REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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I. INTRODUCTION

1. In keeping with Article 58 of its Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") is presenting this report as a diagnostic analysis of the human rights situation with respect to immigrant[1] detention and due process in the United States and to make recommendations so that immigration practices in that country conform to international human rights standards.

2. The United States hosts the largest number of international immigrants in the world.[2] According to the International Organization for Migration (IOM), in 2005 the United States had a total of 38.4 million international migrants. Many of those migrants came to the United States through formal and legal channels. The Department of Homeland Security (DHS) estimates that as of January 2008 there were 12.6 million legal permanent residents (LPRs) in the United States;[3] another 1,107,126 were added in 2008.[4] Every year, many legal permanent residents are granted U.S. citizenship.[5] In 2008, 1,046,539 persons became naturalized citizens.[6] The United States is also one of the leading countries for granting asylum and resettling refugees. In 2008, the United States granted asylum to 22,930 persons and resettled 60,108 refugees.[7]

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[1] Throughout this report, the Commission will use the terms "migrant" and "immigrant" interchangeably. The migrants or immigrants will be referred to as either "undocumented" or "unauthorized", again interchangeably. Finally, the Commission will use the terms "alien" and "noncitizen" also interchangeably.

[2] IOM, Regional and Country Figures, available at: http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/regional-and-country-figures; the United States Government found that as of January 2009 the foreign-born population residing in the United States was an estimated 31.2 million. *See* DHS, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009", p. 3 (January 2009), *available online at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf

[3] DHS, "Estimates of the Legal Permanent Resident Population in 2008" (October 2009), *available at* :http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf

[4] DHS, "U.S. Legal Permanent Residents: 2008" (March 2009), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

[5] According to figures from the Department of Homeland Security, persons who naturalized in 2008 spent a median of nine years in legal permanent resident status before naturalizing. *See at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_2008.pdf.

[6] DHS, "Naturalizations in the United States: 2008," (March 2008), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/natz_fr_2008.pdf. In 2007, some 171 million persons were admitted into the United States as non-immigrants, with temporary visas for various purposes, such as business or pleasure, occupational or academic studies, temporary jobs or to serve as a representative of a foreign government or international organization. *See* DHS, "Nonimmigrant Admissions to the United States: 2007 (August 2008), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2007.pdf.

[7] DHS, "Refugees and Asylees: 2008" (June 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf. The UNHCR reports that in 2006 the United States admitted 41,150 refugees, which matches the DHS figures for that year. In the last 30 years, some 2.8 million refugees have been resettled in the United States. *See* Human Rights First, U.S. Detention of

Continues…

3. According to government figures, as of January 2009, there were approximately 10.8 million undocumented immigrants living in the United States.[8] Of those, some 4 million came after January 2000; the other 6.8 million arrived in the 1980s and 1990s.[9] Nearly half of all undocumented immigrants entered the United States legally, but remained in the country after their visas expired.[10] Approximately 5 million children in the United States have at least one undocumented parent, 3 million of whom are U.S.-born citizens.[11]

4. Under U.S. immigration law, there are a number of ways an undocumented immigrant can regularize his or her status. For example, an immigrant may seek asylum;[12] seek withholding of removal (*non-refoulement*);[13] qualify for adjustment of status,[14] qualify for cancellation of removal, [15] qualify for a "T" visa as a victim of human trafficking,[16] qualify for a "U" visa as a victim of domestic violence or other violent

…continuation
Asylum Seekers: Seeking Protection, Finding Prison, p. 13 (April 2009), available at: http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

[8] DHS, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009" (January 2009), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf; the Pew Hispanic Center, which is mentioned in the DHS document, reported that as of March 2008 there were approximately 11.9 million undocumented immigrants in the United States. *See* Pew Hispanic Center, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, p. 1 (October 2, 2008), *available at:* http://pewhispanic.org/files/reports/94.pdf; that report uses the terms immigrants and migrants interchangeably; also used interchangeably are the terms "undocumented," "illegal," "unauthorized" and "irregulars".

[9] DHS, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009" (January 2009), available at: http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf; in its March 2008 report, the Pew Hispanic Center found that 5.2 million undocumented persons had arrived since January 2000 and 10.3 million since the 1990s. *See* Pew Hispanic Center, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, p. 3 (October 2, 2008), *available at:* http://pewhispanic.org/files/reports/94.pdf.

[10] Pew Hispanic Center, *Modes of Entry for the Unauthorized Migrant Population* (May 2006), available at: http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=19 .

[11] Dorsey & Whitney LLP & The Urban Institute, *Severing a Lifeline: the Neglect of Citizen Children in America's Immigration Enforcement Policy,* p. 20 (2009), available at: http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf.

[12] INA § 208, 8 U.S.C § 1158.

[13] INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); United Nations Convention against Torture (CAT), Article 3(1), *available at:* http://www2.ohchr.org/english/law/cat.htm; 8 CFR § 1208.16-1208.18. Withholding of Removal is available to migrants, who do not qualify for asylum in the United States, but fear that they will be persecuted if returned to their country. It is a U.S. equivalent in domestic law of its international obligation of *non-refoulement* under Article 3 of the CAT. The burden of proof for an applicant under U.S. law, however, is more stringent ("if it is more likely than not that [the applicant] would be tortured") than the text of Article 3(1) of the CAT ("where there are substantial grounds for believing that he would be in danger of being subjected to torture"). *See* U.S. reservations, declarations, and understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), available at: http.

[14] INA § 245, 8 U.S.C. § 1255.

[15] INA § 240A, 8 U.S.C. § 1229b.

[16] INA §§ 101(a)(15)(T), 212(d)(13), 212(a)(9)(B)(iii)(V), 245(l), 8 U.S.C. §§ 1101(a)(15)(T), 1182(d)(13)m, 1182(a)(9)(B)(iii)(V), 1255(l).

crime,[17] seek a waiver of inadmissibility,[18] or qualify for Special Immigrant Juvenile Status.[19] Some who are believed to be undocumented may even actually have derivative or acquired U.S. citizenship.[20] Moreover, deportable LPRs who are detained likewise often have potential forms of relief to remain in the United States.

5. In an effort to control the influx of new immigrants, since the mid-1990s the United States stepped up efforts to detect, detain and deport undocumented immigrants and criminally-convicted legal immigrants, including LPRs. In 1996, the U.S. Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) which significantly expanded the use of mandatory detention without bond, added to the list of crimes that subject legal immigrants, including legal permanent residents (LPRs), to mandatory deportation, and generally created a more stringent approach to immigration policy.[21]

6. In the aftermath of September 11, 2001 and with the passage of the Homeland Security Act of 2002, the new Department of Homeland Security (DHS) took responsibility for the duties of the former Immigration and Naturalization Services (INS). Under the newly created DHS, the government established Immigration and Customs Enforcement (ICE) as the principal domestic immigration enforcement and detention agency.

7. The focus of this report is on ICE's civil immigration operations.[22] Since 2002, with the creation of DHS and ICE, the federal government has taken a stricter enforcement approach to civil immigration violations. In a 2003 memorandum to its field office directors, the Office of Detention and Removal Operations (DRO), a subsection of ICE, announced "Operation Endgame," a ten year strategic plan to achieve a "100% removal rate." [23] Through a series of programs, including partnerships with state and local law enforcement, the number of those deported rose from 189,026 in FY2001 to 358,886

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[17] INA §§ 101(a)(15)(U), 212(d)(14), 212(a)(9)(B)(iii)(IV), 245(m), 8 U.S.C. §§ 1101(a)(15)(U), 1182(d)(14), 1182(a)(9)(B)(iii)(IV), 1255(m).

[18] INA § 212(h), 8 U.S.C. § 1182(h).

[19] INA §§ 101(a)(27)(J), 245(h), 8 U.S.C. §§ 1101(a)(27)(J), 1255(h).

[20] INA §§ 320, 322, 8 U.S.C. §§ 1431, 1433.

[21] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA); the 1997 Omnibus Consolidated Appropriations Act, Pub. Law 104-208, 110 Stat. 3009 (September 30, 1996); and the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[22] It is important to note that U.S. Immigration and Customs Enforcement (ICE) include many operations that focus on transnational criminal activities. The ICE Office of Investigations has taskforces to investigate child pornography/exploitation, community shield (against transnational gangs), human smuggling and other types of smuggling, identity theft and social security fraud, national security and contraband. *See* http://www.ice.gov/investigations/.

[23] Anthony S. Tangeman, Director of the Office of Detention and Removal Operations (DRO), "Endgame: Office of Detention and Removal Strategic Plan, 2003 – 2012," Form M-592 (August 15, 2003), available at: *at* http://cryptogon.com/docs/endgame.pdf; ACLU—Massachusetts, *Detention and Deportation in the Age of ICE*, p. 16 (December 10, 2008), available at: http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf.

in FY2008.[24] ICE detention of noncitizens practically doubled, from approximately 209,000 in FY2001 to 378,582 in FY2008.[25]

8. The IACHR was of the view that this increase in immigration-related detention warranted investigation to ascertain whether the immigration policies and practices were compatible with the United States' international obligations in the area of human rights. Pursuant to Article 18(g) of its Statute and Article 55 of its Rules of Procedure, the IACHR conducted a series of *in loco* observations to investigate the conditions under which immigrants are held in custody in the United States. The Inter-American Commission drew upon other sources of information as well.

9. With respect to the visits to detention centers, and based on the provisions of its Rules of Procedure that govern the "on-site observations" (articles 53 to 55), the IACHR filed a request with the Government of the United States seeking authorization for a visit to observe the conditions under which immigrants are held in detention. The United States Government invited the Inter-American Commission to visit four detention facilities in the summer of 2008. However, the IACHR was unable to make the visits at that time because of the conditions that the United States Government set and to which the Inter-American Commission did not agree.[26]

10. In December 2008, the United States Mission to the Organization of American States contacted the IACHR to resume discussion of a possible visit to the immigrant detention centers in the country. Steps were taken so that the Inter-American Commission was able to perform those visits according to its rules and practices. In the week of July 20 to 24, 2009, a delegation from the IACHR visited detention centers in Arizona and Texas. In all, the delegation visited two shelters for unaccompanied minors, one family detention facility, and three adult detention facilities. The centers visited were the following:

- *Southwest Key Unaccompanied Minor Shelter (*Phoenix, Arizona*)*
- *Florence Service Processing Center* (Florence, Arizona)
- *Pinal County Jail* (Florence, Arizona)
- *T. Don Hutto Family Residential Center (*Taylor, Texas)
- *Willacy Detention Facility (*Raymondville, Texas)
- *International Education Services Unaccompanied Minor Shelter* (Los Fresnos, Texas)

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[24] DHS, "2008 Yearbook of Immigration Statistics," (August 2009), available at: *http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf*.

[25] *Compare* INS, "2001 Statistical Yearbook of the Immigration and Naturalization Service" (February 2003), available at: http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf, with ICE , "Immigration Enforcement Actions: 2008," (July 2009), *available at:*http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

[26] The United States requested that any detainees interviewed first sign written waivers that would have been at variance with the Commission's rule to the effect that any person who wants to provide information shall be permitted to do so without encumbrance.

11. The IACHR would like to thank ICE and the Office of Refugee Resettlement (ORR) for the cooperation they provided to enable the Inter-American Commission to conduct the mission and for their willingness to answer the delegation's questions.

12. Nevertheless, the IACHR denounces the decision of the Sheriff of Maricopa County, in Phoenix, Arizona, who refused to grant access to the delegation. While the IACHR is aware that the Maricopa County jail houses persons arrested under an agreement that allows the state to enforce federal civil immigration laws, it is a universally accepted principle of international human rights law that States must comply with their international obligations in good faith and may not invoke internal rules as a pretext for noncompliance. This good faith principle implies that States must open their doors to agencies that monitor the observance of human rights, so that those agencies can check the situation and properly perform their mission.

13. As for other sources, the Inter-American Commission took into account the information received during the thematic hearing held in October 2007, during its 130th regular session. There, an advocacy group for immigrants in the United States informed the IACHR of alleged violations of human rights in the detention of migrant families, unaccompanied children, asylum seekers and other vulnerable immigrant groups.[27]

14. The Inter-American Commission also consulted experts on immigration in the United States, international organizations, attorneys and defenders of the rights of migrant persons, to get their views on the topic of this report. The IACHR also spoke with former detainees and their families and sent out a questionnaire for the State, persons and civil society organizations in various parts of the country to answer.

15. Thereafter, the Inter-American Commission held two more thematic hearings on problems of enforcement of immigrations laws and due process for detained immigrants in the United States, as well as a working meeting on detainees with mental disabilities or disorders.[28] The IACHR did an exhaustive analysis of the research and reports of State agencies, nonprofit organizations and the media to get a broader perspective on the concerns regarding current policies and practices in immigrant detention and due process in the United States.[29]

16. Following the IACHR's visits to the immigrant detention facilities, ICE organized two briefings for the Inter-American Commission in October 2009: one that

[27] Audio and video of the thematic hearing "Human Rights Situation of Migrant Workers, Refugee Children and Other Vulnerable Groups in the United States", 130th Session of the IACHR, October 12, 2007, *available at:* http://www.IACHR.oas.org/prensa/publichearings/advanced.aspx?Lang=EN.

[28] Audio and video of the thematic hearing on "Due process problems in the application of policies on immigrant detention and deportation in the United States," 133rd Session of the IACHR, October 28, 2008, and "Immigrant Detention and Deportation Policies in the United States," 134th regular session of the IACHR, March 20, 2009, *available at:* http://www.IACHR.oas.org/prensa/publichearings/advanced.aspx?Lang=EN .

[29] The complete list of the published reports consulted for this study is available upon request.

concerned ICE's plans to reform the immigrant detention system, and another on changes to the local enforcement program under the 287(g) agreement, which will be examined later in this report.

17. Notwithstanding the more detailed findings included throughout the body of this report, one of the IACHR's main concerns is the increasing use of detention based on a presumption of its necessity, when in fact detention should be the exception. The United States Supreme Court itself has upheld the constitutionality of mandatory detention in immigration cases that have not been decided, even though the violations being alleged are civil in nature and despite the loss of liberty that detention presupposes.[30]

18. As will be explained, the Inter-American Commission is convinced that in many if not the majority of cases, detention is a disproportionate measure and the alternatives to detention programs would be a more balanced means of serving the State's legitimate interest in ensuring compliance with immigration laws. The IACHR is disturbed by the rapid increase in the number of partnerships with local and state law enforcement for purposes of enforcing civil immigration laws. The Inter-American Commission finds that ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling and that their practices do not use the supposed investigation of crimes as a pretext to prosecute and detain undocumented migrants.

19. For those cases in which detention is strictly necessary, the IACHR is troubled by the lack of a genuinely civil detention system, where the general conditions are commensurate with human dignity and humane treatment, and featuring those special conditions called for in cases of non-punitive detention. The Inter-American Commission is also disturbed by the fact that the management and personal care of immigration detainees is frequently outsourced to private contractors, yet insufficient information is available concerning the mechanisms in place to supervise the private contractors.

20. The IACHR is also disturbed by the impact that detention has on due process, mainly with respect to the right to an attorney which, in turn, affects one's right to seek release. To better guarantee the right to legal representation and, ultimately, to due process, stronger programs offering alternatives to detention are needed and the Legal Orientation Program must be expanded nationwide. The Inter-American Commission is particularly troubled by the lack of legal representation provided or facilitated *ex officio* by the State for cases of unaccompanied children, immigrants with mental disabilities and other persons unable to represent themselves.

II. DRAFT REPORT AND RESPONSE OF THE UNITED STATES

21. The IACHR discussed and approved a draft version of this report on August 2, 2010. Pursuant to Article 60(a) of its Rules of Procedure, the report was sent to

[30] *Demore v. Kim*, 538 U.S. 510 (2003), *available at:* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=01-1491.

the United States on September 1, 2010 with a request that it submit its observations within a one month time period. After an extension was requested and granted by the Inter-American Commission, the State submitted its response on October 19, 2010.

22. In its response, the State expresses its appreciation for the opportunity to comment on the draft report, and its satisfaction for being able to facilitate the Commission's visits to detention facilities and the consultations that took place during 2008 and 2009. The United States indicates that since the research for this report was completed, the the Department of Homeland Security of the Obama Administration launched its own comprehensive review of the immigration enforcement policy system, which in its opinion has resulted in important changes in the immigration enforcement policy arena.

23. The United States highlights its pride in being a nation of immigrants, and values the contributions made by migrants to its economy, culture and social fabric, and points out that one out of five of the 190 million migrants in the world live in this country. The State adds:

> Immigration is an issue of critical importance to the United States, and accordingly is extensively addressed by U.S. law and policy. International law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of state sovereignty. Immigration detention can be an important tool employed by States in exercising their sovereignty, as they ensure public safety and remove as expeditiously as possible individuals who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly immigration detention, provided it is employed in a manner consistent with a State's international human rights obligations, is permitted under international law.

24. However, the State then goes on to express its opinion in the sense that "contrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man nor international law generally establish a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws". The United States stresses the importance of enforcing immigration laws and policies "in a lawful, professional, safe, and humane manner that respects the human rights of migrants regardless of their immigration status". The State agrees with the Commission that it has an obligation to ensure the human rights of all immigrants, documented and undocumented alike, but it also considers that many of the sources referred to by the Inter-American Commission do not give rise to binding legal obligations on the United States. According to the position of the State, the American Declaration is "a non-binding instrument that does not itself create legal rights or impose legal obligations on signatory states". It is also the opinion of the State that Article 20 of the Statute of the Inter-American Commission "sets forth the powers of the Commission that relate specifically to OAS member states which, like the United States, are not parties to the legally binding American Convention on Human Rights", which includes "pay[ing] particular attention to observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the state, and to

verify whether in such cases domestic legal procedures and remedies have been applied and exhausted".

25. The United States reiterates "its respect of and support for the Commission and the strong sense of integrity and independence which historically has characterized its work". It also requests "that in keeping with its mandate under Article 20 of the IACHR Statute, the Commission center its review of applicable international standards on the American Declaration and U.S. observance of the rights enumerated therein". The United States considers that the jurisprudence of the Inter-American Court of Human Rights interpreting the American Convention does not govern U.S. commitments under the American Declaration and that, likewise, "the advisory opinions of the Inter-American Court interpreting other international agreements, such as the International Covenant on Civil and Political Rights (ICCPR) are not relevant".

26. In its response, the State further mentions that in October 2009, the Department of Homeland Security issued a report which identifing some of the same concerns raised by the IACHR in its report.[31] The United States indicates that this report was based on information gathered from 25 separate facility tours; discussions with detainees and employees; meetings with over 100 non-governmental organizations, and Federal, State, and local officials; and the review of data and reports from governmental agencies and human rights organizations. As explained by the State, the DHS report describes the "unique challenges associated with the rapid expansion of ICE's detention capacity from fewer than 7,500 beds in 1995 to over 30,000 today, as the result of congressional and other mandates" and it also "outlines core findings and key recommendations for building a new ICE detention system designed to hold, process, and prepare individuals for removal — as compared to the punitive purpose of criminal incarceration". The State further explains that in following up the DHS report, "sweeping reforms to transform the immigration detention system" would be undertaken, based on several key principles to be applied by ICE:

- Prioritize efficiency throughout the removal process to reduce detention costs, minimize the length of stays, and ensure fair proceedings;

- Detain aliens in settings commensurate with the risk of flight and danger they present;

- Be fiscally prudent when carrying out detention reform;

- Provide sound medical and mental health care to detainees;

- Provide the necessary federal oversight of detention facilities; and

- Ensure Alternatives to Detention (ATD) are cost-effective and promote a high rate of compliance with orders to appear and removal orders.

[31] The DHS report is available at http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

27. The United States refers also to the creation of the Office of Detention Policy and Planning (ODPP) within ICE "to coordinate the agency-wide detention reform effort and transform the vision for reform into concrete and measurable actions and goals". Some of the accomplishments referred to by the State in its response are the following:

- Creation of ODPP to coordinate the overall reform effort;

- Design and test of a new risk assessment tool and intake process to inform and systematize nationwide decision making about who is detained and who is released;

- Preparation of comprehensive policies and guidance and creation of important efficiencies in the ATD program allowing the enrollment of more potentially successful participants;

- Drafting of a new set of detention standards, currently under review, that would make conditions of confinement in its facilities less penal in the short term for more than half of the detainees;

- Elimination of delays associated with detainees health care by revising our Treatment Authorization Process;

- Development of a new Medical Classification Scheme by working with members of the Director's Advisory Group on Health Care;

- Launching of an Online Detainee Locator System (ODLS); and

- Training of more than 40 new federal employees posted at each major detention facility.

28. Additionally, the State mentions that the Director of ICE "issued four nationwide policies that have significantly impacted how ICE uses and prioritizes its resources consistent with reform principles". These policies include the Civil Immigration Enforcement Memorandum; the Parole of Arriving Aliens with A Credible Fear of Persecution; the National Fugitive Operations Program; and the Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions. The United States also underscores that "ICE is committed to providing transparency, consistency across facilities, and efficiency in the resolution of disputes", to which end it "has continually updated its website with policy reform announcements, newly issued policy memoranda, and statistics, and has posted draft policy guidance to solicit public feedback". The State response asserts that DHS and ICE authorities remain fully committed to comprehensive immigration reform, and that they have held "dozens of meetings with Members of Congress, participated in more than 40 roundtable discussions and listening sessions across the United States, and met with over 1,000 different immigration stakeholders".

29. The considerations by the State summarized above are more general in nature. The more specific observations to the IACHR Report will be reflected as appropriate and analyzed in the respective sections of this document. The full text of the observations of the United States --as requested in its October 19, 2010 letter-- is available in the website of the Inter-American Commission.

30. The Inter-American Commission appreciates the response of the State, and the positive engagement with the inter-American system of human rights. However, with respect to the position of the United States interpreting the nature of the American Declaration, it must be reiterated that it is indeed an instrument that generates international obligations in the framework of the OAS Charter, taking into account the IACHR´s Satatute. The IACHR has held before that for Member States that have yet to ratify the American Convention, the expression of their obligations in the sphere of human rights is set forth in the American Declaration; accordingly, such obligations have been interpreted in relation to the OAS Charter generally, and the American Declaration more specifically. The Inter-American Commission has also explained that it may interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.[32] As it stated previously in a general report:

> The international law of human rights is a dynamic body of norms evolving to meet the challenge of ensuring that all persons may fully exercise their fundamental rights and freedoms. In this regard, as the International Covenants elaborate on the basic principles expressed in the Universal Declaration of Human Rights, so too does the American Convention represent, in many instances, an authoritative expression of the fundamental principles set forth in the American Declaration. While the Commission clearly does not apply the American Convention in relation to member States that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration.[33]

31. As for the structure of the report, Section III will present the relevant international standards on the human rights of immigrants; Section IV will contain the IACHR's observations and concerns with regard to immigration detention, certain immigration enforcement procedures, detention conditions and the impact on due process; in section V the Inter-American Commission will make its final conclusions and recommendations as to how best to overcome the problems that the current system poses with respect to the international human rights obligations undertaken by the United States. Throughout the report and as pertinent, the IACHR will make reference to certain

[32] In the same respect, the Inter-American Court of Human Rights has highlighted that "to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948". I-A Court, Advisory Opinion OC-10/89, July 14, 1989, "Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights", Requested by the Government of the Republic of Colombia, para. 37.

[33] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para. 38.

particularly vulnerable groups where immigration detention is concerned, such as unaccompanied children, migrant families, those seeking asylum, persons with mental disabilities or disorders, and others.

III. RELEVANT INTERNATIONAL STANDARDS ON THE HUMAN RIGHTS OF IMMIGRANTS

32. The United States has an obligation to ensure the human rights of all immigrants, documented and undocumented alike; this includes the rights to personal liberty, to humane treatment, to the minimum guarantees of due process, to equality and nondiscrimination and to protection of private and family life.[34] In its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, the Inter-American Court of Human Rights (I/A Court H.R.) described the basic principles of human rights that must inform the immigration policies of the OAS member states. Specifically, the Court wrote that States may establish mechanisms to control undocumented migrants' entry into and departure from their territory, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.[35] It also held that the States have the obligation to respect and to ensure respect for the human rights of all persons under their respective jurisdictions, in the light of the principle of equality and non-discrimination, irrespective of whether such persons are nationals or foreigners.[36]

A. Right to personal liberty

33. The American Declaration of the Rights and Duties of Man (the "American Declaration") provides that every human being has the right to liberty and the right to protection against arbitrary arrest.[37] Article XXV of the American Declaration states that "no person may be deprived of liberty for non-fulfillment of obligations of a purely

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[34] American Declaration of the Rights and Duties of Man (1948), *available at:* http://www.IACHR.oas.org/Basicos/English/Basic2.American%20Declaration.htm.

[35] Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03, para. 119 (September 17, 2003), available at: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf. The Inter-American Court has vigorously asserted that

> the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.

For the sake of clarity and uniform application of the basic international human rights of migrants, the Court held that the advisory opinion on the rights of undocumented migrants "applies to the OAS member states that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its Optional Protocols." *See ibid,* paragraphs 53, 60.

[36] I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03 (September 17, 2003), available at: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.doc

[37] American Declaration, Articles I and XXV (1948). As a member State of the Organization of American States, the United States is obligated to protect the rights recognized in the American Declaration.

civil character."[38] The American Convention on Human Rights (the "American Convention") also provides for the right to personal liberty.[39]

34. In general, the paramount principle where the right to personal liberty is concerned is that pre-trial detention is an exceptional measure.[40] The IACHR will make reference to the relevant international standards developed with respect to criminal proceedings, and then introduce the specific standards that concern immigration-related detention, which is eminently civil in nature. For cases involving criminal proceedings, the Inter-American Commission has developed the criteria that must be met in order for preventive detention (or detention pending trial) to be compatible with the right to personal liberty. As the IACHR wrote:

> The precautionary measures are established only when they are necessary for the proposed objectives. The pre-trial detention is not an exception to this rule. In compliance with the principle of exceptionality, the pre-trial detention will be appropriate when it is the only way to ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes. Therefore, if possible, the pre-trial detention has to be replaced for a lower severity measure.[41]

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[38] American Declaration, Article XXV (1948).

[39] American Convention:

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

[40] For an elaboration on the principle of exceptionality of pre-trial detention under international human rights law, see IACHR. Report No. 86/09, Case 12.553 (Merits). Jorge, José and Dante Peirano Basso(Uruguay), August 6, 2009, paragraphs 93 *et seq*.

[41] IACHR, Report No. 86/09. Case 12.553 (Merits). Jorge, José and Dante Peirano Basso (Uruguay), August 6, 2009, para. 100.

35. Similarly, the Inter-American Commission has held that the principle of necessity that must regulate preventive detention implies that the authority that ordered the measure must sufficiently prove the reasons why the existence of indications of criminal responsibility has any bearing on the efficient course of the investigations in the case in question. It also implies establishing the reasons why it is appropriate to impose preventive detention rather than a less severe measure.[42] This determination must be made on a case-by-case basis.

36. In the universal human rights system, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States, reads as follows: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."[43] The United Nations Human Rights Committee, which oversees the Covenant's implementation, observes that "the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice."[44]

37. The Human Rights Committee has also held that "remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context (…)."[45] Thus, the determination as to whether detention is an appropriate measure must be done on the basis of a case-by-case analysis; a State has to consider all the less invasive or intrusive ways of accomplishing its objective before detention can be admissible.[46] Article 9(1) also requires that the State periodically revisit

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[42] See IACHR. Application to the Inter-American Court of Human Rights in the case of Oscar Barreto Leiva (Case 11.663) against the Bolivarian Republic of Venezuela, filed October 31, 2008, para. 143.

[43] United Nations, International Covenant on Civil and Political Rights, available at: http://www2.ohchr.org/english/law/ccpr.htm.

The body that oversees compliance with the Covenant, the Human Rights Committee, has written that Article 9(1) is applicable to all deprivations of liberty, which includes immigration control. *See* ICCPR, Human Rights Committee, General Comment No. 8, "The right to liberty and security of persons", paragraph 1 (June 30, 1982), *available at:* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument.

[44] *A. v. Australia*, Human Rights Committee, Communication No. 560/1993, CCPR/C/59/D/560/1993, paragraph 9.2 (April 30, 1997) (in which the Committee concludes that remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case), *available at:* http://www1.umn.edu/humanrts/undocs/html/vws560.html.

[45] *A. v. Australia*, Human Rights Committee, *supra*, para. 9.2 (April 30, 1997), available at: http://www1.umn.edu/humanrts/undocs/html/vws560.html.

