup>115</sup>
49. As a result of this lack of coordination, many organizations prioritizing migrant rights feel ill-equipped and unsure of how to interact with and alert government agencies of potential cases. One advocate explains, “We have had cases in the past but did not refer to government agencies,” citing the need for “more trainings and speakers.”<sup>116</sup>
50. A lack of expediency in the local, state, and federal court systems prevents migrant workers from seeking justice. Union representatives recognize that “[m]igrant workers can contact the DOL,” but “it’s a slow process.”<sup>117</sup> Employers face no incentive to quickly resolve wage and hour complaints, benefitting from dragging cases through a lengthy process.<sup>118</sup> The prolonged timeframe for cases, coupled with the lack of support for complainants during the process, prevents workers from seeking justice.<sup>119</sup> One migrant explained the impossible situation complainants are faced with: “I was fired for filing an OSHA complaint. OSHA said they would fight, but how long would it take? I needed *another* job. The remedy is often getting the job back but you don’t want the job back.”<sup>120</sup> One attorney explains, “The worker needs a balance because the employer can fire them and even if retaliation is proved, it can still take a year to get their job back. There is no injunctive relief.”<sup>121</sup>

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<sup>111</sup> *Id.*, ¶ 30.

<sup>112</sup> Interview 14, Aug. 14, 2013.

<sup>113</sup> *Ibid.*

<sup>114</sup> Interview 13, Sept. 9, 2015.

<sup>115</sup> *Ibid.*

<sup>116</sup> Interview 2, May 27, 2015.

<sup>117</sup> Interview 12, May 19, 2015.

<sup>118</sup> Interview 8, Aug. 4, 2015.

<sup>119</sup> Interview 5, Mar. 10, 2015.

<sup>120</sup> Interview 9, Apr. 7, 2015 (emphasis added).

<sup>121</sup> Interview 4, May 26, 2015.