[46] *C. v. Australia*, Human Rights Committee, *supra*, paragraph 8.2 (where it held that the detention pending trial was arbitrary because it was not the least invasive measure to achieve the State's objective). *Shafiq v. Australia*, Human Rights Committee, Communication No. 1324/2004, U.N. Doc. CCPR/C/88/D/1324/2004 (November 13, 2006) (where it held that the State's justification for the author's detention, which was its general experience that asylum seekers abscond if not retained in custody, was not sufficient grounds for detention to be permissible in that particular case), *available at:* http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~Shafiq+-+1324_2004+-+HRC+Views.pdf/$file/Shafiq+-+1324_2004+-+HRC+Views.pdf

the decision to keep a person in custody to determine whether it still has sufficient grounds to justify the detention.[47] The Human Rights Committee suggests two possible grounds for continuing pre-trial detention: if the person refuses to cooperate with the investigation or there is a likelihood of flight.[48]

38. In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses. The United Nations Special Rapporteur on the Human Rights of Migrant Workers wrote, "Irregular migrants are not criminals *per se* and should not be treated as such."[49]

39. In effect, to be in compliance with the guarantees protected in Articles I and XXV of the American Declaration, member States must enact immigration laws and establish immigration policies that are premised on a presumption of liberty --the right of the immigrant to remain at liberty while his or her immigration proceedings are pending-- and not on a presumption of detention.[50] Detention is only permissible when a case-specific evaluation concludes that the measure is essential in order to serve a legitimate interest of the State and to ensure that the subject reports for the proceeding to determine his or her immigration status and possible removal.[51] The argument that the person in question poses a threat to public safety is only acceptable in exceptional circumstances in which there are certain indicia of the risk that the person represents. The existence of a criminal record is not sufficient to justify the detention of an immigrant once he or she has served his or her criminal sentence. Whatever the case, the particular reasons why the immigrant is considered to pose a risk have to be explained. The arguments in support of the appropriateness of detention must be set out clearly in the corresponding decision.[52]

40. The IACHR also underscores the fact that the detention review procedures must respect the guarantees of due process, including the defendant's right to

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[47] *A. v. Australia*, Human Rights Committee, *supra*, para. 9.4.

[48] *Idem*.

[49] United Nations, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, E/CN.4/2003/85 (December 30, 2002), *available at*:http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf.

[50] IACHR, *Rafael Ferrer-Mazorra et al. (United States),* Report No. 51/01 (Merits), Case No. 9903, para. 219 (April 4, 2001), available at: http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/USA9903.htm. See also IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* ("Inter-American Principles on Detention"), Principle III(2) (2008), available at: http://www.cidh.oas.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm. Principle III of the Inter-American Principles on Detention provides the following as the underlying premise: "The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instrument. . . ."

[51] IACHR, *Rafael Ferrer-Mazorra et al. (United States), supra*, para. 242 (April 4, 2001); *See also* IACHR, *Inter-American Principles on Detention*, Principle III, Principle III which states that "preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society."

[52] IACHR, *Rafael Ferrer-Mazorra et al. (United States)*, *supra*, para. 221.

an impartial hearing in decisions that affect his or her fate, his or her right to present evidence and refute the State's arguments, and the opportunity to be represented by counsel.[53]

41. Furthermore, since the State's use of immigration detention must be premised on a presumption of the right to personal liberty, then alternatives to detention programs (such as GPS monitoring), bond or release should also be regarded as a reasonable measure that is proportional to the legitimate end that the State seeks to achieve.

42. Specifically, in the case of immigrants the Human Rights Committee observed that illegal entry by itself would not justify detention for a period.[54] For its part, the United Nations Working Group on Arbitrary Detention has also summarized the basic requirements for detention of immigrants to be permissible:

> It was felt that States should be reminded that detention shall be the last resort and permissible only for the shortest period of time and that alternatives to detention should be sought whenever possible. Grounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits. Established time limits for judicial review must even stand in "emergency situations" when an exceptionally large number of undocumented immigrants enter the territory of a State. Provisions should always be made to render detention unlawful if the obstacle for identifying immigrants in an irregular situation or carrying out removal from the territory does not lie within their sphere, for example, when the consular representation of the country of origin does not cooperate or legal considerations - such as the principle of *non-refoulement* barring removal if there is a risk of torture or arbitrary detention in the country of destination - or factual obstacles - such as the unavailability of means of transportation - render expulsion impossible.[55]

43. Apart from the basic right to personal liberty that all immigrants enjoy, various international instruments have established specific restrictions regarding the detention of certain persons who are members of more vulnerable groups. The IACHR will now summarize the specific international standards on the right to personal liberty with respect to some of these groups.

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[53] IACHR, *Rafael Ferrer-Mazorra et al. (United States)*, *supra*, para. 213. See also: *Torres v. Finland*, Human Rights Committee, Communication No. 291/1988, CCPR/C/38/D/291/1988, para. 7.2 (April 5, 1990), *available at:* http://www.unhcr.org/refworld/country,,HRC,,FIN,,47fdfaf5d,0.html.

[54] *A. v. Australia*, *supra*, para. 9.4.

[55] United Nations Working Group on Arbitrary Detention, "Report of the Working Group on Arbitrary Detention," Doc. A/HRC/10/21, para. 67 (February 16, 2009), *available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/110/43/PDF/G0911043.pdf?OpenElement*.

1. Asylum seekers

44. The 1951 Convention relating to the Status of Refugees (hereinafter "the Convention on Refugees") allows very little margin for restrictions on freedom of movement.[56] Article 31 of the Convention on Refugees reads as follows:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.[57]

45. When interpreting the Convention on Refugees, the Office of the United Nations High Commissioner for Refugees (hereinafter the "UNHCR") concluded that "[a]s a general principle asylum-seekers should not be detained" and that "[t]here should be a presumption against detention."[58] The UNHCR underscores the fact that under Article 31, "detention should only be resorted to in cases of **necessity.**"[59] As the UNHCR wrote, detention of asylum seekers may be resorted to only on grounds prescribed by law,

> to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.[60]

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[56] Article XXVII of the American Declaration establishes the right to seek and receive asylum in a foreign territory and expressly provides that the rights protected under that article include the rights of refugees provided under other international instruments. The United States is a party to the 1967 Protocol relating to the Status of Refugees ("1967 Protocol on Refugees"), which expands the scope of the 1951 Convention relating to the Status of Refugees. *See* *http://www.unhcr.org/pages/49da0e466.html*.

[57] 1951 United Nations Convention relating to the Status of Refugees, *available at:* http://www2.ohchr.org/english/law/pdf/refugees.pdf.

[58] UNHCR, "UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers," Guidelines 2 and 3 (February 1999), *available at:* http://www.unhcr.org.au/pdfs/detentionguidelines.pdf.

[59] UNHCR, "UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers," *supra*, para. 3 (emphasis in the original).

[60] UNHCR Executive Committee, "Conclusion No. 44 (XXXVII): Detention of refugees and asylum seekers" (1986), *available at* http://www.globaldetentionproject.org/fileadmin/docs/UNHCR-Executive-Committee-1986-Conclusion-No44.pdf; *see* UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, *supra*, Guideline 3.

46. The UNHCR concludes that "[d]etention should therefore only take place after a full consideration of all possible alternatives (…)"[61].

47. In those cases in which an asylum seeker's detention is deemed necessary, the UNHCR has established that such detention "should not constitute an obstacle to an asylum-seekers' possibilities to pursue their asylum application." It has also observed that the following minimal procedural guarantees must be observed:

> (i) to receive prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand;
>
> (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
>
> (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum-seeker or his representative would have the right to attend;
>
> (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;
>
> v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.[62]

48. The Inter-American Commission has observed that in cases in which asylum seekers are detained, "the longer detention as a preventive measure continues, the greater the resulting burden on the rights of the person deprived of liberty."[63]

2. Migrant families and unaccompanied children

49. Under Article V of the American Declaration, "[e]very person has the right to the protection of the law against abusive attacks upon his…private and family life." Under Article VII, "[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid." The need to guarantee these rights has a direct bearing on the appropriateness of detaining migrant families and children. Given the

[61] UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, *supra*, Guideline 3.

[62] *Idem*.

[63] IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* para. 142 (February 28, 2000), *available at:* http://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm.

provisions of Articles V and VII, mandatory detention of a child's mother or father must be considered on a case-by-case basis, analyzing whether the measure is proportional to the end the State seeks to achieve and taking the best interests of the child into account.[64]

50. Given the intrinsic protection of family life recognized in Articles V, VI and VII of the American Declaration, it is possible to conclude that families and pregnant women who seek asylum ought not to be detained; and if they are detained, they ought not to be subjected to prison-like conditions.[65]

51. Under international standards, unaccompanied minors ought not to be detained either. In its Advisory Opinion on the *Juridical Condition and Human Rights of the Child,* the Inter-American Court adopted the principle of the "best interests of the child," established in the United Nations Convention on the Rights of the Child as the primary consideration when a member State is contemplating a measure that might affect minors under its jurisdiction.[66] The principle of exceptionality governing deprivation of liberty in general and deprivation of liberty for immigration violations, carries even more weight when children are involved. Only in the most extreme cases could such a measure be justified.

52. Article 37(b) of that Convention, which the United States signed but is not party to,[67] provides that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[68]

53. The United Nations Special Rapporteur on the Human Rights of Migrant Workers observes that in the unusual case where children must be detained,

> … detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child … Children under administrative custodial measures should be separated from adults, unless they can be housed with relatives in separate settings … Should the age of the migrant be in dispute, the

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[64] *See* IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* para. 166 (February 28, 2000), *available at:* http://www.cidh.oas.org/countryrep/Canada2000en/table-of-contents.htm.

[65] UNHCR, "UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers," *supra*, Guideline 8.

[66] I/A Court H.R., *Juridical Condition and Human Rights of the Child,"* Advisory Opinion OC-17/02, paragraphs 58-59 (August 28, 2002), *available at:* http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.

[67] As a signatory of the treaty, the United States is legally bound "to refrain in good faith from acts that would defeat the object and purpose of the treaty." See http://untreaty.un.org/English/TreatyHandbook.pdf.

[68] See also, IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle I (2008).

most favourable treatment should be accorded until it is determined whether he/she is a minor.[69]

54. In the "Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers," the UNHCR concludes that "**minors who are asylum-seekers should <u>not</u> be detained.**"[70] If, for some extraordinary reason children are detained, they ought not to be held in prison-like conditions.[71]

55. The UNHCR also concluded that unaccompanied children who are detained should benefit from the same minimum procedural guarantees of due process that asylum seekers enjoy and a legal guardian or adviser should be appointed for them.[72]

B. Right to due process and access to justice

56. Under Article XXVI of the American Declaration, "[e]very person accused of an offense has the right to be given an impartial and public hearing…." [73] The IACHR has maintained that Article XXVI also applies to immigration proceedings. As the Inter-American Commission wrote: "to deny an alleged victim the protection afforded by Article XXVI simply by virtue of the nature of immigration proceedings would contradict the very object of this provision and its purpose to scrutinize the proceedings under which the rights, freedoms and well-being of the persons under the State's jurisdiction are established."[74]

57. Article 8 of the American Convention reaffirms the rights recognized in Article XXVI of the American Declaration.[75] During any proceeding that can result in a penalty of any kind, all persons are equally entitled to the following minimum guarantees:

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[69] United Nations, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, para. 75(a) (December 30, 2002), available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3ff50c339f54a354c1256cde004bfbd8/$FILE/G0216255.pdf .

[70] UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, *supra*, Guideline 6 (emphasis in the original). The Guidelines also state that detention of pregnant women in their final months and nursing mothers should be avoided. *See* Guideline 8.

[71] *Idem*, Guideline 6.

[72] *Ibidem*.

[73] *See also* American Declaration, Article XVIII: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

[74] IACHR, *Andrea Mortlock, (*United States), Report No. 63/08 (Admissibility and Merits), Case No. 12.534, para. 83 (July 25, 2008), available at: http://www.cidh.org/annualrep/2008eng/USA12534eng.htm.

[75] The IACHR has previously held that the international *corpus juris* on human rights embodied in other recognized international and regional human rights instruments can be a source when interpreting and applying the American Declaration. This includes the American Convention, which in many instances may be regarded as an authoritative expression of the fundamental principles set forth in the American Declaration. *See* IACHR, *Juan Raul Garza,* United States, Report No. 52 (Merits), Case No. 12.243, paragraphs 88-89 (April 4, 2001), *available at:* http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm; IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, supra*, para. 38.

the right to a hearing, with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal; prior notification in detail to the accused of the charges against him; the right not to be compelled to be a witness against oneself or to plead guilty; the right of the accused to be assisted without charge by a translator or interpreter; the right of the accused to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; the right of the defense to examine witnesses present in the court and to obtain their appearance as witnesses, experts or other persons who may throw light on the facts; and the right to appeal the judgment to a higher court.[76] While many of these guarantees are articulated in a language that is more germane to criminal proceedings, they must be strictly enforced in immigration proceedings as well, given the circumstances of such proceedings and their consequences.

58. The IACHR has observed that the due process rights set forth in Article 8 of the American Convention "establish a baseline of due process to which all immigrants, whatever their situation, have a right."[77] Immigrants are at a real disadvantage that can adversely affect due process unless special countervailing measures are taken to reduce or eliminate the procedural handicaps with which immigrants are encumbered.

59. In its Advisory Opinion on the "Juridical Condition and Rights of the Undocumented Migrants" the Inter-American Court highlighted the following:

> […] for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants…. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.[78]

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[76] American Convention, Article 8*; see also,* ICCPR, Article 14; United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 10-18 (1988), *available at* http://www.un.org/documents/ga/res/43/a43r173.htm.

[77] IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, *Annual Report 2000*, para. 90 (April 16, 2001), *available at* http://www.cidh.oas.org/annualrep/2000eng/chap.6.htm; see IACHR, *Wayne Smith,* United States, Report No. 56/06 (Admissibility), Case No. 12.562, para. 51 (July 20, 2006), available at http://www.cidh.oas.org/annualrep/2006eng/USA8.03eng.htm; IACHR, *Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Randolfo Izal Elorz,* Mexico, Report No. 49/99 (Merits), Case No. 11.610, para. 46 (April 13, 1999), *available at:* http://www.cidh.oas.org/annualrep/98eng/Merits/Mexico%2011610.htm.

[78] Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants,* Advisory *supra*, para. 121.

1. Right to judicial protection and to a *habeas corpus* petition

60. The United Nations Working Group on Arbitrary Detention concluded that "where people have been detained, expelled or returned without being provided with legal guarantees, their continued detention and subsequent expulsion are to be considered as arbitrary."[79] The United Nations Special Rapporteur on the Human Rights of Migrant Workers has urged the States to avoid the use of detention facilities and of legal mechanisms and methods of interception and/or deportation that curtail judicial control of the lawfulness of the detention and other rights, such as the right to seek asylum.[80]

61. Article XVIII of the American Declaration provides that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Similarly, Article XXV provides that "[e]very individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court …."

62. The Inter-American Court has held that "writs of *habeas corpus* and of *amparo* are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by [the American Convention] and that serve, moreover, to preserve legality in a democratic society."[81] In the case of *Rafael Ferrer-Mazorra* and in light of the rights protected under the American Declaration, the Inter-American Commission emphasizes the fact that access must be provided to a judicial review of the detention, "as it provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority."[82]

2. Right to seek asylum

63. Article XXVII of the American Declaration provides that "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."[83] In order to comply with Article XXVII, the domestic procedures by which a refugee seeks asylum must be adequate and effective.[84] The adequacy of the internal

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[79] Working Group on Arbitrary Detention, Conclusions and Recommendations, E/CN.4/2004/3, para. 86 (December 15, 2003), a*vailable at:* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/170/72/PDF/G0317072.pdf?OpenElement.

[80] United Nations, Report of the United Nations Special Rapporteur on Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(h).

[81] I/A Court H.R., *Habeas Corpus in Emergency Situations,* Advisory Opinion OC-8/87, Series A No. 8, para. 42 (January 30, 1987), *available at*: http://www1.umn.edu/humanrts/iachr/b_11_4h.htm.

[82] IACHR, *Rafael Ferrer-Mazorra, et al., supra*, para. 232.

[83] American Convention, Article 22(7).

[84] I/A Court H.R., *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, para. 24 (October 6, 1987), available at: http://www1.umn.edu/humanrts/iachr/b_11_4i.htm*;* IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, supra*,

Continues…

procedures not only involves the formal rights of due process in immigration proceedings, but also the effects that detention can have on the asylum seeker's guarantees of due process.

C. The right to humane treatment during detention

64. Thus far, the IACHR has established that immigration detention must be the exception and must be applied in conformity with certain requirements. The Inter-American Commission has also underscored the relevant guarantees of due process and access to justice. In this section, the IACHR will focus on the detention conditions that must be present in those exceptional cases in which deprivation of liberty is necessary, taking into consideration general criteria regarding humane treatment as well as those special guarantees that must be afforded to ensure that immigration detentions, which are civil in nature, do not become punitive.

65. Under Article XXV of the American Declaration, every person who has been deprived of his liberty "has the right to humane treatment during the time he is in custody." In interpreting the rights protected in the Article XXV clause that concerns the right to humane treatment, and the right to the security of one's person protected under Article I of the American Declaration, the Inter-American Commission has made frequent reference to the United Nations Minimum Rules for the Treatment of Prisoners and to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[85] Recently, the IACHR approved its own set of "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" (hereinafter the "Inter-American Principles on Detention"), which explain the protections afforded under Article XXV of the American Declaration.[86]

66. Principle II of the Inter-American Principles on Detention states that "[u]nder no circumstances shall persons deprived of liberty be discriminated against for reasons of race, ethnic origin, nationality, color, sex, age, language, religion, political or other opinion, national or social origin, economic status, birth, physical, mental, or sensory

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…continuation
para. 104: "…the effective protection of substantive rights requires an adequate procedural framework for their implementation."

[85] *See, e.g.,* IACHR, *Oscar Elías Biscet et al.* (Cuba), Report No. 67/06 (Merits), Case No. 12.476, paragraphs 152-53, 156, 238 (October 21, 2006), *available at* http://www.cidh.oas.org/annualrep/2006eng/CUBA.12476eng.htm; IACHR, *Michael Edwards, Omar Hall, Brian Schroeter and Jeronimo Bowleg (*Bahamas), Report No. 48/01 (Merits) Case Nos. 12.067, 12.068 and 12.086, para. 195 (April 4, 2001), *available at*: http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm; IACHR, *Chad Roger Goodman,* Bahamas, Report No. 78/07 (Merits) Case No. 12.265, para. 86 (October 15, 2007), available at: http://www.IACHR.oas.org/annualrep/2007sp/Bahamas12265eng.htm; *see also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), *available at:* http://www.un.org/documents/ga/res/43/a43r173.htm; United Nations Standard Minimum Rules for the Treatment of Prisoners (1977), *available at:* http://www2.ohchr.org/english/law/treatmentprisoners.htm.

[86] *See*, IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*.

disability, gender, sexual orientation, or any other social condition."[87] That same principle provides that measures can and must be taken to protect vulnerable groups, such as pregnant women, persons with physical, mental or sensory disabilities, and that these measures shall be "subject to review by a judge or other competent, independent, and impartial authority."[88]

67. The Inter-American Principles on Detention offer specific guidelines on basic provisions –such as the rights to food, drinking water, sleeping quarters, hygiene, clothing and educational activities, recreation, religious freedom and visits- so as to ensure that all persons held in the custody of a state receive humane treatment.[89] The Inter-American Principles on Detention prohibit overcrowding in prisons and detention facilities, which is regarded as a violation of Article 5 of the American Convention.[90]

68. The ICCPR also establishes general prohibitions against incarceration in inhumane conditions. Article 7 reads as follows: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…" Article 10(1) of the Covenant similarly provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." As to the legal implications that ICCPR Article 10 has for undocumented migrants, the United Nations Special Rapporteur on the Human Rights of Migrant Workers underscored the fact that "detention of migrants on the grounds of their irregular status should under no circumstances be of a punitive nature."[91]

69. When determining whether the obligation to provide humane treatment has been observed, consideration must be given to the question of whether the conditions of detention to which immigrants deprived of their liberty are subjected take into account their status and needs.[92] For example, in *C v. Australia*, the Human Rights Committee

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[87] *Idem*, Principle II*; see also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 5(1); United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra*, para. 6(1).

[88] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra* Principle II*; see also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 5(2); United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra*, paragraphs 82-83.

[89] *See* IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, supra*, Principles XI-XIII, X, XVIII*; see also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*; United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra*.

[90] *See* IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle XVII.

[91] UN, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 73.

[92] *Idem*, para. 54.

concluded that Article 7 had been violated because a person seeking asylum had been detained for such a prolonged period as to cause him mental illness.[93]

70. The next sections describe the specific rights that follow from the obligation to provide humane treatment. Where necessary, the special needs of immigrants are explained.

1. Right to medical care

71. In keeping with the legal obligations regarding humane treatment prescribed in Article XXV of the American Declaration, Principle IX(3) of the Inter-American Principles on Detention provides that:

> All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by qualified medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture.
>
> The medical or psychological information shall be entered into the respective official register, and when necessary taking into account the gravity of the findings, it shall be immediately transmitted to the competent authority.[94]

72. Principle X sets out guidelines on the range of medical, psychiatric and dental services to which immigration detainees should have access, from basic care to prolonged, ongoing treatment in the case of the most serious afflictions.[95] Under Principle X, special measures are to be provided to treat the health needs of vulnerable groups like the elderly, women, children and detainees with physical or mental disabilities.[96] This Principle establishes that "the provision of health services shall, in all circumstances, respect the following principles: medical confidentiality; patient autonomy; and informed consent to medical treatment in the physician-patient relationship."[97]

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[93] *C. v. Australia*, Human Rights Committee. Communication No. 900/1999, CCPR/C/76/DE/900/1999 (November 13, 2002), available at: http://www.bayefsky.com/html/australia_t5_iccpr_900_1999.php.

[94] See also, U.N., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 24; UN, Standard Minimum Rules for the Treatment of Prisoners, *supra*, para. 22(1).

[95] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle X*; see also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principles 24-26; United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra*, paragraphs 22-26.

[96] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle X.

[97] *Idem*.

73. The Inter-American Principles also spell out specific requirements on involuntary seclusion and solitary confinement in the case of persons with mental disabilities:

> In cases of involuntary seclusion of persons with mental disabilities it shall be ensured that the measure is authorized by a competent physician; carried out in accordance with officially approved procedures; recorded in the patient's individual medical record; and immediately notified to their family or legal representatives. Persons with mental disabilities who are secluded shall be under the care and supervision of qualified medical personnel. [98]

74. The United Nations Committee on Economic, Social and Cultural Rights, the body that supervises the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the United States has signed, has reiterated that detainees must have equal and nondiscriminatory access to medical care and attention:

> States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.[99]

75. When examining the specific medical needs of immigration detainees, the United Nations Special Rapporteur on the Human Rights of Migrant Workers recommended the following to the States:

> Ensuring the presence in holding centres of a doctor with appropriate training in psychological treatments. Migrants should have the possibility of being assisted by interpreters in their contacts with doctors or when requesting medical attention. Detention of migrants with psychological problems, as well as those belonging to vulnerable categories and in need of special assistance, should be only allowed as a measure of last resort, and they should be provided with adequate medical and psychological assistance.[100]

2. Right to be separated from criminal inmates

76. In keeping with the legal obligations on humane treatment set forth in Article XXV of the American Declaration, Principle XIX of the Inter-American Principles on

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[98] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle XXII (3).

[99] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14, Doc. No. E/C.12/2004/4 (2000), *available at:* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement.

[100] United Nations, Report of the United Nations Special Rapporteur on Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(m).

Detention requires strict separation of the various categories of persons deprived of their liberty:

> In particular, arrangements shall be made to separate men and women; children and adults; the elderly; accused and convicted; persons deprived of liberty for civil reasons and those deprived of liberty on criminal charges. In cases of deprivation of liberty of asylum or refugee status seekers, and in other similar cases, children shall not be separated from their parents. Asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges.[101]

77. The United Nations Special Rapporteur on the Human Rights of Migrant Workers recommends "ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law."[102]

3. Right to be notified of transfer to other detention establishments

78. In keeping with the legal obligations on humane treatment set forth in Article XXV of the American Declaration, Principle IX(4) of the Inter-American Principles on Detention spells out safeguards to ensure that:

> The transfers of persons deprived of liberty shall be authorized and supervised by the competent authorities, who shall, in all circumstances, respect the dignity and fundamental rights of persons deprived of liberty, and shall take into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case.
>
> The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives; nor shall they be conducted under conditions that cause physical or mental suffering, are humiliating or facilitate public exhibition.[103]

79. Under the UN Body of Principles, an immigrant in custody and transferred to another facility "shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his (…) transfer

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[101] S*ee also,* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 8; United Nations Standard Minimum Rules for the Treatment of Prisoners, *supra*, Rule 8.c.

[102] United Nations, Report of the United Nations Special Rapporteur on Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(i).

[103] *See* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 20.

and of the place where he is kept"[104] and "shall also be promptly informed of his right to communicate by appropriate means with a consular post or diplomatic mission of the State of which he is a national (…)."[105]

80. When transfer is ordered, special consideration is to be given to the impact that transfer will have on the right to protection of the family and the right to due process. When an immigrant has been in a country for some time, he or she should be held in custody in a place close to his or her habitual place of residence, in order to safeguard those rights. Article VI of the American Declaration provides that "every person has the right to establish a family, the basic element of society, and to receive protection therefore." The Inter-American Commission has written that "[i]t is a right so basic to the Convention that it is considered to be non-derogable even in extreme circumstances."[106] The IACHR has repeatedly held that "visiting rights are a fundamental requirement for ensuring respect of the personal integrity and freedom of the inmate and, as a corollary, the right to protection of the family for all the affected parties (…)[and that] because of the exceptional circumstances of imprisonment, the state must establish positive provisions to effectively guarantee the right to maintain and develop family relations."[107]

81. Apart from the right to family, the location of the detention facility can frequently affect an immigrant's due process rights, including his or her right to be represented by an attorney. Only under exceptional circumstances should immigrants in custody who have secured legal representation be transferred outside the jurisdiction in which they were apprehended; it is the government's responsibility to demonstrate to an independent court the need to transfer the immigrant in custody. Moreover, the State must ensure that the transfers are based on objective grounds and answer objective needs. Specifically, it is impermissible for immigration detainees to be transferred to a jurisdiction that would be more likely to issue an order of removal.

4. Right to have duly trained and qualified personnel and independent supervision at the place of detention

82. Principle XX of the Inter-American Principles on Detention establish guidelines regarding the training required for personnel working in and supervising places of detention or imprisonment.[108] Principle 29 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "places of detention shall be visited regularly by qualified and experienced persons

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[104] *See* UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 16(1).

[105] *Idem*, Principle 16(2) and Principle 16(3).

[106] IACHR, *X & Y,* (Argentina), Report No. 38/96 (Merits), Case No. 11.506, para. 96 (October 15, 1996), *available at:* http://www.cidh.oas.org/annualrep/96eng/Argentina11506.htm.

[107] *Idem*, para. 98.

[108] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle XX.

appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment."

83. In particular, immigrants that have to be detained must be accommodated in facilities in which the officials who have custody have been given the proper training in:

> psychological aspects relating to detention, cultural sensitivity and human rights procedures, and ensuring that centres for the administrative detention of migrants are not run by private companies or staffed by private personnel unless they are adequately trained and the centres are subject to regular public supervision to ensure the application of international and national human rights law.[109]

5. Right to an established disciplinary policy and to due process

84. Principle XXII of the Inter-American Principles on Detention provides that: "disciplinary sanctions, and the disciplinary procedures adopted in places of deprivation of liberty shall be subject to judicial review and be previously established by law and shall not contravene the norms of international human rights law." Principle 30 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

> 1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.
>
> 2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.[110]

85. The Inter-American Principles on Detention set out strict guidelines on the use of confinement or isolation measures:

> Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.
>
> In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged,

[109] United Nations, Report of the United Nations Special Rapporteur on Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(j).

[110] UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 30.

> inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment.[111]

86. Finally, any bodily searches or inspections "shall comply with criteria of necessity, reasonableness and proportionality."[112]

6. The right to an effective procedure for petition and response

87. Principle VII of the Inter-American Principles on Detention reads as follows:

> Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law.
>
> This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time. It also comprises the right to opportunely request and receive information concerning their procedural status and the remaining time of deprivation of liberty, if applicable.
>
> Persons deprived of liberty shall also have the right to lodge communications, petitions or complaints with the national human rights institutions; with the Inter-American Commission on Human Rights; and with the other competent international bodies, in conformity with the requirements established by domestic law and international law.[113]

88. The United Nations Special Rapporteur on the Human Rights of Migrant Workers underscores the point that immigration detainees must be assured effective access to judicial recourse in the event that the petition mechanism fails to correct any violation of the right to humane treatment.[114]

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[111] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle XXII (3).

[112] *Idem*, Principle XXI.

[113] *See also* IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle V (2008), which states that "all persons deprived of liberty shall have the right … to lodge complaints or claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food"; and UN, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra*, Principle 33.

[114] UN, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(l).

7. Obligation to investigate deaths that occur during detention

89. Principle XXIII(3) of the Inter-American Principles on Detention reads as follows:

> Member States of the Organization of American States shall carry out serious, exhaustive, impartial, and prompt investigations in relation to all acts of violence or situations of emergency that have occurred in places of deprivation of liberty, with a view to uncovering the causes, identifying those responsible, and imposing the corresponding punishments on them.
>
> States shall take appropriate measures and make every effort possible to prevent the recurrence of acts of violence or situations of emergency in places of deprivation of liberty.

90. Principle 34 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that:

> Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

8. Specific rights of asylum seekers in detention

91. The right to seek asylum is internationally recognized, as are the special risks and threats that might be entailed. Therefore, the UNHCR has established additional guidelines to govern the treatment of asylum seekers in the event they are taken into custody. The UNHCR notes that the general principles of humane treatment apply with equal force to asylum seekers,[115] but emphasizes that they also need to be afforded certain protections specific to their condition:

> (i) the initial screening of all asylum-seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
>
> (ii) the segregation within facilities of men and women; children from adults(unless these are relatives);
>
> (iii) the use of separate detention facilities to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention

[115] The UNCHR is citing the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. *See* UNHCR, "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers," *supra*, Guideline 10.

facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups;

(iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;

(v) the opportunity to receive appropriate medical treatment, and psychological counseling where appropriate;

(vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;

(vii) the opportunity to continue further education or vocational training;

(viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;

(ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries etc.;

(x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.[116]

9. Adherence to UN Principles for the detention of unaccompanied children

92. Article VII of the American Declaration recognizes every child's right to "special protection, care and aid." Inasmuch as the rights of the child and his or her particular vulnerability are internationally recognized, the United Nations Special Rapporteur on the Human Rights of Migrant Workers has advised States to adhere strictly to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.[117]

93. Article 37(d) of the United Nations Convention on the Rights of the Child provides that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

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[116] *See* UNHCR, "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers," *supra*, Guideline 10.

[117] UN, Report of the United Nations Special Rapporteur on the Human Rights of Migrant Workers, Gabriela Rodríguez Pizarro, *supra*, para. 75(a); *see also,* United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), *available at:* http://www.un.org/documents/ga/res/45/a45r113.htm; and United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), *available at* http://www.un.org/documents/ga/res/40/a40r033.htm.

D. Other relevant human rights

1. The principle of equality and nondiscrimination

94. Article II of the American Declaration provides that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." For enforcement of immigration laws, it is widely accepted that "States may … establish mechanisms to control the entry into and departure from their territory of undocumented migrants…"[118] However, international human rights norms require that immigration laws be enforced without any discrimination. In this regard, the Inter-American Court has stated the following:

> States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.
>
> In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.[119]

95. In the enforcement of immigration laws, the basic right to equal protection before the law and non-discrimination requires that States ensure that their immigration law enforcement policies and practices do not unfairly target certain persons based solely on ethnic or racial characteristics, such as skin color, accent, ethnicity, or a residential area known to be populated by a particular ethnic group. Furthermore, international human rights law not only prohibits policies and practices that are deliberately discriminatory in nature, but also those whose effect is to discriminate against a certain category of persons, even when discriminatory intent cannot be shown.

2. Rights to family life, to privacy and to the inviolability of the home

96. Article V of the American Declaration provides that "[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." Under Article IX, "[e]very person has the right to the inviolability of his home."

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[118] Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03, *supra*, para. 119.

[119] *Idem*, paragraphs 103-104.

97. The IACHR has highlighted the fact that the principal objective of these rights is to "protect individuals from arbitrary action by State authorities which infringes in the private sphere (...) The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances."[120] "The notion of 'arbitrary interference' refers to elements of injustice, unpredictability and unreasonableness."[121] Thus, international human rights law protects home and family life from unnecessary intrusion by the State.

98. These rights have important implications for permissible immigration enforcement. First, the State must not enforce immigration laws in the home, unless it has probable cause, based on reliable information, of the location of an individual, the risk to the community is great and all other enforcement alternatives against the person have been considered. Second, if an immigrant parent, whether documented or undocumented, is detained for immigration violations, under no circumstances can the parent's detention be used as a factor for permanently losing legal custody of his or her children. Finally, the best interests of a migrant parent's children must be factored into any removal decision, and if ordered removed the parent must receive adequate due process to make custody determinations regarding his or her U.S. citizen children before removal is executed.

IV. THE INTER-AMERICAN COMMISSION'S OBSERVATIONS AND CONCERNS REGARDING IMMIGRATION DETENTION, DETENTION CONDITIONS AND THE EFFECT ON DUE PROCESS

A. Detentions and immigration enforcement in the United States

1. General issues

99. Noncitizens in U.S. immigration detention fall into two broad categories: noncitizens detained at the border or a port of entry; and those apprehended in the interior of the United States. At a border or port of entry, any person who cannot prove United States citizenship, valid LPR status, or possession of a valid visa to the satisfaction of an immigration officer, may end up in immigration detention if found to be "inadmissible" to the U.S.[122] Similarly, noncitizens apprehended in the interior, who entered the United States unlawfully, LPRs or US citizens who cannot prove their status, or noncitizens who violated immigration laws after entry thereby becoming "removable" (or "deportable"),

[120] IACHR, *María Eugenia Morales de Sierra (*Guatemala), Report No. 4/01, (Merits) Case No. 11.625, para. 47 (January 19, 2001), *available at:* http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/Guatemala11.625a.htm.

[121] IACHR, *X & Y,* Argentina*, supra*, para. 92.

[122] The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952) (codified as amended in 8 United States Code [U.S.C.] §§ 1101 et seq.). Among the grounds of inadmissibility are: health-related grounds; criminal grounds; security and terrorist grounds; economic grounds; grounds related to illegal entry and immigration violations; and grounds related to documentation requirements. INA § 212, 8 U.S.C. § 1182.

may also be detained.[123] Summarizing, undocumented migrants, noncitizens with visas, LPRs and, on occasion, even U.S. citizens can end up in immigration detention.[124]

100. Immigration officers from Immigration and Customs Enforcement (ICE)[125] and Customs and Border Protection (CBP)[126] are authorized to detain noncitizens whom they believe are inadmissible or deportable. The main authority for the detention of noncitizens is found at Immigration and Nationality Act ("INA") §§ 235 and 236, which concern persons subject to removal proceedings,[127] and § 241 on cases in which a final removal order has been issued.[128]

101. As will be apparent throughout this section, the IACHR's primary concerns have to do with the enforcement of this set of provisions. In practice, they have meant that the United States resorts to immigration detention with increasing frequency, even though in many cases the detention is neither necessary nor appropriate under international norms on the right to personal liberty. In effect, ICE detention of noncitizens has almost doubled in the last ten years, from some 209,000 in FY2001, to 378,582 in FY2008.[129]

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[123] Among the grounds for removal (or deportation) are the following: all of the grounds of inadmissibility; status violations such as overstaying a visa; human smuggling; marriage fraud; document fraud; false claim to citizenship; unlawful voting; drug offenses; firearm violations; and committing crimes of moral turpitude or aggravated felonies. INA § 237, 8 U.S.C. § 1227.

[124] For example, some noncitizens in immigration detention are derivative U.S. citizens, but may not be aware of their claim to citizenship. In 2007, the Vera Institute of Justice, which partners with the U.S. Government to provide Legal Orientation Programs to immigration detainees, identified 322 persons in detention who had potential claims to U.S. citizenship. *See* Vera Institute of Justice, Nina Siulc, Zhifen Cheng, Arnold Son, and Olga Byrne, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, Report Summary, p. 1 (May 2008), *available at* http://www.vera.org/publication_pdf/477_877.pdf. As for legal permanent residents (LPRs), the broad definition of "aggravated felony," which has been interpreted to apply retroactively and to include activities that are neither a felony nor violent, makes LPRs deportable and bars them and other noncitizens from almost all defenses to deportation and subjects them to mandatory detention during deportation proceedings. INA §§ 101(a)(43), 237(a)(2)(A)(iii), 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii); *see generally* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. Mem. L. Rev. 853, 859 (Summer 2008).

[125] ICE was established in March 2003 as the largest investigative arm of DHS. DHS, "ICE Fact Sheet: Immigration and Customs Enforcement" (Oct. 1, 2005), available at: http://www.ice.gov/pi/news/factsheets/040505ice.htm.

[126] As another agency within DHS, Customs and Border Protection (CBP) protects the nation's borders from terrorism, human and drug smuggling, illegal immigration, and agricultural pests. Customs and Border Protection, "This is CBP" (Dec. 11, 2008), available at: http://www.cbp.gov/xp/cgov/about/mission/cbp_is.xml.

[127] INA §§ 235, 236, 8 U.S.C. §§ 1225, 1226. While the INA uses the term "removal" proceeding and previously used "deportation" and "exclusion" proceedings, in this report the terms "deportation" and "removal" are used interchangeably.

[128] INA § 241, 8 U.S.C. § 1231.

[129] *Compare* INS, "2001 Statistical Yearbook of the Immigration and Nationality Service" (Feb. 2003), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf *with* ICE, "Immigration Enforcement Actions: 2008" (July 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

102. The information compiled by the Inter-American Commission indicates that immigration detention in the United States is the rule rather than the exception, and that the chances of obtaining one's release are few. Although in general terms reference is made to the necessity of ensuring that a person subject to an immigration proceeding reports for the proceeding or the necessity of protecting public safety, in individual cases involving persons subject to immigration detention, where standards of necessity and proportionality should be applied, these considerations are not weighed.

103. The length of the detentions is also troubling. While the DHS has reported that the average period of detention has dropped to around 30 days,[130] indicating that individuals that fight their case are detained for significantly longer periods, and that the period of detention may soon likely increase because of the backlog in the immigration courts.[131]

104. Furthermore, the IACHR noted that vulnerable groups figure prominently among those being held in immigration detention. For example, the DHS estimates that approximately 1400 noncriminal asylum-seekers are detained daily in the United States.[132] The generalized use of detention in the case of asylum-seekers does not comport with the right to personal liberty. Persons suffering from mental disabilities can also be found among those being held in detention. The Division of Immigrant Health Services (DIHS) estimates that anywhere from 2% to 5% of the detained immigrants suffer from some serious and persistent mental illness, and as many as 16% may have required mental health services.[133] In the pertinent section of this report, the problems with the health services provided to immigration detainees will be discussed. Although significant improvements have been made with immigrant-family detention, ICE still detains families in the Berks facilities in Pennsylvania. Compounding the problem are the older adults and unaccompanied children who are inappropriately placed in secure facilities. The Inter-American Commission must stress the fact that detention has debilitating physical and psychological effects, particularly on these vulnerable groups.[134]

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[130] DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, p. 4 (Oct. 6, 2009), available at: http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[131] A March 2010 TRAC report states that cases awaiting a hearing in U.S. Immigration Courts reached an all-time high of 228,421 in the first months of FY2010 and that the average time these pending cases have been waiting inched up to a new high of 439 days. The Transnational Records Access Clearinghouse (TRAC) is a nonpartisan organization at Syracuse University. It compiles reports and data on enforcement activities, staffing and spending of the United States federal government. TRAC's website is *available at http://trac.syr.edu/.*

[132] *See* DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, p. 4 (Oct. 6, 2009), available at: http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[133] Washington Post, "Suicides Point to Gaps in Treatment" (May 13, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html. The DIHS' response to the Washington Post's questions about what percentage of detainees suffers from mental illness is available at: http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif.

[134] See, for example, USCIRF, *Report on Asylum Seekers in Expedited Removal: Volume II*, pp. 178-202 (February 2005), *available at:*http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf; Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture*, From Persecution to Prison: the Health Consequences of Detention for Asylum Seekers* (June 2003*), available at:* http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf*;* Washington Post,

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105. In general, the IACHR is struck by the significant harm that the indefinite nature of immigration detention causes on those detained. A number of the detainees told the Inter-American Commission that one of the most difficult aspects of detention was the uncertainty as to when it might end, and the status of their cases.[135]

106. The IACHR will now turn its attention to the laws, procedures and concerns, first on the matter of detentions at the border or port of entry or near either of them, second on persons detained in the country's interior, and third on the situation of persons subject to indefinite detention.

2. Noncitizens detained at the border, port of entry or nearby

107. The Inter-American Commission cannot fail to mention the disturbing reports it has received concerning the effects of certain immigration border control measures. In particular, information has been presented about such extreme measures as a wall, hundreds of miles in length, along the border between the United States and Mexico, which has been under construction since 2006 and has taken a toll on the human rights of immigrants.[136] One of the most harmful effects of the physical barriers erected along the border is that their deterrent effect is temporary, as they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous. Summing up, this type of measure increases the death rate among undocumented migrants, as various organizations have confirmed.[137] More serious still are the reports of immigrants killed as they attempted to cross the border by immigration agents who resorted to an excessive and disproportionate use of force.[138]

108. Although an in-depth analysis of these issues is outside the scope of this report, the IACHR must point to the terrible effects of certain immigration policies along

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"Suicides Point to Gaps in Treatment" (May 13, 2008), *available at:*http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html.

[135] The Commission observes that 84% of immigration detainees have no legal representation. *See* ABA, *Reforming the Immigration System,* Executive Summary, p. 7 (February 2010), available at: http://new.abanet.org/Immigration/PublicDocuments/full_report_part1.pdf.

[136] Among the principal factors taken into account in concluding that the measure is ineffective are the following: i) approximately half the undocumented immigrants in the United States arrived with their documents in order and either fell out of status or violated their status to remain in the country; ii) the wall is not planned as a solid structure and can be cleared through a variety of techniques; iii) the wall does not accomplish the objectives set by the United States government itself, the kinds of objectives that an effective immigration policy should have; instead it focuses on the flow into the southern part of the country and fails to take into account the need to classify the immigrants, to detect unauthorized entries, etc. See the Working Group on Human Rights and the Border Wall at the University of Texas. *Obstructing Human Rights: The Texas–Mexico Border Wall.* Submission to the Inter-American Commission on Human Rights. June 2008.

[137] See Joint Report of the ACLU and the *Comisión Nacional de Derechos Humanos de México*. October 2009. Available at: http://www.aclu.org/immigrants-rights/humanitarian-crisis-migrant-deaths-us-mexico-border.

[138] Recently, Human Rights Watch drew attention to this situation. See www.hrw.org/en/news/2010/06/11/usmexico-investigate-border-killings.

the border and to the abuses and excesses committed by officers charged with enforcing the law. The Inter-American Commission will continue to pay close attention to this situation.

a. Expedited removal

109. Noncitizens subject to expedited removal are detained under INA § 235 while an immigration officer decides, without any review by an independent judge or court, whether they will be immediately deported.[139] Of all those removed in FY2008, some 32% were subjected to expedited removal.[140]

110. Expedited removal is a summary proceeding conducted by immigration officers,[141] with no judicial review. It accelerates the removal of inadmissible noncitizens[142] and is applied in cases of noncitizens who do not have the appropriate documents[143] or are in possession of fraudulent documents[144] when they arrive at the border, when they are questioned near the border shortly after entering the United States, or when they arrive at an airport or maritime port (ports of entry).[145]

111. Between April 1997 and November 2002, expedited removal was applied only in the case of noncitizens arriving at airports or land border crossings.[146] Since then, ICE has expanded application of expedited removal to noncitizens arriving and entering by sea and those who are encountered by an immigration officer within 100 air miles of the land borders with Canada and Mexico (approximately 115 land miles) and are unable to prove to the satisfaction of the immigration officer that they have been in the United States continuously for more than 14 days.[147] So, for example, it applies to noncitizens

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[139] 8 U.S.C. § 1225; 8 CFR § 1235.3(b)(2)(iii).

[140] DHS, "Immigration Enforcement Actions: 2008" (July 2009), *available at:* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf. Due to the discrepancy between the total number of removals and detainees, the Commission is unable to say whether precisely 32% of detained immigrants were subject to expedited removal.

[141] The expression "immigration officers" includes officers with Customs and Border Protection (CBP) along the border, and officers with United States Immigration and Customs Enforcement (ICE) assigned to airports and other ports of entry into the United States.

[142] INA § 235, 8 U.S.C. § 1225.

[143] INA § 212(a)(7), 8 U.S.C. § 1182(a)(7).

[144] INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C).

[145] INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i); 8 CFR §§ 235.3(b)(6), 1235.3(b)(6).

[146] Congressional Research Service, Alison Siskin & Ruth Ellen Wasem, *Immigration Policy on Expedited Removal of Aliens,* Report RL33109, p. CRS-2 (Updated May 15, 2006), available at: http://assets.opencrs.com/rpts/RL33109_20060515.pdf.

[147] INA § 235(b)(1)(A)(iii)(I)-(II), 8 U.S.C. § 1225(b)(1)(A)(iii)(I)-(II) (The statute authorizes the Attorney General (now the Secretary of DHS) to exercise discretion in applying Expedited Removal in the interior of the United States for all undocumented migrants apprehended up to two years after entry). *See* USCIRF, *Report on Asylum Seekers in Expedited Removal, Vol. 1: Findings and Recommendations*, p. 2 (Feb. 2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf; Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004), *available at:*

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who are able to cross the border without being inspected or admitted by an immigration officer, but are then caught at ICE vehicle checkpoints, on buses or trains that ICE agents search, or when CBP agents finds them walking away from the border.[148]

112. Those arriving on valid visas, but who indicate a fear of returning home or an intent to seek asylum, may also be subjected to expedited removal proceedings because their desire to seek permanent refuge is deemed to invalidate their temporary visas, leaving them in the same category as those who do not have proper documents.[149] According to the 2005 Bi-partisan U.S. Commission on International Religious Freedom ("USCIRF") Report on Asylum Seekers in Expedited Removal,[150] of the 353 asylum seekers' files reviewed, 18 had facially valid documents that were invalidated because they expressed an intention to seek asylum.[151]

113. If a noncitizen "indicates either an intention to apply for asylum…or a fear of persecution," he or she will be referred to an asylum officer for a "credible fear interview."[152] By statute, the asylum seeker must remain detained while awaiting a credible fear interview and its results.[153] The Bi-partisan USCIRF report indicates that the typical waiting period to receive a "credible fear" interview is 2-14 days, but immigration attorneys say that the wait can be up to a month or longer.[154] The period spent waiting for

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http://www.lexisnexis.com/practiceareas/immigration/pdfs/web595.pdf; DHS, Press Release, "Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border" (Jan. 30, 2006), *available at:* http://www.dhs.gov/xnews/releases/press_release_0845.shtm.. It is reported that the 100-mile and 14-day policy is not applied to Mexican and Canadian nationals. Congressional Research Service, *Immigration Policy on Expedited Removal of Aliens*, p. 7 (Sept. 30, 2005), *available at*: http://fpc.state.gov/documents/organization/54512.pdf.

[148] University of Texas School of Law, Briefing Papers for IACHR Thematic Hearing on Immigration Detention & Due Process (October 28, 2008), *available at:* http://www.utexas.edu/law/academics/clinics/immigration/IACHR_Oct_2008_detention_hearing_submission.pdf.

[149] *See* INA § 222(g); Cable, Department of State, 96-State-232251 (Nov. 8, 1996), *reprinted in* 73 No. 44 Interpreter Releases 1614 (Nov. 18, 1996); Michael A. Pearson, Exec. Assoc. Commissioner, Office of Field Operations, INS, Memorandum to Regional Directors "Aliens Seeking Asylum at Land Border Ports of Entry" (Feb. 6, 2002); American Immigration Lawyers Association, *Immigration Today*, vol. 27, No. 3, p. 24 (May-June 2008).

[150] The U.S. Commission on International Religious Freedom was established by the International Religious Freedom Act of 1998. The USCIRF's legislative mandate includes conducting a study into whether legislative changes to U.S. asylum laws, particularly "expedited removal," are impacting asylum seekers' access to protection.

[151] U.S. Commission on International Religious Freedom (USCIRF), *Report on Asylum Seekers in Expedited Removal. Volume 1: Findings & Recommendations*, p. 62 (Feb. 2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/Volume_I.pdf

[152] INA §§ 235(b)(1)(A)(i) & (ii), 8 U.S.C. §§ 1225(b)(1)(A)(i) & (ii).

[153] INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 CFR §§ 235.3(b)(4)(ii), 1235.3(b)(4)(ii). Limited exceptions exist that allow for release before a credible fear determination, including in order to meet a medical emergency or for a necessary law enforcement objective. 8 C.F.R. § 1235.3(b)(2)(iii). Release is rarely granted under these exceptions.

[154] USCIRF, *Report on Asylum Seekers in Expedited Removal Volume 1: Findings & Recommendations, supra*, p. 29. *See also*, Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, pp. 37-38 (April 2009), *available at:* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-

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the results of the "credible fear" interview lengthens the process, especially in those ICE regional offices that have a substantial backlog of asylum applications. Throughout the "credible fear" screening process, an asylum seeker remains subject to expedited removal and thus mandatory detention, without any possibility of release.[155]

114. Asylum seekers who pass the credible fear interview and are allowed to pursue asylum, leave the expedited removal process and are placed into normal deportation proceedings, which are adjudicated by an immigration judge.[156] An asylum seeker who does not pass his credible fear interview may appeal DHS's decision to an immigration judge, who is required to hear the appeal within a week.[157] Those who do not pass the "credible fear" screening process remain under expedited removal and will remain in custody until they are removed.[158]

115. Some statistics on asylum seekers appear in the 2005 Bi-partisan U.S. Commission on International Religious Freedom ("USCIRF") *Report on Asylum Seekers in Expedited Removal*, which found that in 50% of the expedited removal interviews immigration officers failed to inform the noncitizen that he or she may seek asylum if he or she is in fear of returning home; in 72% of the cases, asylum-seekers sign their written statement in the presence of an immigration officer without having the opportunity to review it or have it interpreted to them; and 15% of the cases observed were not referred for a "credible fear" interview, despite the fact that the applicant claimed to be in fear of persecution.[159] Similarly, during its visits to detention facilities in Texas and Arizona, the Inter-American Commission interviewed a number of detained asylum-seekers who said

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report.pdf. Likewise, the Immigration Clinic at the University of Texas reports that many of its clients have been in detention for a month or longer awaiting their "credible fear" interviews. Professors at the University of Texas Immigration Clinic also commented that the persons subject to "reasonable fear" screening processes --i.e., they do not qualify for asylum but seek withholding of removal-- often wait considerably longer to receive their interviews and results. The federal regulations state that they should receive the "credible fear" interview within 10 days of expressing fear of being returned to their home country. *See* 8 CFR § 208.31.

[155] INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

[156] INA § 208(d)(1); 8 CFR § 208.20(f). The U.S. Immigration Courts are under the Attorney General's authority and are part of the U.S. Department of Justice. If an asylum seeker does not pass the credible fear interview, the person may appeal the asylum officer's determination to an immigration judge. *See* INA § 235(b)(1)(B(iii)(III), 8 U.S.C. § 1225(b)(1)(B(iii)(III). According to the USCIRF report, for FY2003, 90% of arriving noncitizens who expressed a fear of returning passed the "credible fear interview" and the average pass rate from 2000-2004 was 93%. USCIRF, *Report on Asylum Seekers in Expedited Removal Volume 1: Findings & Recommendations*, *supra*, p. 57 (Feb. 2005); USCIRF, *Report on Asylum Seekers in Expedited Removal Volume 2: Expert Reports*, p. 173 (Feb. 2005), *available at* http://www.uscirf.gov/images/stories/pdf/asylum_seekers/credibleFearDeterm.pdf. However, in FY2008 asylum seekers' pass rate for "credible fear interviews" was down to 59%. *See* Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, *supra*, p. 15, fn. 49.

[157] INA § 235(b)(B)(iii)(III), 8 U.S.C. § 1225(b)(B)(iii)(III).

[158] INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

[159] USCIRF, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings and Recommendations, supra* pp. 54, 57; see also USCIRF, *Report on Asylum Seekers in Expedited Removal: Expedited Removal Study Report Card: 2 Years Later* (February 2007), *available at:* http://www.uscirf.gov/images/stories/pdf/scorecard_final.pdf.

they had signed sworn statements and other documents without being given the opportunity to review them or to understand what they were signing.

116. The IACHR is therefore concerned over the high number of immigrants subjected to expedited removal with little or no access to legal representation[160] and without being guaranteed their right to be heard by an immigration judge to argue their legal grounds or other claims to justify their continued presence in the United States.

117. Particularly troubling is the predicament of asylum seekers, since the expedited removal process does not have the necessary means to properly identify claims of this type. The Inter-American Commission is also disturbed by the fact that the State has failed to implement the recommendations proposed by the Bi-partisan USCIRF with a view to safeguarding the rights of asylum seekers in expedited removal proceedings.[161]

118. Even if an asylum seeker passes the "credible fear" screening with the asylum officer, or when appealing his or her case before an immigration judge, if the asylum seeker announces his need for protection at the border or port of entry, he or she will still be regarded as an "arriving alien" and hence be subject to detention without bond. Persons in this situation are eligible only for parole, as will be explained below.[162] The next section describes the situation of "arriving aliens" not subject to expedited removal.

b. Arriving aliens

119. Like asylum seekers and persons fleeing persecution, other noncitizens who are detained at the border or a port of entry because immigration officials cannot confirm their admissibility, are designated as "arriving aliens."[163] Under certain circumstances, even legal permanent residents (LPRs) may be treated as arriving aliens until there is a determination confirming their admissibility.[164] This category of arriving noncitizens, who may have a valid visa or status to be admitted into the United States, are not subject to the summary "expedited removal" procedure and thus have access to

[160] Immigrants facing expedited removal have limited access to legal services, above all because once detained they are quickly removed unless they request asylum.

[161] USCIRF, *Report on Asylum Seekers in Expedited Removal: Expedited Removal Study Report Card: 2 Years Later (*February 2007), *supra*.

[162] Notably, asylum seekers or other migrants placed in expedited removal because they were apprehended within 100 miles of a U.S. border and cannot prove their physical presence in the United States for more than 14 days are not considered "arriving aliens" and thus are eligible for bond and a custody review by an immigration judge. *See* 23 I&N Dec. 731 (BIA 2005), *available at:* http://www.justice.gov/eoir/vll/intdec/vol23/3510.pdf. DHS reports that it detained 8,480 asylum seekers in FY2008. *See* DHS/ICE, "Detention and Removal Operations Report required by Section 904 of the Haitian Refugee Immigration Fairness Act," P.L. 105-277 (Dec. 4, 2009), *available at:* http://www.ice.gov/doclib/foia/hrifa/fy08hrifasection904report.pdf.

[163] See 8 CFR § 1.1(q); INA § 235 (b)(2), 8 U.S.C. § 1225(b)(2).

[164] *See* INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C). Two scenarios considered in the statute are if an LPR has possibly been convicted of an "aggravated felony" or crime of moral turpitude or has been absent from the United States for greater than 180 days. Also, LPRs or other noncitizens with valid visas may be detained and designated "arriving aliens" if there are errors in the paperwork or other questions regarding their admissibility.

judicial review of their cases.[165] Even so, like other "arriving aliens," this class of arriving noncitizens is detained until their claim to be admitted is resolved in immigration court.[166]

120. Arriving noncitizens designated as "arriving aliens" have a limited range of rights to obtain release from preventive detention.[167] "Arriving aliens" cannot seek release on bond or any other review of their detention before an immigration judge;[168] they are only eligible to apply for parole.[169] Parole allows for release from custody, but it is granted at the sole discretion of ICE[170] and there is no review of ICE's parole decisions by an independent judge or court.[171] Furthermore, the application for parole in the case of "arriving aliens" is the exception, and parole decisions in such cases happen only for "urgent humanitarian reasons or significant public benefit."[172]

121. ICE conducts a two-step process to determine if an arriving noncitizen should be paroled. First, an arriving noncitizen must demonstrate that he or she is not a security risk or does not pose a risk of absconding.[173] Nevertheless, even if the arriving noncitizen satisfies this requirement, only limited groups of noncitizens will be eligible for parole. The federal regulations single out the following as the eligible groups: noncitizens with serious medical conditions; pregnant women; juveniles; witnesses in judicial, administrative, or legislative proceedings; and noncitizens whose continued detention is not in the public interest.[174] Even if an arriving noncitizen qualifies for parole under this two-step process, it is still in ICE's exclusive discretion to parole that noncitizen, and ICE's discretionary decision is not subject to judicial review. Furthermore, ICE can seek other assurances from the detainee before parole, such as setting a parole bond amount and periodic reporting requirements.[175]

122. As for the discretionary authority exercised in decisions related to personal liberty, particularly when examining parole proceedings for "excludable aliens" who enter United States territory, the IACHR held the following:

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[165] INA § 235 (b)(2), 8 U.S.C. § 1225(b)(2).

[166] INA § 235 (b)(2), 8 U.S.C. § 1225(b)(2).

[167] *See* INA § 212(d), 8 U.S.C. § 1182 (d); 8 CFR § 235.3.

[168] 8 CFR § 235.3(b)(5) & (c); 8 CFR § 1003.19(h).

[169] *See* 8 CFR § 208.30(f); 8 CFR § 235.3(b)(5) & (c).

[170] *See* 8 CFR § 235.3(b)(5) & (c); 8 CFR § 212.5.

[171] *See* INA § 212(d)(5), 8 U.S.C. § 1182(d)(5); 8 CFR § 212.5(a).

[172] INA § 212(d)(5)(A); 8 U.S.C. § 1182(d)(5)(A).

[173] 8 CFR § 212.5(b).

[174] *Idem*.

[175] 8 CFR § 212.5(d). The University of Texas Immigration Clinic reports that in 2008 ICE began setting bond amounts as a condition for parole of its clients. Prior to 2008, the clinic reports that parole was generally without bond.

> A legislative procedure by which individuals are deprived of their liberty cannot, in the Commission's view, be considered to be sufficiently precise, fair and predictable as required under Article XXV of the Declaration, when that outcome of that procedure is ultimately dependent upon the largely unfettered discretion of the very officials who are responsible for carrying out those detentions. In such circumstances, the Commission considers that the discretionary power left to the public authorities to deprive the petitioners of their liberty are so wide that they exceed acceptable limits.[176]

123. In the case of *Rafael Ferrer-Mazorra*, the Inter-American Commission expressed its concern over the fact that the administrative decision regarding parole was not subject to appeal.[177]

124. With respect to "arriving aliens" who are seeking asylum, in response to the implementation of the 1996 immigration laws, in October 1998 the Immigration and Naturalization Service (INS) established Detention and Parole Guidelines for all of its regional directors, which regulate these and other types of cases.[178] Without eliminating the discretionary nature of the decision to grant parole, the INS guidelines encouraged parole for "arriving alien" asylum seekers. The pertinent part of the October 1998 memorandum read as follows:

> Any alien placed in expedited removal must be detained until removed from the United States and may not be released from detention unless . . . (2) the alien is referred for a full removal proceeding under §240 (for example, upon a finding of "credible fear of persecution'). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have credible fear of persecution, provided that they do not pose a risk of flight or danger to the community.[179]

125. This was the INS and its successor's (ICE) parole policy for "arriving alien" asylum seekers for the next nine years. In November 2007, however, ICE revised its established parole policy for "arriving alien" asylum seekers, making parole a more stringent process.[180] While under both policies ICE had discretionary authority to grant parole, the November 2007 policy changes further curtailed the chances that asylum seekers had of qualifying for this benefit. Under the October 1998 guidance, parole of an "arriving alien" asylum seeker who passed a "credible fear" interview was generally

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[176] IACHR, *Rafael Ferrer-Mazorra et al.,* United States*, supra,* paragraphs 217 and 226.

[177] *Idem*, para. 232.

[178] Michael Pearson, Executive Associate Commissioner, Memorandum to Regional Directors, "Detention Guidelines Effective October 9, 1998" (Oct. 7, 1998); *see also* Michael Pearson, Executive Associate Commissioner, Memorandum to Regional Directors et al., "Expedited Removal: Additional Policy Guidance" (Dec. 30, 1997) (hard copies of the Pearson memos are on file at the Commission). The October 1998 memorandum provides parole guidance for various categories of immigrant detainees.

[179] Michael Pearson, Executive Associate Commissioner, Memorandum to Regional Directors, *supra*.

[180] Julie L. Myers, ICE Assistant Secretary, ICE Policy Directive, "Parole of Arriving Aliens Found to have a 'Credible Fear' of Persecution or Torture," § 8.3.5 (Nov. 6, 2007), *available at:* http://www.rcusa.org/uploads/pdfs/ICE%20Asylum%20Parole%20Guidance%2001-06-07.pdf.

considered in the public interest.[181] The 1998 memorandum makes no reference to the five categories enumerated in the federal regulations.[182] Under the November 2007 directive, ICE takes the five categories for parole found in the federal regulations and makes them a criterion in order to establish eligibility for parole, and not grounds for parole in of itself.[183] In effect, under the November 2007 directive, the parole of "arriving alien" asylum seekers was now not generally considered to be in the public interest; rather, only a subset of "arriving alien" asylum seekers who passed a "credible fear" interview would qualify for parole because it was in the public interest.[184]

126. Therefore, after November 2007, only a fraction of "arriving alien" asylum seekers who passed the "credible fear" screening process qualified to receive parole on public interest grounds.

127. According to the government's statistics, 4,606 asylum seekers were in detention in FY2008 after passing the "credible fear" screening process.[185] The State reports that in FY2008, an arriving alien asylum seeker spent an average of 81 days in detention once the "credible fear" screening process had been completed. Some 75% of these arriving aliens seeking asylum were held for up to 90 days in detention after having passed their respective "credible fear" interviews.[186] A number of NGOs have observed that the average length of detention for arriving aliens seeking asylum is in all likelihood higher than the official statistics.[187] Irrespective of what the precise average period of detention is, the IACHR believes it is unacceptable for noncitizens seeking asylum to have to spend so long a period in detention, as this is a violation not only of international obligations with respect to personal liberty, but also of specific provisions of international refugee law.

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[181] Michael Pearson, Executive Associate Commissioner, Memorandum to Regional Directors, *supra*.

[182] *Idem*.

[183] The October 1998 parole guidance was not exclusive to "arriving alien" asylum seekers.

[184] The November 2007 Directive states the following:

> 8.3.5 Public Interest. Parole on public interest grounds requires careful consideration of whether, consistent with ICE's mission to protect the United States, uphold public safety, and enforce the immigration laws, a specific alien's case is appropriate for parole because of some public interest. Because "public interest" is not amenable to a single, standard definition, the decision to grant parole on this basis must be documented by a well-reasoned justification.

[185] *See* ICE, FOIA Reading Room, "Detention and Removal Operations Report required by Section 904 of the Haitian Refugee Immigration Fairness Act (HRIFA): Fiscal Year 2008," p. 3 (December 4, 2009) available at: http://www.ice.gov/doclib/foia/hrifa/fy08hrifasection904report.pdf. The IACHR observes that according to the government's own figures, another 3,874 asylum seekers were detained in FY2008 after having entered the country.

[186] *Idem*.

[187] *See, e.g.,* Human Rights First, *U.S. Detention of Asylum Seekers, Seeking Protection, Finding Prison, supra*, p. 39*;* Amnesty International*, US Detention of Asylum Seekers and Human Rights* (March 1, 2005), *available at:*http://www.migrationinformation.org/USFocus/display.cfm?ID=296.

128. It is also important to note an asylum seeker who has passed a "credible fear" interview still must file a request with the local ICE office seeking parole. According to the statistics that ICE supplied to the Bi-partisan United States Commission on International Religious Freedom (USCIRF), only 215 of the 842 asylum seekers (25%) detained between November 2007 and June 2008 filed petitions seeking parole,[188] so that only those 215 were considered for parole. The Inter-American Commission is also troubled by the information suggesting regional disparities in parole rates for arriving asylum seekers and the apparent absence of consistency and quality control in parole decision-making and, in general, the low percentage average of asylum seekers who are granted parole after requesting it.[189]

129. The United States addressed this issue in its October 2010 observations:

> In January 2010, ICE issued the revised policy, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture." This policy allows ICE to address and prioritize the use of detention resources and respond to the needs of this vulnerable population. Under the new policy, aliens who arrive in the United States at a port of entry and are found to have a credible fear of persecution or torture will automatically be considered by ICE for parole. This is a change from the prior policy, which required aliens to affirmatively request parole in writing.
> In addition, the new policy adds heightened quality assurance safeguards, including monthly reporting by ICE field offices and headquarters analysis of parole rates and decision-making, as well as a review of compliance rates for paroled aliens. Further, while the prior policy allowed ICE officers to grant parole based on a determination of the public interest, it did not define this concept. By contrast, the new directive explains that the public interest is served by paroling arriving aliens found to have a credible fear who establish their identities, pose neither a flight risk nor a danger to the community, and for whom no additional factors weigh against their release.

130. The IACHR observes that a limited possibility of qualifying for parole exacts a particularly heavy toll on asylum seekers, because of the psychological effect that detention has on such persons[190] and because of how important one's freedom is for

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[188] Human Rights First, *U.S. Detention of Asylum Seekers, Seeking Protection, Finding Prison, supra*, p. 35. "ICE paroled only 107 asylum seekers, out of the 215 written parole requests submitted in the eight month period from November 2007 through June 2008 – a period in which ICE newly detained 842 arriving asylum seekers who were found to have a credible fear of persecution, over and above the number it conducted to hold in detention from the prior years"; See also ICE, FOIA Reading Room, Immigration Statistics: Statistics on Parole of Arriving Aliens Found to Have a "Credible Fear", Quality Assurance Review, November 2007-April 2008 and May 2008 – October 2008, available at: http://www.ice.gov/foia/readingroom.htm.

[189] Some ICE field offices have reported parole rates for asylum seekers of 0.5% (New Orleans), 3.8% (New Jersey), and 8% (New York). USCIRF *Report on Asylum Seekers in Expedited Removal, Vol. 2, supra,* p. 332; USCIRF *Report on Asylum Seekers in Expedited Removal, Vol. 1: Findings and Recommendations, supra,* p.; USCIRF *Report on Asylum Seekers in Expedited Removal: Expedited Removal Study Report Card: 2 Years Later, supra*. See, Human Rights First, *U.S. Detention of Asylum Seekers, Seeking Protection, Finding Prison, supra,* p. 35.

[190] *See* Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: the Health Consequences of Detention for Asylum Seekers* (June 2003), *available at:* http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf.

getting due process and obtaining the protection that an asylum seeker is after.[191] The Inter-American Commission welcomes the updated information supplied by the State, which reveals that the appropriate steps are being put in place to guarantee the rights of asylum seekers.

c. The new guidelines on parole for arriving noncitizens seeking asylum

131. The Inter-American Commission notes the announcement by ICE that effective January 4, 2010, it would be implementing the new guidelines which recommend parole of asylum seekers categorized as "arriving aliens" who pass a "credible fear" interview, can establish their identities, and do not pose a flight risk or danger to the community. [192]

132. In its response to the draft version of this report, the United States explains that "as a division of a U.S. Government agency, ICE is charged with implementing and enforcing U.S. law within its mandate". The new policy issued by ICE regarding arriving aliens, in the view of the United States, "squarely addresses the Commission's concerns regarding the detention of arriving aliens" as it "permits ICE to parole arriving aliens who have a credible fear of persecution, who do not pose a flight risk, or are not believed to be a danger to the community when no additional factors weigh against release of the alien".

133. ICE's new parole guidelines for "arriving alien" asylum seekers feature three important aspects. First, the "arriving alien" asylum seekers will automatically be considered for parole rather than requiring the asylum seeker to petition for parole in writing. Second, the guidelines will require ICE field offices to file monthly reports so that DHS central headquarters can analyze parole rates, field offices' decision-making, and the level of compliance of paroled asylum seekers with the conditions imposed. Third, the new guidelines will require the United States Citizenship and Immigration Services (USCIS)

[191] According to the EOIR, in FY2007, approximately 84% of detained respondents with completed immigration court proceedings lacked legal representation. *See* Vera Institute of Justice, *"Improving Efficiency and Promoting Justice in the Immigration System"* (May 2008), available at: http://www.vera.org/download?file=1780/LOP%2BEvaluation_May2008_final.pdf. According to a law review article written by professors of immigration law, asylum seekers who have legal representation are three times more likely to be granted asylum. *See* Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication,* Stanford Law Review, Vol. 60 (2008), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946. According to a recent report by the Constitution Project, in 2003 39% of non-detained, represented asylum-seekers were granted relief, compared with only 14 percent of non-detained asylum-seekers without counsel. That same year, detained asylum-seekers with counsel were granted relief in 18% of cases compared to only 3% of those without counsel. *See* The Constitution Project, *Recommendations for Reform of Our Immigrant Detention System and Promoting Access to Counsel in Immigration Proceedings,* p. 29 (2009), *available at:* http://www.constitutionproject.org/manage/file/359.pdf.

[192] ICE, News Release, "ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives" (December 16, 2009), available at: http://www.ice.gov/pi/nr/0912/091216washington.*htm*; ICE Directive, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," Directive No. 11002.1 (issued December 8, 2009), *available at*: http://www.immigrantjustice.org/press/detention/iceparoleguidelines2009.html. The text reads, in part, as follows: "When an arriving alien found to have a credible fear establishes to the satisfaction of DRO his or her identity and that he or she presents neither a flight risk nor danger to the community, DRO should, absent additional factors, […] parole the alien on the basis that his or her continued detention is not in the public interest".

asylum officers to provide asylum seekers who pass the credible fear interview with information regarding the new parole process and documentation which will help establish eligibility for release.[193]

134. Although the IACHR considers that this policy change is an important step toward protecting asylum seekers' right to personal liberty, it also believes that legally enforceable regulations should be put into place.[194] When it comes to some of the specifics of the new guidelines, the Inter-American Commission is concerned that the initial requirements, especially the standards requiring that asylum seekers demonstrate they are not a flight risk, place an undue burden of proof on the asylum seeker. As noted in the section on international standards on the right to personal liberty, it is up to the respective authority to present sufficient arguments, on a case-by-case basis, to explain why detention is necessary rather than a less onerous measure. The burden of proof must be on the authority ordering detention or denying parole, not on the immigrant.

135. The burden of proof that these guidelines place on the asylum seeker is not only undue, but perhaps even insurmountable. The new ICE directive on parole provides that the asylum seeker "must present sufficient evidence demonstrating his or her likelihood of appearing when required."[195] The directive also lists a set of "appropriate factors" which would seem incongruent with the circumstances of an arriving asylum seeker and thus very difficult to satisfy:

> Factors appropriate for consideration in determining whether an alien has made the required showing include, but are not limited to, community and family ties, employment history, manner of entry and length of residence in the United States, record of appearance for prior court hearings and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available to the alien.[196]

136. Many arriving asylum seekers have no prior connections to the United States and have limited resources, making the factors presented above largely impossible to satisfy. After seeing the very low parole rates for arriving aliens who have been found to have a credible fear of persecution or torture,[197] the IACHR is particularly concerned that

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[193] ICE Directive, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," Directive No. 11002.1, *supra.*

[194] The Commission observes that the parole guidelines for "arriving alien" asylum seekers have been revised multiple times over the past decade depending on the positions of each successive Administration. *See* Julie L. Myers, ICE Assistant Secretary, ICE Policy Directive, "Parole of Arriving Aliens Found to Have a 'Credible Fear' of Persecution or Torture," *supra*, section "Superseded Policies and Guidance" (Nov. 6, 2007).

[195] ICE Directive No. 11002.1, *supra*, para. 8.3(2)(a).

[196] *Idem*, para. 8.3(2)(b).

[197] While ICE has not provided comprehensive parole statistics for arriving aliens since 2004, Human Rights First reports based on statistics obtained from ICE through a FOIA request indicate that in 2007 only 4.5% of arriving asylum seekers who passed their credible fear interviews was paroled. *See* Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, *supra*, p. 35.

the flight risk criterion could be interpreted in a manner that will prohibit many asylum seekers from being granted parole; instead they might be filtered into Alternatives to Detention programs ("ATDs") or detained.

137. The Inter-American Commission also notes that the new guidelines do not modify ICE's exclusive jurisdiction to serve as both judge and jailer over detained asylum seekers labeled as "arriving aliens."[198] Nothing in the new guidelines changes the fact that there is no way to file an appeal with an immigration judge to challenge the denial of parole.[199]

138. And although the new reporting requirements incumbent upon ICE regional offices and the review of those reports at headquarters seem to provide greater assurances of consistency and quality control with respect to parole decisions issued at the regional level, the review is designed to correct significant and recurring problems in the regional offices' decision-making process, but not review or take corrective action on individual cases.[200] This concern is particularly important because the ICE offices do not operate on the basis of a presumption in favor of liberty and therefore do not do stringent, periodic and case-by-case evaluations to determine whether continuing to hold a detained asylum in custody is a necessary and proportional response.

139. Summarizing, while these new directives have some positive features and are similar to those implemented through the October 1998 Memorandum, the chief human rights concerns have not been adequately addressed. These concerns are the undue burden of proof placed on the asylum seeker, the discretionary nature of the parole decision, and the impossibility of challenging that decision in court.

3. Noncitizens in the U.S. interior

140. The IACHR will next turn its attention to the situation of persons subjected to immigration proceedings and detention once they are in the country's interior. For this purpose, the Inter-American Commission has divided up its reporting according to whether the immigration law is applied at the federal level or the state or local level.

a. Enforcement of Federal Law by Federal Immigration Officers

141. The two principal federal interior immigration enforcement programs are the Worksite Enforcement Unit and the Fugitive Operations Teams.[201] The IACHR will explain what each of these units does, the procedures or programs they use and the main

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[198] *See* IACHR, *Rafael Ferrer-Mazorra et al. (the United States), supra*, para. 232.

[199] *Idem* .

[200] ICE Directive No. 11002.1, *supra*, para. 8.11.

[201] ICE's Offices of Investigation includes task forces such as: Child Exploitation, Community Shield (which targets transnational gangs), Human Trafficking, Identity/Benefits Fraud, National Security, and Drug Trafficking, to name just a few. *See* http://www.ice.gov/investigations/.

concerns as regards the United States' international human rights obligations. The Inter-American Commission will also discuss the initiatives announced by DHS to overhaul the enforcement strategies they deploy.

i. Worksite Enforcement Unit

142. Although in April 2009 ICE issued guidance that changes the principal focus of the Worksite Enforcement Unit, the IACHR believes it is important to examine its previous practices, particularly the high-profile worksite and home raids,[202] as these procedures have serious implications for human rights. Furthermore, this analysis is important inasmuch as the Administration has used these models as a basis and in some respects has continued the same practices despite the reforms.

143. Since FY2006, the Worksite Enforcement Unit has conducted an increasing number of high-profile worksite raids. During these raids, hundreds of undocumented workers were arrested for violations of civil law, yet only a small percentage were taken into custody on criminal charges.[203] The ICE figures show that between FY2006 and FY2008 the Worksite Enforcement Unit made 12,917 administrative arrests, but only 2,682 criminal arrests.[204]

144. The Inter-American Commission learned that these figures on criminal arrests do not capture the specific circumstances under which many of the arrests were made. The IACHR observes that the worksite raid in Postville, Iowa, is emblematic of the "criminal arrests" reported by the Worksite Enforcement Unit between FY2006 and FY2008.[205]

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[202] *See, e.g.,* New York Times, "Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts" (March 22, 2007) (New Bedford, MA), *available at:* http://www.nytimes.com/2007/03/22/washington/22mass.html?scp=2&sq=New+bedford&st=nyt; New York Times, "Hundreds Arrested in U.S. Sweep of Meatpacking Plant," (May 13, 2008) (Postville, IA) *available at:* http://www.nytimes.com/2008/05/13/us/13immig.html?scp=13&sq=Postville%20raid%20immigration&st=cse; New York Times, "Hundreds of Workers Held in Immigration Raid" (Aug. 25, 2008) (Laurel, MS) *available at:* http://www.nytimes.com/2008/08/26/us/26raid.html*;* New York Times, "Immigration Agents to Turn Focus to Employers" (April 30, 2009) (Bellingham, WA) *available at:* http://www.nytimes.com/2009/04/30/us/politics/30immig.html.

[203] The following are press accounts of some of the high-profile raids. *See, e.g.,* New York Times, "U.S. Raids 6 Meat Plants in ID Case" (December 13, 2006) (raids on meat packing plants owned by Swift & Company), *available at:* http://www.nytimes.com/2006/12/13/us/13raid.html; New York Times, "Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts" (March 22, 2007) (New Bedford, MA), available at:http://www.nytimes.com/2007/03/22/washington/22mass.html?scp=2&sq=New+bedford&st=nyt; New York Times, "Hundreds Arrested in U.S. Sweep of Meatpacking Plant" (May 13, 2008) (Postville, IA), *available at:* http://www.nytimes.com/2008/05/13/us/13immig.html?scp=13&sq=Postville%20raid%20immigration&st=cse; New York Times, ""Hundreds of Workers Held in Immigration Raid" supra*;* New York Times, "Immigration Agents to Turn Focus to Employers" (April 30, 2009) (Bellingham, WA) *available* http://www.nytimes.com/2009/04/30/us/politics/30immig.html.

[204] See ICE, "Fact Sheet: Work Enforcement Overview" (April 30, 2009), *available at*: http://www.ice.gov/pi/news/factsheets/worksite.htm

[205] New York Times, "Hundreds Arrested in U.S. Sweep of Meatpacking Plant", *supra*.

145. In an essay published on June 13, 2008, an interpreter for the workers arrested during the raid on the meat packing plants in Postville, Iowa, painted an alarming picture of many of the "criminal arrests" conducted at worksites, and of the due process rights of migrant workers who are brought up on criminal charges.[206] During the Postville raid on May 12, 2008, 389 workers were arrested, only 5 of whom had criminal records.[207] ICE brought criminal charges against 306 of the 389 workers apprehended.[208] To expedite the criminal proceedings, a hearing room was improvised and a complex of 23 trailers set up on the site of the National Cattle Congress, sprawling acreage used as the local fair grounds.[209] The majority of those detained were charged with the crime of "aggravated identity theft" (which carries a mandatory two-year sentence) and of "knowingly using a false Social Security number" (an offense that carried a discretionary sentence of 0 to 6 months).[210]

146. Multiple accounts indicate that the State used the criminal charges as a threat to get the majority of the workers to admit to the charges against them and accept a binding plea agreement in which they admitted to a lesser charge that carried a five-month sentence.[211] The majority of the workers charged were poor peasants from Guatemala and Mexico who were their families' principal providers.[212]

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[206] Erik Camayd-Freixas, Ph.D., Florida International University, "Interpreting after the Largest ICE Raid in US History: A Personal Account" (June 13, 2008), *available at:* http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf.

[207] New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push" (May 24, 2008), available at: http://www.nytimes.com/2008/05/24/us/24immig.html?scp=57&sq=Postville,%20Iowa&st=cse; Erik Camayd-Freixas, *supra*, p. 3.

[208] Erik Camayd-Freixas, *supra*, pp. 2-3*;* New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push" *supra.*

[209] Erik Camayd-Freixas, *supra*, p. 1; New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push" *supra;* New York Times, "Immigrants' Speedy Trials after Raid Become Issue" (August 9, 2008), available at: http://www.nytimes.com/2008/08/09/us/09immig.html.

[210] Erik Camayd-Freixas, *supra*, p. 9. The interpreter observed that the majority of workers interviewed "did not even know what a Social Security number was or what purpose it served." The New York Times reports that some of the workers had obtained the Social Security number from the employer. *See ibid.,* at pp. 5-6; New York Times, "An Interpreter Speaking Up for Migrants" (July 11, 2008), *available at*: http://www.nytimes.com/2008/07/11/us/11immig.html?pagewanted=2&sq=Postville%20manual&st=cse&scp=3; New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push" *supra.*

[211] Letter from Public Defender Rockne Cole to Congressman Zoe Lofgren (dated July 24, 2008), *available at:* http://graphics8.nytimes.com/packages/pdf/national/ColeLetter.pdf; Erik Camayd-Freixas, *supra,* p. 9; New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push", *supra*. The IACHR is disturbed by reports that one of the main prosecutors in the criminal cases related to the Postville raid was nominated for United States Attorney. *See* New York Times, "U.S. Attorney Nominee Criticized over Raids" (November 17, 2009), available at: http://www.nytimes.com/2009/11/17/us/17attorney.html?sq=Postville&st=cse&scp=19&pagewanted=print.

[212] Erik Camayd-Freixas, *supra*, pp. 2, 7, 9-10; New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push", *supra*. The interpreter quotes one worker who said the following to the presiding judge: "Your Honor, you know that we are here because of the need of our families. I beg that you find it in your heart to send us home before too long, because we have a responsibility to our children, to give them an education, clothing, shelter, and food."

147. The American Immigration Lawyers Association filed a complaint because the accused workers were not permitted to speak with immigration attorneys to be advised of the immigration consequences that a guilty plea would have.[213] Under the terms of the plea agreement, the Government required the accused workers to waive their right to an immigration proceeding.[214] The plea agreements were also crafted in such a way that the presiding judges did not have any discretion to change the terms of the plea agreement.[215]

148. The workers entered the hearing room in groups of five to ten, shackled and in chains, and one by one entered a guilty plea.[216] Two hundred seventy of the accused workers pleaded guilty to the criminal violation and served five months in prison.[217]

149. The Inter-American Commission is deeply troubled by the lack of due process in the criminal proceedings conducted against the workers and by the fact that the outcome was a foregone conclusion. While the State has discontinued this type of worksite "criminal procedure" the IACHR is nonetheless concerned that the State is using tactics involving criminal prosecution, such as threatening immigrants with more serious charges in order to get them to plead guilty to lesser offenses or conducting *en masse* hearings, as happens under Operation Streamline conducted in the participating judicial districts along the border with Mexico.[218]

150. The Inter-American Commission notes with concern that criminal law is being misused to criminalize immigration, which can have consequences of various kinds. On the one hand, criminal law can be used to exert pressure on immigrants in removal

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[213] New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push", *supra*.

[214] ACLU, "ACLU Obtains Government "Manual" For Prepackaged Guilty Pleas for Prosecution of Immigrant Workers in Postville, Iowa" (July 31, 2008), available at: http://www.aclu.org/immigrants-rights/aclu-obtains-government-manual-prepackaged-guilty-pleas-prosecution-immigrant-work. The Postville Defense Manual is available at: http://www.aclu.org/immigrants-rights/government-manual-distributed-iowa-defense-lawyers.

[215] Postville Defense Manual, *supra*; Letter from Public Defender Rockne Cole to Congressman Zoe Lofgren, *supra*; Erik Camayd-Freixas, Ph.D., *supra*; New York Times, "Immigrants' Speedy Trials after Raid Become Issue", *supra;* Federal Rules of Criminal Procedure, Rule 11(c)(1)(C), available at: http://www.law.cornell.edu/rules/frcrmp/Rule11.htm.

[216] New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push", *supra*; Erik Camayd-Freixas, *supra*, p. 8.

[217] New York Times, "270 Illegal Immigrants Sent to Prison in Federal Push" supra.

[218] *See, e.g.,* The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, Berkeley Law University of California, "Assembly-Line Justice: A Review of Operation Streamline" by Joanna Lydgate (January 2010), *available at*: http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.*pdf*. With the flood of criminal proceedings instituted under Operation Streamline against immigrants for having entered the country illegally, immigration proceedings represented 54% of all criminal proceedings prosecuted in Fiscal Year 2009, some 9,899 cases. TRAC, "FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings" (December 21, 2009), *available at:* http://trac.syr.edu/tracreports/crim/223/; *TRAC, "*Immigration Prosecutions at Record Levels in FY 2009" (September 21, 2009), *available at*: http://trac.syr.edu/immigration/reports/218/.

proceedings by threatening them with criminal prosecution, which often corners them into waiving their rights. On the other hand, if the message sent is that these undocumented immigrants are criminals, the use of these practices that are controversial from the human rights standpoint --such as detaining immigrants for the sake of "public safety"-- can become even more widespread.

151. Furthermore, these worksite raids raised disturbing humanitarian concerns. According to information from NGOs, these operations involved dozens of armed agents who surrounded the workplace to prevent workers from leaving while the interrogations about their immigration status lasted for hours.[219] They also reported that in many cases workers signed deportation papers even before they were able to exercise their right to speak with an attorney.[220] They also observed that after being held in custody at worksites for hours, the arrested workers were generally handcuffed and in some cases even shackled to be boarded on buses to be taken to the facility where the immigration proceeding would be conducted.[221] In many of these raids, ICE did nothing to coordinate with local schools and social services to ensure that the dependent children of the detained workers would be properly cared for. In the worksite raid conducted in New Bedford, Massachusetts, one hundred or more dependent children were left without their only provider and caretaker, in some cases for several days.[222]

152. As previously observed, in April 2009 ICE issued directives for worksite immigration enforcement with the focus on employers.[223] Nevertheless, the new strategy mentions that "ICE will continue to fulfill its responsibility to arrest and process for removal illegal workers encountered during worksite enforcement operations."[224] This directive extends application of the humanitarian guidelines --which include coordinated medical

[219] The reports on the professionalism of ICE and the way in which the workers are interrogated varied from one worksite to another. *See, e.g.,* National Council of La Raza & The Urban Institute, *Paying the Price: the Impact of Immigration Raids on America's Children,* p. 23. (2007), available at: http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf; Dorsey & Whitney LLP & The Urban Institute, *Severing a Lifeline: The Neglect of Citizen Children in America's Immigration Enforcement Policy*, pp. 41-44 (2009), available at: http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_ReportOnly_web.pdf. The workers reported that during the raids on the Swift & Company workplace, they were handcuffed and detained for hours, not allowed to use the telephone or restroom, and were denied access to legal representation and contact with their families. *See* Oskar Garcia, Associated Press, "Union sues to stop immigration raids at meatpacking plants" (December 12, 2007).

[220] National Council of La Raza & The Urban Institute, *supra,* p. 24.

[221] *Idem.*

[222] It has been reported that some 71% of the children affected were age five or under. *See* National Council of La Raza & The Urban Institute, *supra,* pp. 35-36, 38; Dorsey & Whitney LLP & Urban Institute, *supra*, p. 44.

[223] ICE Memorandum "Worksite Enforcement Strategy", Marcy M. Forman, Director, Office of Investigations, addressed to Assistant Directors, Deputy Assistant Directors and Special Agents in Charge (dated April 30, 2009), *available at*: http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf.

[224] ICE Memorandum "Worksite Enforcement Strategy," *supra*.

care, social services, adequate supplies of food and water--[225] to "all worksite enforcements involving 25 or more illegal workers rather than 150 [the previously-established ceiling]."[226].

153. ICE has already implemented this new worksite enforcement strategy. In November 2009, ICE completed an initial round of audits of the employment records of 654 companies and announced a second round of audits that would include the employment records of another 1,000 companies.[227] Thus, the new worksite enforcement strategy appears to have focused on "building" criminal cases against employers, imposing civil fines on employers or threatening them with fines, and forcing them to fire undocumented workers.[228]

154. Based on the information received, the IACHR believes this new approach strikes a better balance between the State's prerogative to enforce rational immigration policy, while doing so in a manner that treats undocumented migrant workers and the families who depend on those workers in a humane manner. The Inter-American Commission appreciates how important it is that the humanitarian services guidelines will now be triggered in operations involving far fewer workers. The new strategy also brings a better balance to immigration enforcement by not placing the consequences and impacts for irregular labor exclusively on the most vulnerable actors in the system—the migrant workers.

155. The United States mentions in its October 2010 observations to the draft version of this report that "ICE's Worksite Enforcement program is focused on creating a culture of compliance by holding employers accountable for obeying the law" and that the agency "is aggressively pursuing criminal prosecution of employers who knowingly hire undocumented aliens". The investigations of such employers by ICE, as indicated by the State, "often uncover other criminal violations and widespread abuses, such as money laundering, alien harboring, alien smuggling, document fraud, and other forms of worker exploitation". The State affirms that "ICE is particularly sensitive to allegations of exploitation and underpayment of wages", and adds:

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[225] ICE, "Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees," available at: http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/ice-hum-guidelines.pdf. ICE issued these humanitarian guidelines when numerous reports indicated that children were being left without parents, which was just one of the humanitarian concerns raised subsequent to the worksite raids conducted in New Bedford, MA (March 6, 2007) and Worthington, MN (December 12, 2006). *See, e.g.,* Dorsey & Whitney LLP & the Urban Institute, *supra,* pp. 41-44.

[226] ICE Memorandum "Worksite Enforcement Strategy," *supra.*

[227] New York Times, "Immigration Officials to Audit 1,000 More Companies" (November 20, 2009), available at: http://www.nytimes.com/2009/11/20/us/20immig.html.

[228] *See* New York Times, "Immigration Crackdown with Firings, Not Raids" (September 30, 2009), available at: http://www.nytimes.com/2009/09/30/us/30factory.html. (ICE's audit of employment records at American Apparel led to the firing of 1800 workers whose social security numbers and other documents could not be verified). *See also,* ICE, News Releases, Worksite, available at: http://www.ice.gov/pi/news/newsreleases/index.htm?top25=no&year=all&month=all&state=all&topic=16.

> Along with criminal prosecutions of employers, ICE will continue to fulfill its responsibility to arrest and process for removal unauthorized workers encountered during worksite enforcement operations, which are conducted in support of a criminal investigation of an employer. However, when encountering unauthorized workers, ICE continues to employ existing humanitarian guidelines. These guidelines require ICE to develop a comprehensive plan to identify, at the earliest possible point, any individuals arrested on administrative charges who may be sole care givers or who have other humanitarian concerns, including those with serious medical conditions that require special attention, pregnant women, nursing mothers, parents who are the sole caretakers of minor children or disabled or seriously ill relatives, and parents who are needed to support their spouses in caring for sick or special needs children or relatives. These special vulnerabilities are then carefully assessed prior to any decision on whether or not an unauthorized worker should be detained or released.

156. The IACHR welcomes the constructive engagement on the part of the immigration authorities in the United States, while at the same time recognizing that there is a larger political debate inside the United States with respect to comprehensive immigration reform and whether currently undocumented migrants should receive legal status. The merits of that larger debate, however, are beyond the scope of this report.

ii. Fugitive Operations Teams

157. The Fugitive Operations Teams (FOTs) are seven-member teams tasked with identifying, locating, apprehending, processing, and removing fugitive aliens from the United States.[229] The stated goal of the Fugitive Operations Program is to "give top priority to cases involving [fugitive] aliens who pose a threat to national security and community safety, including members of transnational street gangs, child sex offenders, and aliens with prior convictions for violent crimes."[230] A "fugitive alien" is defined as "an alien who has failed to leave the United States based upon a final order of removal, deportation, or exclusion; or who has failed to report to ICE after receiving notice to do so."[231]

158. The United States explains this program in the following terms:

> The focus of the National Fugitive Operations Program is the apprehension and removal of fugitive aliens, with a particular focus on criminals and national security threats. An ICE fugitive is defined as an alien who has failed to leave the United States based upon a final order of removal, deportation, or exclusion; or who has failed to report to ICE as requested.

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[229] ICE, "ICE ACCESS" (last updated Feb. 20, 2009), available at: http://www.ice.gov/partners/dro/iceaccess.htm.

[230] ICE, "ICE Fugitive Operations Program" (last updated Nov. 2, 2009), available at: http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm.

[231] "ICE Fugitive Operations Program", *supra a*. ICE reports that as of FY2008, there were approximately 560,000 fugitive aliens in the United States.

159. The FOTs were launched with 8 teams in 2003.[232] As of November 2009, there were more than 100 FOTs across the United States.[233] The Fugitive Operations budget has, likewise, multiplied during that period from US$9 million in FY2003 to US$218 million in FY2008.[234] Since 2005, FOTs have conducted a number of high-profile operations including "Operation Return to Sender" (nationwide), 'Operation City Lights" (Las Vegas), "Operation Phoenix" (Florida), "Operation Deep Freeze" (Chicago), and "Operation FLASH" (New England).[235]

160. FOTs' enforcement actions typically consist of home raids at the last known address of a fugitive alien as recorded in the Deportable Alien Control System ("DACS"), which was transferred to the a new electronic database "ENFORCE", unveiled in August 2008.[236] The FOTs will many times partner with local law enforcement Joint Fugitive Task Forces in carrying out their enforcement actions.[237]

161. Although ICE maintained that the FOT program was targeted at apprehending fugitive immigrants with serious criminal records,[238] ICE's policy goals for accomplishing the mandate of the FOT program became less strict with the passage of time and the program became a means to make more collateral arrests of undocumented immigrants against whom no prior removal orders were pending.

162. In FY2003, when the FOTs began, ICE determined that each team's annual goal was to apprehend 125 fugitive aliens, with priority being given to the backlog of fugitive alien cases and aliens released on orders of supervision, a form of relief from detention that is similar to a parole.[239] In January 2004, ICE attempted to focus the FOTs' priorities on apprehension of fugitive aliens with criminal records, by requiring that 75% of all fugitive operations have as their goal the apprehension of "criminal" aliens.[240] In

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[233] ICE, New Releases: ICE multifaceted strategy leads to record enforcement results" (Oct. 23, 2008), available at: http://www.ice.gov/pi/nr/0810/081023washington.htm.

[234] MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, p. 5 (Feb. 2009), available at: http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

[235] DHS OIG, *An Assessment of the United States Immigration and Custom Enforcement's Fugitive Operations Teams*, OIG-07-34, p. 15 (March 2007), *available at:* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf.

[236] MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, *supra*, pp. 6-7.

[237] "ICE ACCESS" *supra*.

[238] "ICE Fugitive Operations Program" *supra.*

[239] DHS OIG, An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams, *supra*, p. 8.

[240] ICE Memorandum "Case Load Priority with Fugitive Operations," from Anthony S. Tangeman, Director, Office of Detention and Removal (dated January 22, 2004), a*vailable at:* http://graphics8.nytimes.com/packages/pdf/nyregion/2009/20090205_RAID_FINAL.pdf.

January 2006, ICE reshuffled the FOTs' apprehension priorities and goals.[241] It is important to note that ICE set an annual average goal of 1,000 fugitive immigrants per FOT, without factoring in the degree of priority of the fugitive.[242] Eight months later, in September 2006, ICE changed the annual, per-team production target to 1,000 fugitive alien arrests.[243] It is not surprising, then, that the changes to the FOTs' goals and priorities which ICE introduced in 2006 have significantly increased the number of collateral arrests of immigrants who were not being sought during the home raids.[244]

163. In effect, according to the MPI's analysis of ICE's figures on arrests made by the FOTs between FY2003 and February 2008, only 27% of the persons apprehended by the FOTs had criminal records of any kind, and persons with criminal records represented a diminishing percentage of all individuals apprehended over that time period.[245] By contrast, the MPI found that in that same period, arrests of undocumented (but not fugitive) immigrants represented an ever-increasing percentage of the total number of arrests made by the FOTs, and by 2007 accounted for 40% of the total.[246]

164. The Inter-American Commission observes that the FOTs are but another example of how the civil nature of immigration is distorted through these practices, which persecute immigrants on the grounds that they have committed crimes and thus pose a threat to public safety. While the IACHR recognizes that the State has both an obligation and a right to protect the security of persons under its jurisdiction, the FOTs' operations –- which in theory are supposed to be prioritizing persons who have committed crimes-- appear in practice to have become a façade for persecuting undocumented immigrants in general.

165. Furthermore the IACHR observes that this strategy has proved to be very problematic from the standpoint of the balance that has to be struck between the State's interests and the recognized rights of the family, family life and privacy. A March 2007 report done by the DHS' Office of the Inspector General expressed deep concern over the reliability of the figures in the databases in the DHS' Deportable Alien Control System, the principal internal source of information on fugitive immigrants.[247] In that report, an

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[241] ICE Memorandum "Fugitive Operations Case Priority and Annual Goals," from John P. Torres, Acting Director, Office of Detention and Removal (dated January 31, 2006), available at: *http://graphics8.nytimes.com/packages/pdf/nyregion/2009/20090205_RAID_FINAL.pdf*.

[242] ICE Memorandum "Fugitive Operations Case Priority and Annual Goals," from John P. Torres, Acting Director, Office of Detention and Removal (dated January 31, 2006), available at: http://graphics8.nytimes.com/packages/pdf/nyregion/2009/20090205_RAID_FINAL.pdf.

[243] ICE Memorandum "Fugitive Operations Case Priority and Annual Goals," *supra.*

[244] *See* MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, *supra*, p. 17.

[245] In MPI, *supra,* pp. 14, 16, it is concluded that in 2007, fugitive immigrants with criminal records accounted for only 9% of the arrests made by the FOTs.

[246] *Idem*, p. 17.

[247] DHS OIG, An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams, OIG-07-34, *supra*, p. 15 (March 2007). In August 2008 the DACS system was replaced by the ENFORCE database, an updated electronic platform on immigration information.

experienced analyst who had worked with the DACS for some time estimated that only about half the information in the database was accurate.[248] As a result, many of the raids conducted by FOTs were in homes where the fugitive alien they were after no longer lived. Whenever it conducts a home raid, the Fugitive Operations Team obtains an administrative detention warrant for every fugitive immigrant being sought in the operation.[249]

166. The Inter-American Commission has information to the effect that the administrative warrants of detention are issued by ICE officials and no evidence need be presented under oath before an independent judge to show probable cause that the law has been violated.[250] In responses to the Legislature's questions about home raids in New Haven, Connecticut, Michael Chertoff, former Secretary of Homeland Security, acknowledged that the administrative warrants for removal do not give FOT agents the authority to enter a dwelling without consent.[251] Secretary Chertoff observed, however, that other persons they encounter during an operation can be questioned about their right to be in the United States and "if deemed to be here illegally, may be arrested without warrant."[252]

167. The IACHR is also alarmed by information received regarding how the home raids are carried out. The Inter-American Commission has received reports to the effect that armed FOT agents arrive at the homes in the early morning hours, bang hard on the doors and windows, and falsely identify themselves as the "police," whereupon they

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[248] *Idem*. It has been reported that while the DACS system was replaced by the ENFORCE system, the DACS data was imported to the ENFORCE system, so that the reliability of the data is still a problem. *See* MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, *supra*, p. 9.

[249] *See* MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, *supra*, p. 9.

[250] 8 CFR §§ 236.1, 287.5(e)(2) & (3); *See Marshall v. Barlow's Inc.*, 437 U.S. 307, 320 (1978); *Blackie's House of Beef, Inc. v. Castello*, 659 F.2d 1211, 1218-19 (D.C. Cir. 1981); MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, p. 17 (February 2009), *available at:* http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf

[251] New York Times, "Hunts for 'Fugitive Aliens Lead to Collateral Arrests" (July 23, 2007), available at: http://www.nytimes.com/2007/07/23/nyregion/23operation.html. The New York Times article also includes links to a letter from a group of Connecticut Congressmen, dated June 11, 2007, and DHS Secretary Chertoff's letter of reply dated June 14, 2007. Letters *available at*: http://www.nytimes.com/packages/html/nyregion/20070723deleg.pdf and http://www.nytimes.com/packages/html/nyregion/20070723Chertoff.pdf.

[252] New York Times, "Hunts for Fugitive Aliens Lead to Collateral Arrests", *supra.* DHS Secretary Chertoff's letter of reply, dated June 14, 2007, *available at*: http://www.nytimes.com/packages/html/nyregion/20070723Chertoff.pdf.

Nevertheless, Secretary Chertoff also expressed his opinion regarding the legal limitations on this prerogative, as follows:

> Questioning as to identity or request for identification does not constitute a Fourth Amendment seizure. The individual being interviewed must voluntarily agree to remain during questioning. To detain an individual for further questioning, however, the immigration officer must have reasonable suspicion that the individual has committed a crime, is an alien who is unlawfully present, is an alien with status who is either inadmissible or removable from the United States, or is a nonimmigrant who is required to provide truthful information to DHS upon demand. *See* 8 C.F.R. § 214.1(f).

force the door open to enter the homes with guns drawn.[253] Once inside, the FOT agents rounded up everyone in the house; they shifted their focus away from the identified fugitive who was the purpose of the raid and instead began to question all the residents of the household about their immigration status, even before a probable cause to do so had been established.[254]

168. Under federal immigration regulations, in reports on FOT operations ICE officials are to document that a team has obtained prior consent before entering the premises.[255] However, the 2009 report prepared by the Immigration Justice Clinic of the Benjamin N. Cardozo Law School of Yeshiva University examined home raids conducted in Long Island, New York state and in the state of New Jersey between 2006 and 2008. It found that in 86% of the home raids conducted on Long Island and 24% of those conducted in New Jersey, the ICE officials did not obtain prior consent before entering the homes, or were unable to document the fact that they had obtained that consent.[256] It was later discovered that all but nine of the administrative warrants issued by the immigration enforcement agency had the wrong address for the person they were pursuing.[257]

169. As for immigration enforcement and home raids, the IACHR recognizes that every State can practice policies and order methods to control the flow of immigrants that enter and leave its territory. Nevertheless, the Inter-American Commission must reiterate that the means a State uses to exercise that authority must be respectful of human rights. The IACHR finds it deeply troubling that the State continues to use home

[253] *See* Dorsey & Whitney LLP & the Urban Institute, *supra*, pp. 33-37, citing Bernstein, N., "Raids were a shambles, Nassau complains to U.S.," The New York Times*,* October 3, 2007. (ICE agents conducted home raids wearing cowboy hats and brandishing shotguns and automatic weapons at home occupants including U.S. citizens and lawful residents); Nicodemus, A., *Illegal Aliens Arrested in Raids; Feds Nab 15 in Milford*, Sunday Telegram (Massachusetts), December 9, 2007 (ICE agents broke through front door of home in the early morning hours with guns draw); Llorente, E., Suits: *Feds Play Dirty; Immigration Officials Say Raids on Illegals are Within the Law,* The Record (Hackensack, NJ), January 2, 2008 (Armed ICE agents showed up at homes at 5:00 a.m., banged on doors, kicked in doors or used ruses to gain entry, then went room-to-room ripping covers off people in their beds and questioning them); Hernandez, S., *ICE Increases Use of Home Raids,* Daily Journal, March 26, 2008 (ICE agents came to a home of an immigration attorney looking for another person; when the attorney closed his door and asked them to leave the premises because they could not produce a search warrant, the agents threatened to break his door down); Bernstein, N., *Immigrant Workers Caught in Net Cast for Gangs,* the New York Times, November 25, 2007 (Nassau County police commissioner describes the "cowboy mentality" of ICE agents who raided Long Island homes, including armed raids on the wrong homes); Forester, S., *Immigration Raids Spark Anger in Sun Valley Area: One Family of Legal Residents Say They Were Terrorized,* The Idaho Statesman, September 21, 2007; Immigration Justice Clinic, Benjamin N. Cardozo Law School, Yeshiva University, *Constitution on ICE: A Report on Immigration Home Raid Operations* pp. 16-23 (2009) (the report cites 25 different examples of a similar pattern of behavior by ICE officials during home raids), *available at:* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf.

[254] Immigration Justice Clinic of the Benjamin N. Cardozo Law School, *supra,* pp. 16-17; *see,* Dorsey & Whitney *supra*, pp. 33-37.

[255] 8 CFR § 287.8(f)(2).

[256] Immigration Justice Clinic of the Benjamin N. Cardozo Law School, *supra,* pp. 9-10.

[257] New York Times, "*Raids were a shambles, Nassau complains to U.S." supra; see* MPI, *Collateral Damage: an Examination of ICE's Fugitive Operations Program*, *supra*, p. 6; Immigration Justice Clinic of the Benjamin N. Cardozo Law School, Yeshiva University, *supra.*

raids as a principal mechanism to enforce its immigration laws, despite the traumatic effects such raids have on the persons affected, which many times include children. The State should make every effort to strike a better balance between its interests in practicing reasonable immigration enforcement policies and its obligation to ensure the human rights of all persons subject to its jurisdiction.

170. The Inter-American Commission welcomes ICE's decision to eliminate FOTs' annual quotas for immigrant arrests and to provide guidance to focus this program on its intended mandate, *i.e.*, apprehending fugitive aliens who have a criminal record.[258] In a December 2009 Memorandum, ICE officials provided detailed guidance to the FOTs with respect to how they are to carry out their mandate. First, FOTs are instructed to spend at least 70% of their resources on the apprehension of fugitives, with particular emphasis on fugitives with criminal convictions.[259] Second, FOTs are to receive Fourth Amendment training (Unreasonable Search and Seizure) every six months; are to focus on cases with the most recently issued final orders of removal where the contact information is more likely to be current, and are to conduct surveillance of the targeted home before conducting a raid.[260] Third, ICE instructs that FOTs can only detain immigrants of a vulnerable population under extraordinary circumstances and only with approval from the Field Office Director and notice to ICE headquarters.[261] Finally, the guidelines set new goals for measuring FOTs' performance—focused principally on reducing the pool of fugitives and compliance with the memorandum's stated priorities.[262]

171. The IACHR, nonetheless, remains deeply concerned that FOTs' continued use of home raids[263] may violate articles V, VI, and IX of the American Declaration, especially if there is no verifiable evidence that a targeted person poses a threat to public safety or national security. FOTs are still likely to carry out home raids at wrong addresses and are still permitted to detain migrants with ordinary status violations who are encountered in the course of an operation.[264] Thus, while ICE has changed the focus of the program, this does not necessarily mean that it will not continue to have significant impacts on non-targeted immigrants.

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[258] ICE Memorandum from Assistant Secretary John Morton to Field Office Directors and All Fugitive Operation Team Members, *supra*; San Francisco Chronicle, "ICE Eliminates Fugitive Arrest Quotas" (Aug. 18, 2009), *available at:* http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?blogid=14&entry_id=45743; Chicago Tribune, "ICE Drops arrest quotas for illegal immigrants" (Aug. 18, 2009), *available at*: http://archives.chicagotribune.com/2009/aug/18/news/chi-tc-nw-immigration-0817-0818aug18. "Fugitive" in this context refers to immigrants who have standing orders of removal but absconded before they could be deported.

[259] ICE Memorandum from Assistant Secretary John Morton to Field Office Directors and All Fugitive Operation Team Members, *supra*, p. 1.

[260] *Idem*, pp. 2-3.

[261] *Idem*, p. 3.

[262] *Idem*.

[263] *See* New York Times, "Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids," (July 22, 2009), *available at:* http://www.nytimes.com/2009/07/22/nyregion/22raids.html?scp=1&sq=Cardozo%20immigration&st=cse.

[264] ICE Memorandum from Assistant Secretary John Morton, *supra*, p. 3.

172. Furthermore, although the quotas that the FOTs must meet have been eliminated, the Inter-American Commission has received disturbing information to the effect that deportation quotas continue to be factors weighed in evaluations and promotions of ICE agents.[265] Given the circumstances, the IACHR believes that the elimination of the FOTs' quotas is unlikely to do much to eliminate the problems examined in this section. Quite the contrary, quotas used as a consideration in promotions may shift ICE's priority away from immigrants with serious criminal histories, and instead encourage questionable methods to increase removal figures.

b. Immigration enforcement at the state and local levels

i. Immigration detention of noncitizens convicted of crimes or arrested on criminal charges (The Criminal Alien Program and Secure Communities Program)

173. Undocumented immigrants are generally transferred to ICE after any incarceration, regardless of the seriousness of the case that led to the arrest, because they are likely removable even when there is no criminal conviction on their record. Legal permanent residents and other noncitizens who have a valid immigration status are often transferred to ICE custody after having served a criminal sentence, since many crimes that result in a sentence of imprisonment are potentially grounds for deportation and may require mandatory detention.[266] Therefore, any noncitizen in jail who is undocumented or any alien who has a criminal conviction that would make him deportable despite LPR or other lawful status, will have an ICE "detainer"[267] placed on him, meaning that he will be released into ICE custody immediately upon his release from criminal custody, at which

[265] *See* Washington Post, "ICE officials set quotas to deport more illegal immigrants" (March 27, 2010) (the article includes links to internal ICE documents), *available at*: http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032604891.html?sid=ST2010032700037. An investigation conducted in March 2010 by the Washington Post and the Center for Investigative Reporting found that many ICE field offices had monthly removal quotas in which the criminal histories of the immigrants were not a factor; these were among the criteria used to evaluate and promote each ICE agent. This situation was said to have developed recently when, in February 2010, ICE's Director of Detention and Removal Operations urged all the directors of field offices to use their resources and efforts to maximum advantage with a view to increasing the average daily detention population, to redouble efforts to identify immigrants charged with or convicted of crimes, and to increase their operations to identify fugitive immigrants with criminal records.

The Washington Post found that most field offices were requiring that agents process an average of 40 to 60 cases a month to earn "excellent" ratings. One ICE agent told the Washington Post that removal quotas could become an incentive for ICE agents to focus on deporting immigrants with no criminal records because such cases take less time to process. Immigration officials also reported that it takes an average of 45 days to process and deport immigrants with criminal records, whereas removal of an immigrant with no criminal record can be done on average in 11 days.

[266] *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) ; INA § 236 (c)(1) & (2), 8 U.S.C. § 1226(c)(1) &(2).

[267] "A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advice the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 CFR § 287.7(a).

point he will be placed in immigration detention during his deportation proceedings.[268] Under U.S. immigration law, neither bond nor parole is available for many detained noncitizens who have criminal convictions on their records.[269]

174. U.S. federal immigration officials have greatly expanded their partnerships with state and local law enforcement in order to identify immigrants who may be unauthorized or deportable owing to criminal convictions.[270] ICE's two principal initiatives to coordinate immigration information sharing with state and local law enforcement are the Secure Communities program and the Criminal Alien Program.

175. The Secure Communities program was initiated in October 2008 and seeks to install biometric fingerprint database with search capabilities in all local jails and booking locations.[271] This will allow local law enforcement to ascertain the immigration status of each arrestee at the time of booking.[272] If the biometric test shows an individual is deportable, the local law enforcement contacts ICE. As of August 30, 2009, the Secure Communities program was installed in 81 jurisdictions in 9 states.[273] In November 2009, ICE reported that in its first year the Secure Communities program had identified 111,000 deportable migrants in local jails.[274] ICE noted that of the total of migrants identified under the Secure Communities program, approximately 11,000 were charged or convicted of violent crimes or other serious crimes (Level 1 crimes), while the other 100,000 were charged or convicted of Level 2 or 3 crimes.[275] Unfortunately, ICE does not provide a breakdown between level 2 and level 3, as the range of crimes that fall under these

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[268] INA § 236(c)(1), 8 U.S.C. § 1226(c)(1).

[269] INA § 236(c)(2), 8 U.S.C. § 1226(c)(2). This section only provides for release for some criminally-convicted detainees who are cooperating in an investigation or are serving as a witness in another prosecution.

[270] After the terrorist acts of September 11, 2001, the federal government incorporated civil immigration violations into the principle criminal database of the Federal Bureau of Investigation (FBI), known as the National Crime Information Center's database (NCIC). ICE's Law Enforcement Support Center (LESC) facilitates federal, state, and local law enforcement's and prison officials' search of the NCIC to assess an inmate or a criminally-charged person's immigration status for possible reporting to ICE officials. ICE, "Law Enforcement Support Center" (Nov. 19, 2008), available at: http://www.ice.gov/pi/news/factsheets/lesc.htm. ICE reports that as of November 2008 over 250,000 ICE records had been incorporated into the FBI's National Crime Information Center.

[271] ICE, "Fact Sheet: Secure Communities" (Sept. 1, 2009), *available at:* http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

[272] ICE, "Fact Sheet: Secure Communities", *supra.*

[273] ICE, "Secure Communities: Phased Implementation" (Sept. 24, 2009), available at: http://www.ice.gov/secure_communities/deployment/.

[274] ICE, Secure Communities News Release (Nov. 12, 2009), *available at:* http://www.ice.gov/pi/nr/0911/091112washington.htm.

[275] ICE, Secure Communities News Release, *supra*; ICE has classified the crimes and offenses with which an alien is charged or convicted into three levels. *See* Template for Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement and [State Identification Bureau], Annex A, available at: http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf.

categories varies significantly in severity.[276] Likewise, it does not provide a breakdown between the number of identified, deportable immigrants who were charged with a crime versus those convicted of a crime.

176. Under ICE's Criminal Alien Program (CAP), by contrast, ICE officials are stationed at various federal, state and local jails and detention facilities or monitor the detention population, sometimes remotely by telephone or video teleconferencing,[277] to identify deportable noncitizens.[278] Under CAP, participating local law enforcement agencies (LEAs) notify the supervising ICE official when they have arrested or convicted an individual who they have reason to believe may be deportable.[279] The ICE official then conducts the investigation into the person's immigration status.[280] In FY2008, ICE reports that CAP identified and charged 221,085 noncitizens in prisons for removal from the United States.[281]

177. In FY2009, ICE reported that 178,605 (48%) of the immigration detainees were identified under CAP.[282] Again during FY2009, ICE reported that the Secure Communities program had identified 111,000 unauthorized or deportable immigrants who had been either charged with or convicted of criminal offenses.[283] The Inter-American Commission observes that state and local law enforcement partnerships account for a significant majority of the aliens encountered and detained in the United States.[284]

178. The IACHR's main concern with respect to state and local law enforcement agencies' involvement in immigration enforcement is that it can lend itself to

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[276] *See* ICE, Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement and [State Identification Bureau], Annex A, *available at:* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf.

[277] *See, e.g.,* University of California—Berkeley, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, Policy Brief, "The C.A.P. Effect: Racial profiling in the ICE Criminal Alien Program," pp. 2, 4 (Sept. 2009), available at: http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[278] ICE, "Fact Sheet: Criminal Alien Program" (Nov. 19, 2008), available at: http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm.

[279] National Immigration Law Center, "Overview of the Key ICE ACCESS Programs: 287(g), the Criminal Alien Program, and Secure Communities," (Nov. 2009), *available at:* http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf.

[280] National Immigration Law Center, *supra*.

[281] ICE, News Releases, "ICE multifaceted strategy leads to record enforcement results" (Oct. 23, 2008), *available at:* http://www.ice.gov/pi/nr/0810/081023washington.htm; ICE, News Releases, "Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year" (Nov. 12, 2009), *available at:* http://www.ice.gov/pi/nr/0911/091112washington.htm. It is not clear to what extent the Secure Communities figures may overlap with the Criminal Alien Program statistics for 2008, as a number of law enforcement agencies may participate in both programs.

[282] DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, p. 12 (October 6, 2009), available at: http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[283] ICE, Secure Communities News Release, *supra*.

[284] See DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, *supra.*

discriminatory practices in the wide range of interactions between police and the general public. This situation is primarily due to ICE's lack of oversight, data collection, and sufficient review to be able to monitor the way in which local and state law enforcement agencies identify which persons they will report to ICE as potentially unauthorized or deportable noncitizens.

179. By way of example, the Inter-American Commission was disturbed by a recent study published by the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity of UC-Berkeley Law School ("the Warren Institute Study") which examined whether racial profiling was being used in the Criminal Alien Program (CAP) in Irving, Texas.[285] The Warren Institute Study looked at the number of arrests of Hispanics in Irving, Texas (in the Dallas suburbs) over a 23-month period: from January 2006 to November 2007.[286] The city of Irving became a partner in the CAP in September 2006, which made it possible to compare the arrest rate among Hispanics, mainly for Class C misdemeanors,[287] before and after Irving's participation in the CAP.[288]

180. The study found that once the CAP was implemented in Irving, arrests of Hispanics for Class C misdemeanors increased dramatically, far outstripping the number of Class C misdemeanor arrests among non-Hispanics, even though the total number of non-Hispanics arrested in Irving was higher than the number of Hispanics.[289] Statistically speaking, these figures should be a warning signal that at least some of these Class C misdemeanor charges against Hispanics might have simply been an excuse to detain undocumented immigrants. Even more troubling is the fact that under the CAP, ICE consistently issued detainers for fewer persons than were referred by the local police.[290] It is possible that this discrepancy can be explained by the discretion that ICE has not to issue detainers for immigration-related matters against persons charged with misdemeanors.[291]

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[285] University of California—Berkeley, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, Policy Brief, *supra.* Both the CAP and Secure Communities program share similar characteristics that make them vulnerable to racial-profiling practices. The Commission is concerned by the lack of ICE oversight of the way in which participating law enforcement agencies exercise their civil immigration authority.

[286] University of California—Berkeley, *supra.* According to this report, the population of Irving, Texas breaks down as follows: 41.2% Hispanic, 34.4% non-Hispanic white, 12.2% African-American, and 10.1% Asian American.

[287] Under § 12.23 of the Texas Penal Code, a "Class C Misdemeanor" carries a fine not to exceed $500. Minor traffic violations are the most common Class C misdemeanor. The authors of the study report that "[g]iven their frequency and relatively light penalty, officers are typically given broad discretion in whether to stop, investigate, and arrest for a Class-C misdemeanor offense."

[288] As pointed out in Section II, under the CAP the participating LEAs refer arrested persons and convicted criminals to ICE when they believe that they might be deportable; ICE does a check of the person's immigration status.

[289] University of California—Berkeley, *supra*, p. 5.

[290] University of California—Berkeley, *supra*, p. 7. As pointed out in Section II, under the CAP, partner local law enforcement agencies only refer to ICE those persons under arrest or convicted whom the partner agency suspects might be illegal aliens. Then ICE interviews the person and decides whether or not a detainer should be issued.

[291] See footnote 266 for a definition of "detainer".

However, the Warren Institute Study shows that 98% of the detainers issued by the CAP Program in Irving were for persons charged with or convicted of misdemeanors.[292] This statistic shows that ICE was not exercising its discretionary authority not to issue detainers for undocumented persons charged with Class C misdemeanors; on the contrary, it issued detainers for all the illegal aliens that it identified through the Irving police's CAP referrals.

181. It is apparent that the Irving police referred to ICE many lawful residents who had been charged with a Class C misdemeanor. Given the discrepancies between the number of Irving CAP referrals and the fewer number of detainers issued by ICE as a result of those referrals, the disproportionate increase in the number of Hispanics charged with Class C misdemeanors is an example of the use of racial profiling in that particular CAP partnership.[293] In fact, in response to a number of appeals, in November 2007[294] ICE issued a memorandum for the Dallas area police departments (including that of Irving), reminding them that "[t]he intention to pursue prosecution leading to convictions of alien criminals arrested on state charges must be a critical consideration in referrals under the CAP Program."[295] The ICE memorandum instructed local law enforcement agencies that referrals to the Dallas ICE Detention and Removal Operations under the CAP Program should mainly be foreign nationals arrested and prosecuted (or referred to the district attorney for prosecution) for a criminal offense that was a Class B misdemeanor or higher.[296]

182. The IACHR is concerned that what happened with the CAP Program in Irving County might not be an isolated case. A report that the Immigration Policy Center published in February 2010 found a similar pattern in the Travis County CAP Program in Texas.[297] Like the Warren Institute Study, the Immigration Policy Center report found a similar drastic increase in the number of immigration detainers for persons charged with Class C misdemeanors, as well as a growing presence of ICE agents in Travis County jails under the CAP program.[298]

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[292] University of California—Berkeley, *supra*, p. 7.

[293] *See* Dallas Morning News, "Irving police dispute law school's racial profiling study"(September 24, 2009), available at: http://www.dallasnews.com/sharedcontent/dws/news/city/coppell_vr/stories/DN-profiling_24met.ART.Central.Edition1.4bf3bd4.html.

[294] Dallas Morning News, *supra.* .

[295] ICE Memorandum, "Dallas CAP Referral Guidelines," available at: http://www.dallasnews.com/s/dws/img/11-07/1121cap.pdf.

[296] ICE Memorandum, "Dallas CAP Referral Guidelines," *supra*. In January 2008, it was reported that despite the memorandum, ICE continued to accept many referrals from the Irving police of persons accused of Class C misdemeanors. *See* Dallas Morning News, "Criminal Alien Program still taking illegals arrested for minor offenses" (January 20, 2008), available at: http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012008dnmetimmigholds.20740eb.html.

[297] Immigration Policy Center, American Immigration Council, Andrea Guttin, Esq., *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas (*February 2010*),* available at: http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

[298] Immigration Policy Center, *supra,* pp. 4-5, 10. .

183. ICE recently indicated that it intends to expand its partnerships with state and local law enforcement agencies in the enforcement of federal civil immigration laws. ICE intends to continue the planned expansion of the Secure Communities program, with the goal of having biometric search capabilities available in all county and local jails by 2013.[299] ICE has requested US$200 million in FY2010 for the program, a 30% increase.[300] An ICE official has estimated that if Secure Communities is expanded to all local jails, approximately 1.4 million deportable immigrants would be identified annually.[301]

184. In the response submitted to the draft version of this report, the United States explains that the Secure Communities Program, which relies on fingerprints, is used by ICE to deploy technology to state and local agencies, and that it allows the federal immigration authorities to identify aliens who are booked on criminal charges. The United States considers that the IACHR's perception that this program can lead to discriminatory practices in the communities where it is deployed is "not accurate":

> In fact, Secure Communities reduces the potential for racial or ethnic profiling because, as it relies on biometric -not biographic- information. The program is neutral and does not target people based on physical appearance or other considerations which could lend themselves to concerns over racial profiling. Indeed, the program checks the fingerprints of all people arrested and booked, whether U.S. citizen, lawful permanent resident, visa holder, or person unlawfully present.
>
> To date, ICE has not received any formal complaints or allegations of racial profiling as a result of the Automated Biometric Identification System/Integrated Automated Fingerprint Identification System (IDENT/IAFIS) interoperability activation. Existing processes are in place at the local, State and Federal levels to report allegations of racial profiling or abuse occurring in local law enforcement agencies. Because DHS is serious about responding to reported allegations of racial profiling, due process violations, or other violations of civil rights or civil liberties relating to Secure Communities, DHS CRCL expanded the existing complaints process to include Secure Communities. Information on the complaint process, including how a claimant can file a complaint, is readily available to the public and can be found on the Secure Communities website at: http://www.ice.gov/secure_communities/complaint_process.htm

185. The IACHR appreciates this constructive response and the serious attention to these issues, especially with increased oversight by the federal immigration authorities over local agencies where the potential for abuse could eventually be greater. However, faced with the above mentioned reports, the Inter-American Commission must reiterate the concerned expressed above and again call on the United States to do everything to ensure that race does not become a factor in local and state identification of

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[299] Washington Post, "U.S. to Expand Immigration Checks to All Local Jails" (May 19, 2009), available at: http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051803172.html; ICE, Secure Communities News Release, *supra*.

[300] Washington Post, "U.S. to Expand Immigration Checks to All Local Jails" *supra.*

[301] *Idem.*

potentially unauthorized noncitizens and other removable noncitizens. Because accurate information on the enforcement of these programs is essential to ensuring that they are not enforced in a discriminatory manner, the IACHR is troubled by the fact that the Memorandum of Agreement template under ICE's Secure Communities Program and the Standard Operating Procedures (SOP) template do not prescribe or analyze the way in which data are compiled.[302]

ii. Delegation of Civil Immigration Enforcement to State and Local Law Enforcement (State and local partnerships for enforcing civil immigration laws under 287(g) agreements))

186. ICE has also developed a program that authorizes civil immigration enforcement by state and local law enforcement agencies. The 287(g) program, which oversees the creation of Memorandums of Agreement (MOAs) with state and local law enforcement agencies, is named for the section of the Immigration and Nationality Act which authorizes these types of agreements.

187. An MOA is essentially a contract between ICE and the local or state law enforcement agency, which establishes the law enforcement agency's authorization to enforce civil immigration laws, the tracking and reporting requirements to ICE, and ICE's supervising obligations, to name just some of the more important aspects of an MOA. There are two types of MOAs: Taskforce Officers and Jail Enforcement Officers.[303] The Taskforce Officers MOAs permit local and state law enforcement agencies to conduct civil immigration searches and arrests in their normal course of duties—from traffic stops to criminal investigations.[304] Under the MOAs for Jail Enforcement Officers, on the other hand, state and local law enforcement agencies are only allowed to charge noncitizens already in custody or criminally convicted and being held in state and local facilities.[305]

188. Historically, civil immigration enforcement was the exclusive purview of federal authorities.[306] The 1996 immigration laws included the 287(g) provision that

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[302] ICE, FOIA Reading Room, "Secure Communities," available at: http://www.ice.gov/foia/readingroom.htm.

[303] *See* Justice Strategies, *Local Democracy on ICE*, p. 9 (Feb. 2009), available at: http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf; *see* Justice Strategies, *Local Democracy on ICE*, p. 13 (Feb. 2009), available at: http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf; ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" (last updated on Nov. 18, 2009), *available at:* http://www.ice.gov/pi/news/factsheets/section287_g.htm

[304] *See* Justice Strategies, *supra*, p. 13; GAO, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, p. 8 (Jan. 2009), available at: http://www.gao.gov/new.items/d09109.pdf.

[305] GAO, *Immigration Enforcement: Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, *supra*, p. 5. As of January 2009, there were 12 local and state law enforcement agencies with dual Task Force and Jail Enforcement MOAs, 27 agencies with only Task Force MOAs, and 27 with only Jail Enforcement MOAs. ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" (last updated on November 18, 2009), available at: http://www.ice.gov/pi/news/factsheets/section287_g.htm.

[306] *See* Justice Strategies, *supra*, p. 9.

opened up the possibility, for the first time, of state and local enforcement of federal civil immigration laws under MOAs.[307] After September 11, 2001, ICE decided to exercise its 287(g) authority to address threats to national security and to give "state and local officers [the] necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering."[308] The federal government entered into its first MOA in 2002.[309] During the debate for comprehensive immigration reform in 2006-2007, many localities with rising immigrant populations sought to take civil enforcement of immigration laws into their own hands.[310] As of January 2009, 66 state and local law enforcement agencies in at least 20 different states had entered into 287(g) agreements;[311] by the end of 2008, ICE had trained 1,075 state and local law enforcement officers.[312]

189. ICE reports that 44,692 (12%) alien apprehensions in FY2009 were the product of 287(g) partnerships.[313] It also reports that since January 2006, approximately 130,000 potentially removable aliens have been identified under the 287(g) program.[314]

190. As in the case of the CAP and Secure Communities Programs, the 287(g) agreements open up the possibility of racial profiling. The failure to segregate civil law enforcement from criminal law enforcement invites abuse, as will be explained in the following paragraphs.

191. ICE has stated that the goal of the 287(g) program is to combat all serious and violent criminal acts committed by an undocumented or removable noncitizen.[315]

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[307] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-563, P.L. 104-208, Sec. 133 (Sept. 30, 1996).

[308] ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" (last updated Feb. 20, 2009) (The document has since been updated on the ICE website. A hard copy of the previous web page is on record at the Commission).

[309] *Idem*.

[310] Brookings Institution, *Immigration, Politics, and Local Response in Suburban Washington*, p. 18 (Feb. 2009), *available at*: http://www.brookings.edu/~/media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf. This report provides an interesting case study of one county's move toward local enforcement.

[311] ICE, "The ICE 287(g) Program: A Law Enforcement Partnership", *supra*; *See* Justice Strategies, *Local Democracy on ICE*, *supra*, p. 13.

[312] ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" *supra*; *see* GAO, *Immigration Enforcement: Better Controls needed over program Authorizing State and Local Enforcement of Federal Immigration Laws*, p. 5 (Jan. 2009), available at: http://www.gao.gov/new.items/d09109.pdf. Only 8 of the 67 MOAs were signed in 2006 or earlier.

[313] *See* DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations,* p. 12 (October 6, 2009), *available at:* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[314] ICE, "The ICE 287(g) Program: A Law Enforcement Partnership" *supra*. The web site points out that the majority was identified in local detention facilities. *See,* DHS OIG, *The Performance of 287(g) Agreements*, OIG-10-63, p. 6 (March 2010), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

[315] ICE, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act" (dated January 8, 2010), available at: http://www.ice.gov/pi/news/factsheets/section287_g.htm.

However, even before the 287(g) program was instituted, state and local law enforcement agencies had the authority to investigate those criminal acts and institute criminal proceedings. What this program does is to give state and local authorities additional tools that are not for criminal investigations; were they to be so used they would constitute violations of basic constitutional rights. The 287(g) agreements allow state and local law enforcement to incarcerate a person for violations of civil immigration laws, often without any possibility of bond. They can also make administrative arrests and issue administrative removal warrants without having to get an independent judge's okay.[316] As observed in the February 2009 report published by *Justice Strategies*: "The 287(g) program is useful precisely when an arrestee is *not* a 'criminal illegal alien' and an officer lacks reasonable suspicion for a crime."[317] Although claiming to be pursuing criminals, under the 287(g) program agents appear to have the authority to get undocumented immigrants that they would have been unable to detain otherwise.

192. Another indication of the situation is the mismatch between the state and local law enforcement agencies that are partners in the 287(g) program and the crime rates within their respective jurisdictions. According to the Justice Studies report, some 61% of the 287(g) partner law enforcement agencies have a violent crime rate and property crime rate that is below the national average and the vast majority saw a drop in violent crime and property crime between 2000 and 2006.[318] However, the same report observed that 87% of the jurisdictions that the 287(g) partner agencies serve had a Latino population growth rate that was higher than the national average between 2000 and 2006.[319] This suggests that the involvement of many local and state law enforcement agencies in the 287(g) program could be out of their concern over the increase in the Hispanic population and not because of any evidence of an increase in crime rates among the immigrant population.

193. These concerns are also supported by the figures obtained by the Inter-American Commission and the practices that law enforcement officers engage in under these programs.

194. The figures suggest that a high percentage of the immigrants arrested under the 287(g) program are initially detained for minor infractions. For example, it has been reported that 95% of the persons arrested under the 287(g) program in Gaston, North Carolina, were arrested for misdemeanors, 60% of which were non-DWI traffic violations; in Alamance County in North Carolina, 80% of the persons arrested under the 287(g) program were charged with misdemeanors, 45% of which were non-DWI traffic violations.[320] In all, between 2006 and 2008, 86.7% of the immigrants arrested under the

[316] *See* Justice Strategies, *Local Democracy on Ice, supra,* pp. 11-12.

[317] *Idem,* p. 14.

[318] *See* Justice Strategies, *Local Democracy on Ice, supra,* p. 16.

[319] *Idem.*

[320] *See* Justice Strategies, *Local Democracy on Ice, supra,* pp. 16-17, footnote 54. The Immigration and Human Rights Policy Clinic of the University of North Carolina at Chapel Hill reports that the Sheriff's Office of Alamance County has repeatedly set up a roadblock near the local Latino market. *See* Immigration and Human

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287(g) program in North Carolina (eight counties and one city) were charged with minor infractions.[321]

195. The local law enforcement agency whose conduct under the 287(g) program has stirred the most controversy among the public over the alleged use of racial profiling is the Office of the Sheriff of Maricopa Country (MCSO),[322] to which the IACHR was denied access, as explained in the introduction to this report. The IACHR must again go on record to underscore its profound concern over the federal government's lack of authority to grant a visit to immigration detainees who are accused of violations of federal immigration law and are being held in the facilities of agencies that are partners in the 287(g) program. The Inter-American Commission notes that the United States Department of Justice has a federal investigation underway to look into violations of civil rights in the MCSO's enforcement of federal immigration laws.[323] This might suggest the absence of timely and adequate oversight of the condition of persons who, in the final analysis, are the legal responsibility of ICE.

196. While the MOA with the MCSO clearly provided that MCSO personnel could not perform immigration enforcement functions without the supervision of an ICE officer,[324] an investigation that the East Valley Tribune conducted in 2008 found that the ICE agent who oversees the 287(g) partnership with the MCSO stated: "We obviously don't supervise them doing their operations."[325]

197. This apparent lack of oversight is particularly troubling, as the IACHR has been informed that the MCSO has a reputation for exercising its civil immigration authority

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Rights Policy Clinic of the University of North Carolina at Chapel Hill and the American Civil Liberties Union of North Carolina, *The Policies and Politics of Local Immigration Enforcement Laws,* pp. 29, 41 (February 2009), available at: http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf. A research study published in February 2010 by the Latino Migration Project of the University of North Carolina found that 56.5% of the 287(g) arrests in Gaston County were for non-DWI traffic violations; in Alamance County the figure was 40.7%. *See* University of North Carolina, Latino Migration Project, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities,* p. vi (February 2010), available *at:* http://isa.unc.edu/migration/287g_report_final.pdf.

[321] University of North Carolina Latino Migration Project, *supra,* p. vi.

[322] *See* Justice Strategies, *Local Democracy on ICE*, *supra*, pp. 16-17, footnote 54. The Immigration and Human Rights Policy Clinic of the University of North Carolina at Chapel Hill reports that the Sheriff's Office of Alamance County has repeatedly set up a roadblock near the local Latino market. *See* Immigration and Human Rights Policy Clinic of the University of North Carolina at Chapel Hill and the American Civil Liberties Union of North Carolina, *The policies and politics of local immigration enforcement laws, pp. 29, 41* (February 2009), available at: http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf.

[323] Arizona Republic, "Arpaio to be investigated over alleged violations" (March 11, 2009), available at: http://www.azcentral.com/arizonarepublic/news/articles/2009/03/11/20090311investigation0311.html.

[324] ICE, FOIA Reading Room, "Memoranda of Agreement 287(g) (old)—Maricopa County," p. 7 available at: http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf.

[325] East Valley Tribune, "Reasonable Doubt Part III: Sweeps and saturation patrols violate federal civil rights regulations" (July 2008), available at: http://www.eastvalleytribune.com/story/120562.

through controversial methods like "criminal sweeps"[326] which as a rule last for two days and involve dozens of officers 'saturating' a specific area of the county and making traffic stops in marked and unmarked cars.[327]

198. Based on a strained interpretation of Arizona's criminal law by Maricopa County Attorney Andrew Thomas regarding human smuggling,[328] the MCOS has arrested undocumented immigrants on the grounds that any person who pays a "coyote" or other criminal organization[329] is a felony conspirator in his or her own trafficking into the United States.[330] According to the February 2009 report prepared by Justice Strategies, the Maricopa County Attorney's Office used the charge of "conspiracy to commit human smuggling," a class 4 felony, to persuade undocumented immigrants to plead guilty to a lesser criminal charge.[331] According to investigative reporting done by the East Valley Tribune, in 2006 and 2007 the MCSO arrested 578 illegal immigrants during traffic stops; 498 of them were then charged under state human smuggling laws by virtue of the fact that they had paid "coyotes".[332] The Inter-American Commission observes that a similar strategy was used by federal prosecutors in the Postville worksite raid and Operation Streamline.

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[326] The "criminal sweeps" are also referred to as "crime suppression patrols."

[327] Arizona Republic, "Sheriff's Office says race plays no role in who gets pulled over" (October 5, 2008), available at: http://www.azcentral.com/news/articles/2008/10/05/20081005arpaio-profiling1005.html. According to a recent Associated Press article by Jacques Billeaud, the Maricopa County Sheriff's Office has conducted 13 "criminal sweeps" since early 2008. *See* Associated Press, "Protests, grand jury challenge Sheriff Joe Arpaio" (February 28, 2010), available at: http://www.google.com/hostednews/ap/article/ALeqM5hsUmDTKoXscEMSe9FGxF1sYbSGDQD9E4VH2G0. The Commission notes that the MCSO also established a Human Smuggling Unit and a telephone tip line that people can call to report information about alleged undocumented immigrants. It also recruited members of the public to join the MCSO's posse, a force of 3000 volunteers to assist in MCSO operations. *See, e.g.,* the Maricopa County Sheriff's Office's web page, *available at:* http://www.mcso.org/; Phoenix Business Journal, "Sheriff's immigration tip line ringing off the hook," (September 26, 2008), available at: http://phoenix.bizjournals.com/phoenix/stories/2008/09/29/story14.html; Fox News, "Arizona Cops Use Human Smuggling Laws to Round Up Illegal Immigrants" (May 10, 2006) , *available at:* http://www.foxnews.com/story/0,2933,194934,00.html.

[328] Justice Strategies, *Local Democracy on ICE*, *supra*, p. 29, footnote 61 (citing Thomas, Andrew, Maricopa County Attorney, Annual Report 2005. Phoenix: Maricopa County Attorney's Office, 2006).

[329] "Coyote" is a colloquialism for a human smuggler or human trafficker.

[330] Fox News, "Arizona Cops Use Human Smuggling Laws to Round Up Illegal Immigrants" (May 10, 2006), *available at:* http://www.foxnews.com/story/0,2933,194934,00.html; *see also,* Justice Strategies, *Local Democracy on ICE*, *supra*, pp. 23-24.

[331] Justice Strategies, *Local Democracy on ICE*, *supra*, p. 29*; see also* Arizona Republic, "Smuggling trial may come to an abrupt end" (July 11, 2006), *available at:* http://www.azcentral.com/arizonarepublic/local/articles/0711conspiracy11.html.

[332] *Compare* East Valley Tribune, "Reasonable Doubt Part I: MCSO Evolves into an Immigration Agency" (July 10, 2008), available at: http://www.eastvalleytribune.com/story/120461 with East Valley Tribune, "Reasonable Doubt Part II: Human Smuggling Unit in Action," (July 10, 2008), *available at:* http://www.eastvalleytribune.com/story/120469. The East Valley Tribune report observes that in order for the MCSO to be able to charge undocumented immigrants under the human smuggling law, officials need to get the persons to admit that they paid a smuggler to take them across the border.

199. According to an analysis done by the *Arizona Republic* of the records of arrests made between March and July 2008 by eight crime suppression patrols, Hispanics accounted for the largest number of arrests made per "criminal sweep", even when the operation was conducted in an area where non-Hispanics account for the majority of the population. Furthermore, the Arizona Republic's analysis suggests that the enforcement of civil immigration laws was one of the main goals of the "criminal sweeps" since in five of the eight sweeps the immigration arrests outnumbered arrests of other kinds.[333]

200. A troubling example is the "criminal sweeps" that the MCSO conducted in Cave Creek, Arizona, an area known for the presence of "day laborers."[334] On December 12, 2007, a suit was filed in federal court against the MCSO on behalf of a legal immigrant who accused the MCSO of overstepping its authority and enforcing federal immigration law in a discriminatory manner.[335] In February 2010, a federal judge imposed sanctions on the MCSO for destroying the records of the "criminal sweep" at Cave Creek and erasing e-mail messages between employees that made reference to the operation.[336] Nevertheless, the IACHR observed that a number of e-mail messages sent at the time of the Cave Creek "criminal sweep" are attached to the previous 287(g) MOA between ICE and Maricopa County, available at the FOIA ICE website.[337] In response to the legal proceedings instituted against it, the MCSO circulated an internal e-mail that provides unmistakable evidence to the effect that in the Cave Creek "criminal sweep" the MCSO conducted traffic stops as a pretext for checking the immigration status of the persons stopped.[338]

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[333] Arizona Republic, "Sheriff's Office says race plays no role in who gets pulled over", *supra.*

[334] Arizona Republic, "Sheriff Joe Arpaio Accused of Profiling in Lawsuit" (December 13, 2007), *available at:* http://www.azcentral.com/news/articles/1212arpaio-ONL.html.

[335] ICE, FOIA Reading Room, ""Memoranda of Agreement 287(g) (old)—Maricopa County" p. 18 *available at:* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf. Arizona Republic, "Sheriff Joe Arpaio Accused of Profiling in Lawsuit" *supra.* The plaintiff, Manuel de Jesus Ortega Melendres, a legal immigrant, alleges that he was detained by MCSO officers as he was riding in a vehicle driven by a white man. Mr. Ortega alleges that although the white driver was not issued a citation, Mr. Ortega and other immigrants in the vehicle were required to prove their immigration status to MCSO officers. He alleges that even though he showed the MCSO officer a valid U.S. visa, Mr. Ortega was allegedly detained for eight hours, until an ICE agent determined that his documents were valid and released him.

[336] Arizona Republic, "Judge rips Sheriff Arpaio on lost profile case files" (February 13, 2010), *available at: http://www.azcentral.com/news/articles/2010/02/13/20100213judge-rips-sheriff-arpaio.html.* In March 2010 it was revealed that a third-party vendor of the data server for Maricopa County discovered a back-up version of the MCSO e-mail messages. *See* Arizona Republic, "Joe Arpaio's office, county wrangle over control of e-mails" (March 8, 2010), *available at:* http://www.azcentral.com/news/election/azelections/articles/2010/03/08/20100308joe-arpaio-maricopa-county-emails.html.

[337] ICE, FOIA Reading Room, "Memoranda of Agreement 287(g) (old)—Maricopa County" p. 18 *available at:* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf.

[338] *Idem*. The summary of the e-mail is as follows:

> Subject: Cave Creek day labors and tip line. On 09-27-07 HSU [Human Smuggling Unit] detectives conducted a detail addressing the complaints in Cave Creek regarding the day labors. Once our UC vehicles [unmarked cars] identified the vehicles leaving the church our marked units developed probable cause for a traffic stop. The first vehicle stopped was for a speed violation doing 45 mph in marked 35 mph zone. On this stop Detective [name erased] identified three male subjects in the vehicle as being illegal aliens. All three were

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201. Like all earlier and recent MOAs, the Maricopa County MOA states that the 287(g) partners are legally bound by all federal civil rights laws and by the United States Department of Justice's "Guidance regarding the Use of Race by Federal Law Enforcement Agencies" of June 2003 (DOJ Guidance).[339] The information recounted here paints a very disturbing picture of how the MCSO has used its civil immigration enforcement authorities under the 287(g) program, particularly the serious evidence of the use of discriminatory practices.

202. The Inter-American Commission welcomes ICE's decision to discontinue the authorization of the "Task Force" model in the case of the MCSO[340] and the

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> then taken back to the District IV substation for processing. On the second stop the probable cause was a broken rear tail lamp. On this stop Detective [name erased] identified six male subjects as Illegal aliens. These subjects were also taken back to District IV for processing.
>
> According to the UC [unmarked cars] detectives, after the first stop, the USC [United States citizen] driver went back to the church and appeared that he relayed what had just occurred and then left by himself. Shortly after the second stop and taking more people into custody, the church seemed to shut their operation down for the day. The sign on the road identifying day labors at their location was removed and everybody left the area. At this point our UC [unmarked car] vehicle pulled out and never made contact with anybody associated with the church.
>
> There were a total of nine male subjects taken into custody without incident. All were taken to ICE for further processing.
>
> After all the above was complete HSU detectives conducted "knock and talks" in the Village Apartments based on tips from the hotline. The tips from the hotline produced negative results.
>
> Sgt. [name erased]
>
> Human Smuggling Unit

Also included were other e-mail messages and documents attached to the previous MOA between ICE and the MCSO under the 287(g) program. These included statistics from various MCSO patrols, which indicate that immigration enforcement figured prominently in the MCSO's "criminal sweeps".

[339] ICE, FOIA Reading Room, "Memoranda of Agreement 287(g) (old)—Maricopa County", *supra*, p. 9; ICE, FOIA Reading Room, ICE, "Memoranda of Agreement 287(g) (new) — Maricopa County" p. 8 available at: http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf. U.S. Department of Justice, Civil Rights Division, "Guidance regarding the Use of Race by Federal Law Enforcement Agencies" (June 2003), *available at:* http://www.justice.gov/crt/split/documents/guidance_on_race.php. These guidelines state that in making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect's description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful. The Justice Department's Guidance also states that an officer may not use race or ethnicity as a factor in deciding which motorists to pull over. Likewise, the officer may not use race or ethnicity in deciding which detained motorists to ask to consent to a search of their vehicles."

[340] The MCSO still has the authority to make arrests under the 287(g) program. *See* New York Times, "Immigration Hard-Liner Has His Wings Clipped" (October 6, 2009), available at: http://www.nytimes.com/2009/10/07/us/07arizona.html.

Department of Justice's decision to open an investigation into alleged civil rights violations in the MCSO's police practices.[341]

203. Regarding this matter, the State also confirms that the Sheriff of Maricopa County "had been the subject of a number of complaints, including some from local city majors and members of the U.S. Congress" and that on September 2, 2010, the United States filed a suit against that County, the Sheriff's Office and Sheriff Arpaio ("the Defendants") to "enforce Title VI of the Civil Rights Act of 1964, the Title VI implementing regulations issued by the United States Department of Justice, and related contractual assurances". The United States also indicates that since March 2009 it has been attempting to "secure the Defendants' voluntary cooperation with the United States' investigation of alleged national origin discrimination in Defendants' police practices and jail operations". However, the Defendants have refused to do so, despite their obligation to comply in full with the United States' requests for information. The United States further indicates that the "Defendants' refusal to cooperate with reasonable requests for information regarding the use of federal funds is a violation of Defendants' statutory, regulatory, and contractual obligations" and that accordingly it is "seeking a judgment granting declaratory and injunctive relief for Defendants' violations of the law".

204. The United States asserts that DHS "is fully committed to enforcing the nation's immigration laws while respecting the rights of all individuals encountered during such enforcement efforts". With respect to this specific issue, however, the IACHR learned that after the Task Force authorization was rescinded, Maricopa County Sheriff Joseph Arpaio stated that he would continue to exercise authority to enforce federal immigration laws in the field. Arpaio cited a non-existent federal statute that he had allegedly distributed in a handout at a press conference in reaction to ICE's decision.[342] The handout read as follows:

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[341] Letter from Loretta King, Acting Assistant Attorney General, United States Department of Justice, to Maricopa County Sheriff Joseph Arpaio (March 10, 2009), available at: http://ndlon.org/images/documents/usdojlettertoarpaio.pdf. *See* Arizona Republic, "Arpaio to be investigated over alleged violations" (March 11, 2009), a*vailable at:* http://www.azcentral.com/arizonarepublic/news/articles/2009/03/11/20090311investigation0311.html. Should the DOJ conclude that racial profiling is being used or that other civil rights violations are occurring, the IACHR urges the State to monitor the oversight of the measures prescribed to correct the situation. The Commission has learned that in 1999 the DOJ found that conditions in the Maricopa County jails were unconstitutional given the deliberate indifference to the inmates' serious medical and mental health needs. The MCSO reached a negotiated settlement with the DOJ in 1999 to improve conditions. However, the Goldwater Institute and press reports indicate that as of 2008 the DOJ had not conducted an inspection of the Maricopa County jails to ensure that the agreement was being honored. *See* Goldwater Institute, Policy Report, *Mission Unaccomplished: The Misplaced Priorities of the Maricopa County Sheriff's Office*, No. 229, (December 2, 2008), *available at:* http://www.goldwaterinstitute.org/Common/Img/Mission%20Unaccomplished.pdf; Arizona Republic, "Judge backs County inmates in jail case" (October 23, 2008), *available at:* http://www.azcentral.com/news/articles/2008/10/23/20081023joe-arpaio-judge-backs-inmates.html; Department of Justice, Press Release, Maricopa County to Improve Medical and Mental Health Care for Inmates, under Justice Department Agreement" (December 6, 1999), *available at:* http://www.justice.gov/opa/pr/1999/December/588cr.htm.

[342] Arizona Republic, "Arpaio cites non-existent law in his argument for crime sweeps" (October 16, 2009), *available at:* http://www.azcentral.com/news/articles/2009/10/16/20091016arpaio1016.html; Arizona Republic, "Arpaio promises to press on with immigrant sweeps" (October 7, 2009), *available at:* http://www.azcentral.com/arizonarepublic/local/articles/2009/10/07/20091007Arpaio2871007.html; Fox News—

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> Immigration officers and local law enforcement officers may detain an individual for a brief warrantless interrogation where circumstances create a reasonable suspicion that the individual is illegally present in the U.S. Specific facts constituting a reasonable suspicion include evasive, nervous or erratic behavior; dress or speech indicating foreign citizenship, and presence in an area known to contain a concentration of illegal aliens. Hispanic appearance alone is not sufficient.[343]

205. It was later discovered that the contents of the handout came from a website of the Federation for American Immigration Reform (FAIR), an organization that advocates restriction of immigration policies.[344] When confronted about the false document, the MCSO responded that "[a]lthough the citation and language does not appear in the U.S. code, Title 8 does exist, and the Sheriff's Office believes that it still has the authority under federal law to detain illegal aliens during the course of their duties."[345]

206. When the delegation from the Inter-American Commission asked the ICE State and Local Coordination Team about the document, the Team stated that it was unaware of the document.[346] The day after ICE officials withdrew the MCSO's authorization, the latter conducted another "criminal sweep". In February 2010, Sheriff Joseph Arpaio asserted that he would continue to enforce federal immigration law in the field and that he planned to train 881 of his agents in immigration enforcement.[347]

207. The IACHR, therefore, finds it troubling that ICE continues to maintain a contract with the MCSO for enforcement of civil immigration law.

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Phoenix, "Backlash over Arpaio's "Mexican" Comment" (October 21, 2010), available at: http://www.myfoxphoenix.com/dpp/news/immigration/backlash_over_arpaio_comment_10_21_2009; Arizona Capitol Times, "Sheriff Joe, a non-existent U.S. law and the next crime sweep" (October 14, 2009), available at: http://azcapitoltimes.com/azpolicywonk/tag/crime-suppression-sweeps/. A supposed copy of the file is available at: http://azcapitoltimes.com/wp-files/pdfs/section8.pdf.

[343] *See* http://azcapitoltimes.com/wp-files/pdfs/section8.pdf.

[344] Federation for American Immigration Reform (FAIR), "The Law against Hiring or Harboring Illegal Aliens (latest revision of January 20, 2010), a*vailable at:* http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersbcdd. FAIR's interpretation of the law is based on an extremely loose reading of the U.S. Supreme Court's decision in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-87 (1975).

[345] Arizona Republic, "Arpaio cites non-existent law in his argument for crime sweeps", *supra*.

[346] *See* IACHR briefing with ICE officials at ICE headquarters in Washington, D.C. (Oct. 2, 2009) about the 287(g) program.

[347] Wall Street Journal, "Arizona Sheriff, U.S. in Standoff Over Immigration Enforcement" (February 10, 2010), available at: http://online.wsj.com/article/SB10001424052748703455804575057650062572536.html?mod=WSJ_WSJ_US_News_5; Associated Press, "Protests, grand jury challenge Sheriff Joe Arpaio" (February 28, 2010), available at: http://www.google.com/hostednews/ap/article/ALeqM5hsUmDTKoXscEMSe9FGxF1sYbSGDQD9E4VH2G0.

208. Even more alarming is the recent passage of a new criminal immigration law in the state of Arizona on April 23, 2010 and set to take effect on July 23, 2010. That law has content similar to the handout that Sheriff Arpaio circulated, as it requires the Arizona police to ask for the immigration status of any person where "reasonable suspicion" exists that the person is an alien who is unlawfully present in the United States. Likewise, the law establishes in effect that the presence of an undocumented immigrant in Arizona is a criminal offense, which carries a prison sentence.

209. The Inter-American Commission reiterates what it stated in its Press Release No. 47/10 of April 28, 2010 to the effect that this law constitutes an unacceptable criminalization of the presence of undocumented persons and is incompatible with the United States' international obligations in the area of nondiscrimination, especially inasmuch as it invites racial profiling and its implementation will likely have a disproportionate impact on certain immigrant groups.

210. In its October 2010 response to the draft version of this report, the United States agrees with the unconstitutional and discriminatory nature of certains provisions of the law passed by the Arizona legislature, and describes the actions taken by the Obama Administration to challenge it in court:

> As the Commission has noted, in April of 2010, the state of Arizona enacted Senate Bill 1070 (S.B. 1070) a law which, among other things, required police to make a reasonable attempt, when practicable, to determine the immigration status of a person when in the course of a lawful stop, detention, or arrest a reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, unless that determination may hinder or obstruct an investigation. On July 6, 2010 the Department of Justice (DOJ) filed a legal challenge to S.B. 1070 in the United States District Court for the District of Arizona on grounds that it is preempted under the Constitution and federal law, because it unconstitutionally interferes with the federal government's authority to set and enforce immigration policy. In particular, DOJ submitted that the law's mandate on Arizona law enforcement to verify immigration status is preempted because it will result in the harassment and detention of foreign visitors and legal immigrants, as well as U.S. citizens, who cannot readily prove their lawful status, and impermissibly burden federal resources and impede federal enforcement priorities. The suit, which requested that the court issue a preliminary injunction to enjoin enforcement of the law, was filed on behalf of DOJ, DHS, and the Department of State, which share responsibilities in administering federal immigration law. On July 28 a federal judge issued a preliminary injunction blocking sections of the law, including those which raised most concern about potentially discriminatory effects. The injunction has been appealed, and the Justice Department will continue to challenge the law. The United States continues to maintain a firm position against racial profiling in all of its enforcement activities, including in the delegation of immigration authority to its State and local partners.

211. In press release 47/10 issued by the IACHR to express concern over this law, the IACHR "exhort[ed] U.S. authorities to find adequate measures to modify the recently approved law in the State of Arizona in order to bring it into accordance with international human rights standards for the protection of migrants". The Inter-American

Commission considers that the legal actions initiated by the Federal Government of the United States, described above, represent a highly positive initiative and a concrete example of compliance with international human rights standards by that country.

212. On the other hand, the IACHR is also deeply concerned that what happened in the case of the MCSO is an example of a more pervasive problem with ICE's lack of oversight and of the lack of accountability of the agencies that enforce federal civil laws on ICE's behalf under 287(g) partnerships. This concern is consistent with a January 2009 report of the Government Accountability Office (GAO), which found a considerable lack of supervision over the participating agencies' implementation of the 287(g) program.[348]

213. During its visits to Texas and Arizona, the Inter-American Commission learned of other disturbing law enforcement methods used by the 287(g) partner agencies. The delegation from the IACHR had an opportunity to meet with persons who had been interrogated by 287(g) partner LEAs about their immigration status. In some cases, the persons alleged that local law enforcement officers, acting on ICE's behalf under the 287(g) program, had insisted that they sign documents without having an opportunity to read them and deceived others who believed they were signing "voluntary departure" documents.[349] In one case, a person told the Inter-American Commission that he was placed in a small cell with officers seated on either side of him, while a third officer told him over and over to sign the documents.[350]

214. Finally, the IACHR learned of certain figures that might suggest that state and local law enforcement agents under the 287(g) program are not only using criminal prosecution as a façade to justify the detention of undocumented immigrants without taking into account the eminently civil nature of their infractions, but also could be distracting the public's attention away from public safety issues that truly need to be addressed, thereby adversely affecting the safety of the population in their jurisdictions.[351] For example, the MCSO told the United States Federal Bureau of Investigations (FBI) that between 2004 and 2007, violent crime reported in the County increased by 69% and that homicides were up by 166%.[352] By contrast, the cities of Phoenix and Mesa, which are within Maricopa County but do not participate in the 287(g) program, reported an increase of from 5% to 15% in violent crime during that same period.[353] The East Valley Tribune's

[348] GAO, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration, GAO-09-109 (January 2009), available at: http://www.gao.gov/new.items/d09109.pdf.

[349] Audio of the interviews is on file with the IACHR.

[350] Audio of the interviews is on file with the IACHR.

[351] *See* Police Foundation, *The Role of the Local Police: Striking a Balance between Immigration Enforcement and Civil Liberties,* p. xii (April 2009), *available at:* http://www.policefoundation.org/.

[352] Goldwater Institute, Policy Report, *Mission Unaccomplished: the Misplaced Priorities of the Maricopa County Sheriff's Office*, No. 229, p. 4 (December 2, 2008), *available at:* http://www.goldwaterinstitute.org/Common/Img/Mission%20Unaccomplished.pdf.

[353] *Idem*.

2008 investigative report concluded that, subsequent to the 287(g) partnership, the response time of MCSO officers to top priority emergencies increased considerably.[354] The Goldwater Institute reported that 66 positions in the Patrol Division went unfilled to cover a deficit of $1.3 million, due mainly to Maricopa County's immigration enforcement activities.[355] The Goldwater Institute reports that the MCSO had an alarmingly low rate of cleared cases that resulted in arrests, at just 18%.[356]

215. ICE has announced plans to expand its local law enforcement partnerships under the 287(g) program, albeit with a number of changes. In this regard, the United States includes the following information in its response to the draft version of this report:

> DHS continues to add and incorporate safeguards, which will aid in the prevention of racial profiling and civil rights violations and improve accountability for protecting human rights under the program. In July 2009, ICE revised the memoranda of agreement with State and local law enforcement agencies to narrow the scope of the delegated authority, improve oversight and performance review, and require that all ICE partners commit to the new standards and use the authority consistent with ICE priorities. In addition, ICE will soon issue guidance to partners on how to create and sustain local steering committees to solicit the input from a variety of audiences on how to improve the program in the area. This guidance is currently under review by the agency's NGO advisory groups in order to ascertain their feedback before final implementation. These reforms are designed to ensure that State and local officers who exercise 287(g) authority focus on convicted criminal aliens and those who endanger our communities.
>
> Additionally, comprehensive civil rights instruction and training are provided to all State and local law enforcement officers prior to, and during, their assumption of immigration authority. For example, all law enforcement officers authorized to perform 287(g) functions must attend and graduate from a 4-week training course at the ICE Academy which includes courses in civil rights and civil liberties and racial profiling. DHS CRCL has also worked with the Federal Law Enforcement Training Center (FLETC) to strengthen the training provided to all initial entry trainee federal law enforcement officers, and DHS has developed training materials for in-service personnel entitled, "Guidance Regarding the Use of Race for Law Enforcement Officers." These training materials, which are provided to all employees in web-based and CD-ROM format, provide a tutorial on DOJ guidance and DHS policy, as well as practical tips drawn from real life situations

[354] East Valley Tribune, "Reasonable Doubt Part I: MCSO Evolves into an Immigration Agency" (July 10, 2008), available at http://www.eastvalleytribune.com/story/120461.

[355] Goldwater Institute, Policy Report, *supra,* p.9.

[356] *Idem*, p. 6. By comparison, the Goldwater Institute reports that most of the Phoenix Police Department's cases end in arrests and that 78% of its violent crime cases end in arrests. According to the Goldwater Institute, the MCSO is probably making excessive use of the "exceptionally cleared" case category in order to keep its criminal investigation success rate artificially high. *See* Goldwater Institute, Policy Report, *Justice Denied: The Improper Clearance of Unsolved Crimes by the Maricopa County Sheriff's Office,* No. 09-03 (May 21, 2009), *available at:* http://www.goldwaterinstitute.org/Common/Img/052109%20Bolick%20Justice%20Denied.pdf

> on how law enforcement personnel can avoid engaging in racial profiling. This thorough preparation specifically addresses ICE's stance against racial profiling and the constitutional concerns regarding the use of race in domestic law enforcement activities.
>
> ICE also has developed an inspection program to audit the agreements of ICE's State and local partners. The ICE Office of Professional Responsibility (OPR) conducts these inspections and reports the results to ICE management for any corrective actions.
>
> Also, the 287(g) program has a detailed complaint process in place that is articulated in each agreement. Complaints are accepted from any source and can be directed to the DHS Office of the Inspector General or to ICE OPR. In addition, any complaints that ICE receives directly are immediately forwarded to DHS CRCL.

216. The Inter-American Commission also observes that in October 2009, as part of an effort to lend continuity to its 287(g) partnerships and bolster accountability, ICE announced issuance of standardized MOAs authorizing enforcement of immigration laws by both task force officers and jail enforcement officers.[357]

217. As a general issue, the IACHR observes that the ambiguity with respect to the exercise of criminal law enforcement functions and purely immigration enforcement functions are still there. The objectives spelled out in the 287(g) program --i.e., identification and removal mainly of immigrants with serious criminal records-- do not match the performance indicators that ICE uses to assess the partner agencies under the new MOAs, which include the number of aliens encountered by 287(g) officers.[358] The Inter-American Commission is concerned that this could keep the main focus on the number of immigrants arrested, irrespective of the seriousness of the offenses they may have committed. Nor does it do anything to eliminate the possibility for pretextual arrests on charges that are later withdrawn or not prosecuted as an excuse to check a person's immigration status.[359]

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[357] ICE, News Releases, "ICE Announces Standardized 287(g) Agreements with 67 State and Local Law Enforcement Partners" (October 16, 2009), *available at:* http://www.ice.gov/pi/nr/0910/091016washingtondc.htm.

[358] DHS OIG, *The Performance of 287(g) Agreements,* OIG-10-63, p. 8 (March 2010), *available at:* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf. The document also reports that ICE had plans to evaluate its 287(g) partners under the new MOAs, based on their cost effectiveness for ICE, without taking into consideration what the community, the field office, the media or legal demands had to say regarding the partners' exercise of civil immigration authorities.

[359] ICE, FOIA Reading Room, "Old 287(g) Memorandums of Agreement—Maricopa County," available at: http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf. The language used in the new MOA template regarding prosecution of criminal charges is weaker than the language in the old MOAs. For example, the old MOA with the Maricopa County Sheriff's Office stated that "[t]he LEA is expected to pursue to completion prosecution of the state or local charges that caused the person to be taken into custody."

218. Although the IACHR welcomed the statements made by the ICE State and Local Coordination Team during the October 2009 briefing concerning the reforms and accountability mechanisms,[360] the language of the new, standardized MOA establishes few measures to identify and avoid the possible use of racial profiling and in some respects expands the civil immigration authority of the state and local partners without proper ICE oversight.

219. The new MOA provides greater latitude with respect to the circumstances under which LEAs acting on ICE's behalf are authorized to question an individual about his or her immigration status. The typical language of the old MOAs was as follows:

> The power and authority to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States (…) and to process for immigration violations those individuals who are convicted of **State or Federal felony offenses**[361] (emphasis added).

220. This language indicates that in the context of a criminal arrest and the removal process the LEA agent acting on ICE's behalf may only interrogate an individual about his or her immigration status if the person in question has been convicted of a felony.[362] The new MOA states the following in this regard:

> The power and authority to interrogate any person reasonably believed to be an alien about his right to be or remain in the United States and to process an alien solely based on an immigration violation (…) will be delegated only on a case-by case basis. (…). When an alien is **arrested for the violation of a criminal law**, a TFO may process that alien for removal subject to ICE supervision as outlined in this agreement[363] (emphasis added).

221. The Inter-American Commission appreciates the language requiring that ICE give its preapproval for interrogation of an individual based solely on a civil violation of immigration law; however, it is unclear precisely how this requirement will be implemented in practice. The IACHR finds it troubling that if an immigrant is arrested for a lesser infraction, such as a traffic violation, the language of the new MOA unequivocally permits the participating local enforcement agency (LEA) to question that person about his or her immigration status. The Inter-American Commission deems that without proper ICE

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[360] See IACHR briefing with ICE officials on the 287(g) program, *supra*.

[361] *See, e.g.,* ICE, FOIA Reading Room, "Old 287(g) Memorandums of Agreement-Maricopa County," available at: http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/maricopacounty.pdf; *see also,* ICE, "Old 287(g) Memorandums of Agreement," available at: http://www.ice.gov/foia/readingroom.htm.

[362] The IACHR believes that the ambiguous wording of the provision leaves room for a variety of interpretations. *See, e.g.,* GAO, *Immigration Enforcement:* Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration, p. 13 (January 2009), available at: http://www.gao.gov/new.items/d09109.pdf.

[363] ICE, 287(g) MOA template, Appendix D, Standard Operating Procedure (SOP) Template, available at: http://www.ice.gov/doclib/foia/media-requests/09foia4646moutemplate.pdf. The term *Task Force Officer* refers to the staff representing the LEA.

oversight, this broad interrogation authority can be exercised in such a way as to leave noncitizens and citizens in a vulnerable situation and at risk of becoming the victim of racial profiling.[364]

222. The IACHR also finds other amplifications of the LEAs' civil immigration authorities under the new MOA template. The Inter-American Commission is particularly concerned by the fact that under the new MOA template, the LEAs' authority to conduct searches and to issue arrest warrants for immigrants, both of which come under federal civil immigration law.[365] The burden of proof for an administrative search is less exacting than the "probable cause" standard required for a criminal search warrant.[366] ICE has now empowered LEA partners to conduct these two principal functions of civil immigration investigation and enforcement, with minimal, required ICE oversight.[367]

223. The Inter-American Commission is pleased that the MOA template includes specific language to the effect that in their activities under the 287(g) program, LEAs are bound by federal civil rights law.[368] However, the Inter-American Commission is concerned that the MOA does not make provision for mechanisms whereby the LEAs would have to answer to ICE and to the community in general. Specifically, the language used in the MOA template is more aspirational than binding.[369]

224. While the MOA template provides that personnel of a participating LEA must be under ICE supervision for purposes of exercising their immigration authority, it

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[364] As discussed in The Chief Justice Earl Warren Institute study, the police can make discretionary arrests for various misdemeanor or petty offenses. *See* University of California—Berkeley, the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, Report on Policy: 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.

[365] *Compare* ICE, 287(g) MOA template, Appendix D, available at: http://www.ice.gov/doclib/foia/media-requests/09foia4646moutemplate.pdf with ICE, FOIA Reading Room, "Old 287(g) Memorandums of Agreement," available at: http://www.ice.gov/foia/readingroom.htm. *See ACLU*, Immigrants' Rights Project, "The new standardized MOA, Maricopa County's MOA and the ACLU side-by-side comparison," available at: http://www.aclu.org/files/pdfs/immigrants/287g_comparison_20090716.pdf; ACLU-Tennessee, "ACLU-TN Finds New MOA to Govern Sheriff's 287(g) Program Worsens Existing Agreement" (July 24, 2009), available at: http://www.aclu-tn.org/release072309.htm.

[366] *See Marshall v. Barlow's Inc.*, 437 U.S. 307, 320 (1978); *Blackie's House of Beef, Inc. v. Castello*, 659 F.2d 1211, 1218-19 (D.C. Cir. 1981). The Commission notes that an administrative search warrant does not allow an officer to enter a dwelling unless an individual has first given his consent.

[367] For a comparison of how the relationship between ICE and its 287(g) partners has changed, see, *e.g.,* ACLU-Tennessee, "ACLU-TN Finds New MOA to Govern Sheriff's 287(g) Program Worsens Existing Agreement" (July 24, 2009), available at: http://www.aclu-tn.org/release072309.htm.

[368] Although they were not entirely uniform in their language, the earlier MOAs for the 287(g) program included provisions that stated that officers with 287(g) partner LEAs were bound by the provisions of federal civil rights law.

[369] ICE, 287(g) MOA template, Section III, available at: http://www.ice.gov/doclib/foia/media-requests/09foia4646moutemplate.pdf. The wording is as follows: "The AGENCY is expected to pursue to completion all criminal charges that caused the alien to be taken into custody and over which the AGENCY has jurisdiction."

does not specify the extent and the manner of ICE's supervision.[370] A March 2010 report by the DHS OIG found significant disparities in ICE's supervision of 287(g) program officers.[371] The new MOA regulations regarding ICE supervision mainly concern the processing of unauthorized immigrants once they have been identified, rather than oversight at the time when the racial factor may come into play.[372]

225. The IACHR is also concerned that the new MOA template eliminates the provision requiring LEAs to compile information on the exercise of civil immigration authority under the 287(g) program.[373] A March 2010 report by the DHS OIG mentioned this concern and recommended that ICE require that information of this kind be collected and reported.[374] The Inter-American Commission must point that this was the only of the 33 recommendations made by the DHS OIG that ICE rejected,[375] despite how important information of this kind is to ensure that discrimination in the form of racial profiling does not make its way into these programs.

226. Finally, the IACHR observes that the new MOA template curtails transparency because ICE approval is required for the release of any information related to 287(g) programs and disclosure of such information must be done be in accordance with federal regulations—eliminating the applicability of states' open records laws.[376] Consequently, the new MOA template may frustrate the ability of civil society organizations and the general public to ensure that LEAs are exercising 287(g) authorities appropriately, are accountable to ICE, and that ICE is performing its oversight function.

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[370] ICE, 287(g) MOA template, Section XI, *supra*. It is unclear whether ICE's supervision is to be done on a daily basis and in person.

[371] DHS OIG, *The Performance of the 287(g) Agreements*, OIG-10-63, pp. 10-13 (March 2010), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

[372] ICE, 287(g) MOA template, *supra*. Under the MOA, ICE approval is required for any immigration enforcement operation under the 287(g) program. Presumably, this provision covers the possibility of enforcement actions such as "crime sweeps". However, a March 2010 report of the DHS OIG indicates that this type of ICE supervision and oversight has not been consistent. DHS OIG, *The Performance of 287(g) Agreements,* OIG-10-63, *supra*, pp. 12-13.

[373] The IACHR observes that information would have to be compiled on all encounters between agents in the 287(g) program and the public, the race and ethnicity of all those persons, past criminal and civil arrests and the outcome of all those arrests. *See* DHS OIG, OIG-10-63, *supra*. ICE, 287(g) MOA template, section XII, *supra*. The old MOAs typically required LEAs to keep exact data and statistics on their 287(g) programs. *See in general,* ICE, FOIA Reading Room, "Old 287(g) Memorandums of Agreement," available at: http://www.ice.gov/foia/readingroom.htm. The new MOA requires that LEAs compile information to be sent to the ENFORCE database, which mainly contains biographical information, immigration status and information on detention of irregular immigrants who have been identified. *See*, GAO, *Immigration Enforcement Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration*, GAO-09-109 (January 2009), available at: http://www.gao.gov/new.items/d09109.pdf; MPI, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, pp. 12-15 (Sept. 2009), *available at:* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf. The MPI report suggests that ICE's "ENFORCE" system can track case information on persons under investigation, booked, in detention or removal.

[374] *See* DHS OIG, OIG-10-63, *supra*, pp. 25-26.

[375] *See* DHS OIG, OIG-10-63, *supra*, pp. 1, 53.

[376] For more information on the open records laws in each state, *see* The Reporters Committee for Freedom of the Press, "Open Government Guide," available at: http://www.rcfp.org/ogg/index.php.

4. Bond

227. Under certain circumstances noncitizens who are taken into preventive custody during removal proceedings may apply for release on bond[377] provided they are not "arriving aliens" and are not subject to mandatory detention on criminal or terrorism grounds. The amount can be recovered at the end of the proceedings. The detainee can seek review of his custody and the bond amount before an immigration judge.[378] The minimum bond amount prescribed by U.S. immigration law is US$1,500.[379] However, ICE can establish an initial bond amount that is significantly higher than this minimum threshold.[380] In the United States, the average immigration bond is US$5,941.[381] Either side —the noncitizen or the government—may appeal a bond determination and order of release.[382] In most cases, the noncitizen may pay the bond set and obtain release while the appeal proceeds.

228. The United States explains the following in its observations to the draft version of this report:

> As to the concerns on immigration bonds, the vast majority of aliens in immigration proceedings are not detained in ICE custody. The vast majority of unauthorized aliens are not detained during their immigration proceedings. If a bond is deemed necessary to ensure the appearance of an alien or to protect the safety of the community, standardized criteria are used to determine the bond amount, including, but not limited to, the alien's criminal history, flight risk, danger to the community or to national security, and family ties.
>
> As noted by the Commission, the average bond is under $6,000 and therefore is not subject to the automatic stay if the bond determination is appealed. See 8 C.F.R. § 1003.19(i)(2) (requiring an automatic stay of any custody order when bond is set by DHS at $10,000 or more). Accordingly, the automatic stay concern referenced in the Commission's report is likely to affect only the most dangerous aliens whose release into the community is unwise. Moreover, aliens offered release on bond may post it by paying a small percentage of the total amount (generally 10 percent), meaning that the average alien can post bond by paying just $600.

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[377] INA § 236(a), 8 U.S.C. § 1226(a); 8 CFR § 236.1.

[378] 8 CFR § 236.1; 8 CFR § 1003.19. Under the regulations, an immigration judge may also determine that a detainee should be released on parole without posting bond.

[379] INA § 236(a), 8 U.S.C. § 1226(a).

[380] INA § 236(a), 8 U.S.C. § 1226(a); 8 CFR § 236.1; 8 CFR § 1003.19.

[381] Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, p. 17 (2009), *available at:* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf (which cites information provided by Andrew R. Strait, Acting Coordinator / Policy Analyst, National Community Outreach Program, Office of Policy, US Immigration and Customs Enforcement, January 16, 2009). Amnesty International reports that the average bond in New York is $9,831 and that in at least eight other jurisdictions, the average is over $6,000.

[382] 8 CFR §§ 1003.19(f) & (i)(1).

229. The State, however, has not contested that it is in fact very difficult for immigrants to pay the average bond amount. Based on the U.S. Census Bureau's March 2005 Current Population Survey data, the average unauthorized male worker earned an annual salary of approximately US$25,000.[383] Immigration attorneys have reported that many of their detained clients are unable to pay them.[384]

230. If ICE establishes an initial bond amount of US$10,000 or higher, an immigration judge's ruling that seeks to reduce that amount or release the detainee on parole will be automatically stayed, which means that the detainee may not be released on bond or any other procedure until the appeal filed by the government with the Board of Immigration Appeals (BIA) is decided.[385] Immigration attorneys complained to the Inter-American Commission that they feel at times ICE abuses this provision of the statute and moreover sometimes the BIA declines to review a bond appeal until it receives the merits of the case, which effectively prevents a detainee's release throughout immigration proceedings.

231. Finally, in order to ensure release on bond, the noncitizen has to demonstrate that he or she poses no threat to other persons, property or national security and is not a flight risk, thus ensuring that he or she will report for all future immigration proceedings.[386]

232. Detention of unauthorized immigrants is not criminal detention, must not be punitive and should only happen in the exceptional circumstances where detention is warranted. Absent those circumstances, detention of unauthorized immigrants is incompatible with the right to personal liberty. Therefore, because undocumented immigrants should as a general rule remain at liberty, detention for a protracted period owing to the inability to post bond –which is what happens in most cases- becomes arbitrary. The IACHR urges the State to order the necessary measures to make detention for immigration violations the exception rather than the rule and so that the bond system does not become another obstacle that undocumented immigrants have to surmount in order to obtain the liberty to which they are, as a general rule, entitled.

5. Indefinite detention of noncitizens who cannot be deported

233. Noncitizens ordered deported generally remain in detention until they are removed from the United States.[387] Under U.S. immigration law, ICE is required to conduct a review of the post-order custody of any immigrant detainees who are still in ICE

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[383] Amnesty International, *Jailed Without Justice: Immigration Detention in the USA*, *supra*, fn. 114.

[384] *See,* Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, *supra*, p. 38.

[385] 8 CFR § 1003.19(i)(2).

[386] *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006) (which cites *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999), *available at:* http://www.justice.gov/eoir/vll/intdec/vol24/3544.pdf.

[387] INA § 241, 8 U.S.C. § 1231.

custody 90 days after the order of removal.[388] Prior to that review, within 30 days of post-order detention, ICE is required to notify a detainee of his or her obligation to cooperate with the deportation process and the consequences of failing to do so. Within 60 days of the post-order of removal detention, ICE is required to provide information with respect to the 90-day custody review.[389] The 90-day period can be suspended if the government determines that the person ordered deported fails or refuses to make timely application in good faith for travel or other documents necessary for the person's departure or acts to prevent his or her removal.[390] After the 90 days expire, ICE is permitted to detain an individual for an additional 90 days upon a custody review by ICE officials.[391] A February 2007 DHS OIG report found that ICE complied with these notification requirements in only 50% of cases.[392] Moreover, that same report found that 19% of post-order removal detainees did not receive a timely 90-day custody review.[393]

234. In 2001, the U.S. Supreme Court held that post-order of removal detention cannot be indefinite. In *Zadvydas v. Davis*, the U.S. Supreme Court held that the applicable immigration laws did not authorize indefinite detention and designated six months as the time period beyond which a noncitizen cannot be held after issuance of a final removal order, absent evidence that removal is reasonably foreseeable.[394]

235. Despite the U.S. Supreme Court's ruling, detention beyond the six-month period still occurs.[395] Some of these cases are due to an individual's failure to cooperate in the removal process or because the person falls under one of the exceptions to release.[396] Nevertheless, there are cases where persons are detained beyond the 180-day period, in

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[388] 8 CFR §241.4.

[389] 8 CFR §241.4. Failure to cooperate with the removal process may mean suspension of the 180-day clock for each day a detainee in post-order of removal detention is not cooperative.

[390] INA § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C). ICE is required to provide the person with regular written warnings regarding the consequences of the person's failure to cooperate with the deportation process.

[391] 8 CFR § 241.4; INA § 241(a)(6); *see Zadvydas v. Davis*, 533 U.S. 678 (2001), *available at:* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=99-7791.

[392] DHS OIG, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, p. 16 (Feb. 2007), *available at:* http://trac.syr.edu/immigration/library/P1697.pdf.

[393] DHS OIG, OIG-07-28, *supra*, p. 16.

[394] *Zadvydas v. Davis*, *supra*. Six months is double the statutory 90-day period permitted to secure removal under INA § 241(a)(6), 8 U.S.C. § 1231(a)(6). There is no consensus as to how long a detainee can be held past the 6-month mark if evidence is shown that removal is reasonably likely. *See* The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings* (Nov. 2009), *available at:* http://www.constitutionproject.org/manage/file/359.pdf. *See also Clark v. Martinez*, 543 U.S. 371 (2005) (applying the logic of *Zadvydas* to immigrants who are found inadmissible at a point of entry to the United States), *available at:* http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-878.

[395] DHS OIG, *ICE's Compliance with Detention Limits for Aliens with a Final Order of Removal from the United States*, OIG-07-28, p. 13 (Feb. 2007), *available at:* http://trac.syr.edu/immigration/library/P1697.pdf. The OIG reports that as of June 2006, there were 428 persons who had been detained for over one year since their final orders of removal from the United States.

[396] 8 CFR § 241.13(f); 8 CFR § 241.14.

clear violation of the U.S. Supreme Court's decision.[397] The DHS Office of Inspector General (OIG) reported that of the 150 files it reviewed of persons who were entitled to these statutory custody reviews, 64 (43%) had been in detention with a final order for more than 180 days but had not received a custody review in the last 90 days.[398] Of these 150 persons, 36 (24%) had not received a review in the last 180 days.[399] The MPI's September 2009 study found that ICE data from January 25, 2009 showed 992 persons who had been detained for more than six months after receiving their final order of removal.[400]

236. In its October 2010 observations, the United States explains that "ICE proactively attempts to remove aliens following the entry of a final removal order by an immigration judge" but clarifies that the removal process "can take up to several months to complete, depending on several factors, including but not limited to, the country of removal, whether or not the alien is cooperative throughout the removal process, and/or whether or not the alien has any ongoing appeals". The State further indicates that in the above mentioned Zadvydas v. Davis decision, the U.S. Supreme Court understood this possibility, and therefore established that "six months is a presumptively reasonable period for the agency to complete the removal process on behalf of a given alien". The Supreme Court also noted in its decision that "[t]his 6-month presumption, of course, does not mean that every alien not removed must be released after six months" but that "to the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."

237. The Inter-American Commission is deeply troubled that the 180-day custody determination is not conducted by an independent immigration or federal judge. Indeed, the IACHR received information indicating that post-order of removal detainees must affirmatively file a *habeas corpus* petition in order to be released after the 180 days of post-order detention have expired. Further, ICE regulatory requirements regarding the oversight and review of these detainees' cases diminish considerably after 180 days.[401] Without assistance of legal counsel, these detainees face tremendous obstacles in securing their release. Even so, immigration attorneys report that they often have limited knowledge of everyone detained at a given detention facility.[402]

238. In this regard, the United States points out that in order to remain diligent throughout the removal process, the agency "regularly conducts post-order custody reviews in accordance with the regulatory requirements in 8 C.F.R. § 241.4; ICE

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[397] DHS OIG, OIG-07-28, *supra*.

[398] DHS OIG, OIG-07-28, *supra*, p. 34.

[399] *Idem*.

[400] MPI, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* p. 18 (Sept. 2009), *available at:* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[401] DHS OIG, OIG-07-28, *supra*, pp. 33-34.

[402] In fact, one attorney reported to the Inter-American Commission that at one facility he visited frequently it took a security officer to alert him to two Chinese post-order of removal detainees who had been detained at the facility for close to two years, before he was able to assist with their habeas petitions.

also regularly releases aliens when the agency has determined, upon its completion of such reviews, that there is no significant likelihood of removal in the reasonably foreseeable future". The State submits that it is not necessary for aliens to file a habeas petition in order to be released after 180 days of post-order detention have expired

239. The IACHR welcomes this information, as well as all actions adopted by the United States to guarantee the right to personal liberty of migrants as protected by the American Declaration.

240. Finally, the Inter-American Commission must express its deep concern over the indefinite detention to which noncitizens are subjected when their countries refuse to accept them (*e.g.,* Vietnam, Laos, Cambodia, and the People's Republic of China) or when their countries do not maintain normal diplomatic relations with the United States (*e.g.,* Cuba and Iran), or they are simply stateless.[403]

B. Conditions of immigrant detention

1. The absence of a civil detention system

241. Given the previous information, the IACHR is deeply troubled by the continual and widespread use of detention in immigration cases.

242. As pointed out in various sections of this report, immigration detention must be the exception and dictated by very specific procedural considerations, such as ensuring the undocumented immigrant's appearance for proceedings or, in certain limited cases, the need to protect public safety. Detention is prescribed only when a case can be made for the fact that the particular circumstance of the undocumented immigrant brings these considerations into play and when less severe measures are not possible.

243. For those cases in which detention is both strictly necessary and proportional, the Inter-American Commission insists that immigration detention is an eminently civil matter and the conditions of detention ought not to be punitive or prison-like. However, the IACHR observes with concern that this principle is not observed in immigration detention in the United States.

244. As Dr. Schriro observed, between FY2007 and FY2009 two thirds of the immigration detainees had no criminal histories.[404] Only a small percentage of the remaining third had been convicted of a felony or violent crime.[405] It is important to point out that many of the undocumented immigrants with criminal records that ICE detains have already served their sentences; therefore, had their legal status been different, they

[403] Congressional Research Service, Alison Siskin, Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, fn.38 (Apr. 28, 2004), *available at:* http://trac.syr.edu/immigration/library/P2.pdf.

[404] DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations,* p. 12 (October 6, 2009), available at: http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

[405] DHS, Dr. Dora Schriro, *supra,* p. 6.

would have been set free. The Inter-American Commission must emphasize that while they are in ICE custody, the undocumented immigrants are detained for violations of civil law, no matter what their criminal histories may be.

245. ICE's new administration has repeatedly acknowledged that most undocumented immigrants are not detained in a manner or in conditions suitable to their status as civil detainees. As Dr. Schriro wrote in her report:

> The majority of the population is characterized as low custody, or having a low propensity for violence.
>
> With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards… These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population. […]
>
> Quite a few [of the facilities to which ICE detainees are assigned] do have windows. … Movement is largely restricted and detainees spend the majority of time in their housing units.[406]

246. Although detention conditions at the three centers visited in Arizona and Texas differ significantly, they all employ disproportionately restrictive penal and punitive measures. At each of the three centers, detained immigrants wear prison uniforms; all the units operate as incarceration facilities; on a daily basis, detainees are subjected to multiple head counts that require that they remain in their beds for as much as an hour at a time; the prison guards sometimes lock them in (confine them to their cells or force them to stay in their beds); and detainees are handcuffed and shackled whenever they are taken outside the center's walls, even when they are taken to court.[407]

247. Under the right to humane treatment, many of these practices are unacceptable for any detainee, regardless of the criminal or civil nature of his or her detention. However, as it pertains to the present report, the IACHR observes that, in general, in every circumstance described here, the immigration detainees are treated as criminals. Based on the interviews conducted, the Inter-American Commission cannot fail to mention the psychological impact that this "criminalization" has on those placed in the detention system.

248. The IACHR acknowledges ICE's stated commitment to develop a "truly civil detention system."[408] The Inter-American Commission will now discuss its concerns

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[406] DHS, Dr. Dora Schriro, *supra,* pp. 2-3, 21.

[407] Indeed, the IACHR has been informed that in some instances the detained immigrants are arrested without cause and incarcerated with criminal prisoners. This situation appears to be most prevalent among female immigrant detainees, who represent a significant minority of the detainee population. *See, e.g.,* University of Arizona, *Unseen Prisoners; A Report on Women in Immigration Detention Facilities in Arizona,* pp. 25-27 (January 2009), *available at:* http://www.nationalimmigrationproject.org/detention_petition_final.pdf

[408] New York Times, "U.S. to Reform Policy on Detention for Immigrants" (December 6, 2009), *available at:* http://www.nytimes.com/2009/08/06/us/politics/06detain.html.

regarding supervision and oversight of the detention centers and the main problems it has identified in the detention conditions. It will then make its observations on some of the recent reforms introduced with the idea of changing those conditions.

2. ICE mechanisms of supervision and accountability with regard to detention conditions

249. Currently, there are 8 federally-owned detention facilities,[409] 7 private contract facilities, 5 facilities operated by the Federal Bureau of Prisons, and nearly 350 state and local prisons (IGSA centers) where DHS contracts bed space.[410] Approximately 67% of immigrant detainees are housed in state and local prisons (IGSA facilities).[411] A September 2009 Migration Policy Institute (MPI) report found that of the 17 most populous immigrant detention facilities, which house 50% of the detained immigrant population, nearly 75% are managed and operated by private security firms.[412]

250. As the IACHR observed during its visits, and as the MPI report confirms, the DHS signs Inter-Governmental Services Agreements (IGSA) with local or county government entities, which in turn subcontract with private security firms to perform the detention services.[413] The two major private prison contractors, Corrections Corporation of America (CCA) and GEO Group, Inc., had combined earnings of over $325 million thanks to their ICE contracts in 2008.[414]

251. ICE has established 41 new performance-based detention standards that govern the conditions under which adult noncitizens are to be detained.[415] However, these

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[409] These ICE-owned facilities, however, are operated by private security companies. *See* DHS, Dr. Dora Schriro, *supra*, p. 10.

[410] DHS, "Detention Management" (Dec. 10, 2008), *available at:* http://www.ice.gov/pi/news/factsheets/detention_mgmt.htm; Dr. Schriro's report places the number of IGSA facilities at 240. DHS, Dr. Dora Schriro, *supra*, p. 10.

[411] ICE, "Detention Management Program" (last updated February 1, 2010), *available at:* http://www.ice.gov/partners/dro/dmp.htm; MPI, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, p. 18 (September 2009), *available at:* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[412] MPI, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, pp. 15-16 (September 2009), *available at*: http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[413] *See* MPI, *supra*, pp. 15-16. The IACHR observes that many IGSA detention facilities are run by private contractors. *See*, Detention Watch Network, Map of detentions, *available at:* http://www.detentionwatchnetwork.org/dwnmap.

[414] *See,* CCA, "2008 Annual Report," p. 20 *available at:* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTg3MDJ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1; Geo Group, "2008 Annual Report," p. 1, *available at:* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzMwODQ3fENoaWxkSUQ9MzEyNzY3fFR5cGU9MQ==&t=1. The IACHR points out that this figure does not include the important contracts that both CCA and Geo Group have entered into with the United States Marshals Service and the Federal Bureau of Prisons, which house thousands of immigration detainees who are being criminally prosecuted under Operation Streamline and similar initiatives.

[415] DHS, ICE Performance Based National Detention Standards (Sept. 2008), *available at:* http://www.ice.gov/partners/dro/pbnds/index.htm. Prior to 2008, INS had issued 38 detention standards in

Continues…

performance-based standards are not legally enforceable by detainees in court or any other administrative judicial process.[416] U.S. federal immigration regulations only state: "Under no circumstances shall an alien be detained in facilities not meeting the four mandatory criteria for usage. These are: (1) 24-hour supervision, (2) conformance with safety and emergency codes, (3) food service, and (4) availability of emergency medical care."[417] It should be noted that for IGSA facilities portions of the performance-based standards do not expressly apply; rather, the standards establish a certain margin of flexibility where some sections are concerned. The standards state that "IGSAs must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures."[418]

252. As for ICE's efforts to ensure compliance with the detention standards, the IACHR observes that the current annual monitoring system is not adequately equipped to identify and reduce the violations of detention standards and human rights, particularly given the size the United States immigration system. One of the Inter-American Commission's concerns has to do with facilities that had a daily population of 10 or more persons in FY2009. Of those, 39% did not have an annual ICE performance evaluation based on ICE detention standards during that period.[419] The evaluations done by ICE, the independent reviews,[420] and the IACHR's own review of the detention center monitoring reports available to the public[421] show that the ICE monitoring practices are not up to identifying violations of detention standards; do not provide detailed descriptions of the violations so that they can be brought to the attention of the authorities; make no recommendations to find a solution; and that no follow-up is done to determine whether violations have decreased.

…continuation
2000, which ICE subsequently used to audit immigration detention facilities. *See* http://www.ice.gov/pi/dro/opsmanual/index.htm.

[416] IACHR, Meeting with Immigration Attorneys and Advocates in Washington, DC, (July 24, 2008) (audio of meeting on file at the Commission).

[417] 8 CFR § 235.3(e).

[418] ICE, Performance Based National Detention Standards, *supra*.

[419] ICE, FOIA Reading Room: "Detention Facility Statistics: Average Daily Population (ADP) for Fiscal Year 2009," available at: http://www.ice.gov/doclib/foia/dfs/avgdailypop_fy09.pdf. Similarly, of the 255 detention facilities with an ADP of at least one migrant during FY2009, 47% did not undergo an annual inspection in 2009. It has been reported that ICE requires that each facility undergo annual review to check for compliance with detention standards. *See* GAO, "Observations on the Adherence to ICE's Medical Standards in Detention Facilities," p. 4 (June 4, 2008), *available at:* http://www.gao.gov/new.items/d08869t.pdf.

[420] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), *available at*: http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf.

[421] ICE, FOIA Reading Room, "Detention Facility Reviews/Audits: Detention and Removal Operations" (DRO), available at: http://www.ice.gov/foia/readingroom.htm.

253. A 2009 report by the National Immigration Law Center (NILC),[422] which examined hundreds of reports monitoring detentions at facilities across the United States, prepared by ICE, the American Bar Association (ABA) and the Office of the United Nations High Commissioner for Refugees (UNHCR) between 2001 and 2005,[423] found that the inspections were deficient on several counts. The Inter-American Commission believes that the report is instructive in identifying the structural concerns posed by current detention oversight and supervision practices that ICE uses.[424]

254. The NILC report states that neither the review form nor the manual for the Detention Management Control Program (DMCP) provides specific criteria by which to evaluate a facility according to the detention standards, either in general or specifically.[425] As a result, the reviewer has a wide margin of discretion to evaluate whether a facility meets the requirements that each standard establishes and to determine whether it is in overall compliance.[426] Inevitably, this results in inconsistent evaluations that make the ICE review less credible. A June 2008 report of the DHS Office of the Inspector General (OIG)

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[422] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers* (2009), *available at*: http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf.

[423] A total of 305 facility monitoring reports were reviewed. National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* pp. 1, 88-95. These monitoring reports were made available to the public as a result of a court order, under which ICE made public all its reports on detention facilities between 2004 and 2005. ICE retained information on 20 of the 38 national standards –including medical care, use of force, food services and religious practices- in the 53 facility reviews that it produced. The authors of the report titled "A Broken System" allege that it was later revealed that ICE had retained another 133 reports on facilities between 2004 and 2005. The Commission is surprised that only 186 reports have been identified for the period between 2004 and 2005. ICE claims that it evaluates every facility on an annual basis. If that is the case, then there ought to be at least 300 reports both for 2004 and for 2005.

[424] The review form for centers where detention periods are over 72 hours is G-324A. This form is used both for ICE's internal annual evaluations and the reviews conducted privately by Creative Corrections and the Nakamoto Group. Examples of Form G-324A appear at: ICE, FOIA Reading Room, "Detention Facility Reviews/Audits: Detention and Removal Operations" (DRO) available at: http://www.ice.gov/foia/readingroom.htm. The detention facility inspection form contains mainly a checklist with three levels of evaluation. For each detention standard, the reviewer answers "yes" or "no" as to whether the facility is in compliance with each of a series of regulations –usually 10 or more- that must be complied with in order to satisfy the general detention standard. After each rule there is a space for the reviewer to make specific comments. Based on the results on those elements, the reviewer must decide if the facility's compliance with the standard of detention is "Acceptable", "Deficient", "At Risk", or "Repeat Finding". Finally, based on the facility's overall compliance with the detention standards, the reviewer must rate the facility as "Superior", "Good", "Acceptable", "Deficient" or "At Risk." Some of the same concerns on the inspection process were echoed in a June 2008 report of the DHS OIG. *See* DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, pp, 19-25 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

[425] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* p. 5. The reviewer's job is more complicated because some of the elements of the detention standards are not expressly applied to the IGSA facilities. There are a number of sections in the standards where the IGSAs have alternatives that "equal or exceed" the object and purpose of the detention standard. Reviewers receive little in the way of guidance as to how to evaluate those alternatives.

[426] *See, e.g.,* Texas Appleseed & Akin Gump Strauss Hauer & Feld LLP, *Justice for Immigration's Hidden Population*, pp. 34-35 (March 2010), *available at:* http://graphics8.nytimes.com/packages/pdf/national/30immig_report.pdf.

expressed a similar concern with regard to ICE inspections, and stated that: "In some monitoring reports, the reviewers deemed the facility's performance on certain elements acceptable, despite identifying notable deficiencies."[427] Similarly, a December 2006 report of the DHS OIG found, in its independent evaluation of five centers, a substandard performance with respect to compliance of a number of detention standards. When ICE evaluated those centers, it found that their performance had been acceptable.[428]

255. The ICE inspection reports do not contain detailed information describing the violations of detention standards that occur in each facility. The NILC report and the IACHR's own review of the inspection reports indicates that reviewers rarely provided specific information on any violation or any suggestions as to how a violation might be corrected.[429] Without this essential information, it is difficult for staff in a facility to be able to correct existing deficiencies.

256. The Inter-American Commission is also troubled over the mechanisms to follow up on violations once they have been identified. The ICE summary on inspections of centers in 2008 and 2009 shows that 26 detention centers that received negative evaluations in 2008 (and which housed an average daily population of at least 10 immigration detainees in FY2009) were not inspected in 2009.[430] The IACHR notes that when the deficiencies have been identified, ICE agents have not been very consistent when the time came to put together strategies in the detention centers to set in motion "plans of actions" to remedy the problems. In its July 2009 reply to a communication sent by a group of organizations that defend immigrants' rights, ICE indicated that detention centers need only submit a "plan of action" to remedy the violations of detention standards if the detention center in question receives an overall deficient or at-risk rating. The communication reads as follows:

> The DSCU [Detention Standards Compliance Unit] reviews the final report of a contractor and assigns a rating. Facilities that receive a deficient or at-risk rating must submit a plan of action identifying the corrective measures to be taken to address the non-complying conditions.[431]

257. The NILC reported, however, that in testimony given in a previous court proceeding, the former head of the DSCU, Mr. Walter LeRoy, stated that even centers given

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[427] DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, p. 23 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

[428] DHS OIG, OIG-08-52, *supra,* p. 36.

[429] DHS OIG, OIG-08-52, *supra,* p. 7.

[430] ICE, FOIA Reading Room, "Statistics on Detention Centers: Average Daily Population (ADP) for Fiscal Year 2009," available at: http://www.ice.gov/doclib/foia/dfs/avgdailypop_fy09.pdf. The Commission also observes that 54 of the detention centers that received negative evaluations in 2008 and that accommodated an average daily population of at least one detained immigrant during FY2009, were not inspected in 2009.

[431] Communication from Jane Holl Lute, ICE Deputy Secretary, to Professor Michael Wishnie and Paromita Shah, dated July 24, 2009, available at: http://www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf.

an overall rating of "acceptable" could be required to develop plans of action to correct any violation of detention standards identified.[432]

258. The NILC report also cites a number of examples in which the ABA, the UNHCR or ICE has demonstrated a continuing violation of detention standards in a center that has already been identified as being in violation of standards in previous inspection reports.[433] At least one ICE inspection official is cited in the NILC report as saying that he never reviewed the previous inspection reports before conducting a new evaluation of a center.[434]

259. Summarizing, the Inter-American Commission observes with concern that ICE has failed to develop an effective and rigorous culture of detention-standards compliance. Recently, an official with the Office of Detention and Removal Operations (DRO) expressed concern at a Congressional hearing over the "unethical manner in which ICE internal investigations are conducted."[435] The DRO agent also said the following:

> No checks and balances currently exist within ICE. ICE investigates itself. Because ICE investigates itself there is no transparency and there is no reform or improvement.
> […]
>
> Oversight must be removed from ICE, otherwise ICE and senior leadership will continue to have complete control over the investigative process and the outcome.[436]

260. Furthermore, even if ICE's own oversight and supervision mechanisms were adequate, they would have little chance of favorably affecting immigrant detention conditions. The IACHR observes that the IGSA and CDF contracts, or their subcontracts with private security firms, are the only legally binding instruments that dictate detention conditions.[437] After reviewing the contracts with the IGSA, which were made public and

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[432] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* p. 7.

[433] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* p. 5. For example, see the chapters on "Telephone Access", "Group Presentation on Legal Rights", "Administrative and Disciplinary Segregation," "Detainee Handbook"," and "Detainee Grievance Procedures". *See also,* Houston Chronicle, "*Immigrant facilities subpar*," (February 5, 2010), *available at:* http://www.chron.com/disp/story.mpl/special/immigration/6852074.html.

[434] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* p. 6.

[435] Statement by Chris Crane, Vice President of Detention and Removal Operations, National Immigration and Customs Enforcement Council No. 118 of the American Federation of Government Employees (AFGE), AFL-CIO, before the Subcommittee on Border, Maritime and Global Counterterrorism (December 10, 2009), available at: http://homeland.house.gov/SiteDocuments/20091210105603-99475.PDF.

[436] Statement by Chris Crane, *supra*.

[437] DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps" (October 6, 2009), available at: http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," (October 6, 2009), available at: http://www.dhs.gov/ynews/releases/pr_1254839781410.shtm.

are available at the ICE website,[438] the Inter-American Commission observes with concern that there are no legal mechanisms, short of termination of the contract, whereby ICE can ensure compliance with detention standards. As a result, only those detention centers that have committed the most egregious violations of those standards, to the point of requiring termination of the contract, might face any consequences. The head of the Detention Standards Compliance Unit (DSCU) reported that as of 2009 only three contracts had been rescinded for failure to comply with detention standards.[439] The head of the DSCU also observed that ICE has no internal policies requiring the agency to terminate contracts with centers that were rated as either deficient or at-risk on one or more detention standards.[440]

261. The IACHR observes that of the 154 detention centers housing an average daily population of 10 immigration detainees in FY2009, ICE gave 40% of them an overall deficient rating on compliance with the standards for detention of immigrants in 2008, 2009 or both.[441] This information, combined with the documents obtained through Freedom of Information Act requests (FOIA),[442] do not correlate with the date published during the first half of 2007, which indicated that only 13% of the centers evaluated during that period received a deficient rating.[443]

262. ICE's inability to enforce the detention standards is further encumbered by state and local agencies' practice of delegating responsibilities under the IGSA to private security firms and contractors.[444] In effect, ICE has several times evaluated the private subcontractors with which it has no contractual relationship at all, to check for their compliance with safety and security standards. But in practical terms ICE has no tools to enforce compliance. During its visit to the Willacy Detention Facility, the Inter-American

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[438] ICE, FOIA Reading Room, "Intergovernmental Service Agreements," available at: http://www.ice.gov/foia/readingroom.htm.

[439] National Immigration Law Center, ACLU of Southern California, Holland & Knight, *supra,* pp. 12-13.

[440] *Idem.*

[441] ICE, FOIA Reading Room, "Detention Center Statistics: Average Daily Population (ADP) for Fiscal Year 2009," available at: http://www.ice.gov/doclib/foia/dfs/avgdailypop_fy09.pdf. The Commission got to the 40% figure as follows: (201 centers listed with ADP of 10 during FY2009)-(47 centers of the Office of Refugee Resettlement (ORR) or other centers not under ICE's direct supervision) = 154 centers. (61 centers with a deficient rating during 2008 and 2009)/(154 centers) = 40% of all centers have a deficient rating. Following the same method, the Commission observes that of all the centers with ADP of one detainee or more during FY2009, ICE rated 45% as deficient in 2008, 2009 or both.

[442] ICE, FOIA Reading Room, "Detention Center Statistics: Average Daily Population (ADP) for Fiscal Year 2009," *supra*.

[443] ICE, "Semiannual Report on Compliance with ICE National Detention Standards – January-June 2007" (May 9. 2008), *available at:* http://www.ice.gov/doclib/pi/news/newsreleases/articles/semi_annual_dmd.pdf. The IACHR noted that it was unable to make a direct comparison between 2008 and 2009 because ICE has not published the statistics on those centers' compliance with detention standards for those calendar years.

[444] MPI, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?*, p. 17 (September 2009), *available at:* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

Commission observed that the multi-level contractual relationship prevented timely implementation of improvements in detention conditions.[445]

263. State authorities must be able to exercise proper control over contracts with private firms so that effective mechanisms are at the ready to ensure compliance with detention conditions that befit the status of immigrants. State officials must not lose sight of the fact that the work these private companies do is directly related to the human rights of persons who have been placed in the custody of the State.

264. The IACHR further observes that under the IGSA contracts to house immigration detainees, ICE generally pays a fixed *per diem* rate for every day that the immigrant remains in detention.[446] The daily per diem paid by ICE is not in any way contingent upon the local government's performance or the private subcontractor's compliance with performance-based detention standards.[447] The profits are the principal motive for local governments and private security firms to enter into contracts with ICE.[448] On the whole, any reform done to improve the degree of compliance with national detention standards will eat into the profit margin under those contracts. Therefore, neither local governments nor private security companies have any incentive to perform above the minimum required to avoid termination of the contract with ICE.

265. While the available information indicates that the contracted centers received an average *per diem* of $95 during FY2008,[449] many detention centers received less than the *per diem* rate, particularly those centers that housed the highest numbers of immigration detainees. According to ICE information, in FY2008, 20 centers with an average daily population of 200 or more detainees (accounting for approximately one third of the daily population in ICE detention during FY2008) received a *per diem* allowance of US$67.63.[450] The Etowah County jail in Alabama (an IGSA center), which had an average

[445] For example, the director of the subcontractor company that operates the center for Willacy County, Texas, observed several times during the visit that the company could ask the county representative to have the necessary improvements to the center done only on the basis of "good will". Consequently, although the facility was opened in 2006, it was not until July 2009 that it had a proper room where attorneys could meet with their clients.

[446] ICE, FOIA Reading Room, "Inter-governmental Service Agreements," *supra.*

[447] The Commission notes that in October 2007, DHS' Assistant Secretary of Homeland Security for ICE, Julie Myers, reported that 7 of ICE's CDF contracts contained a guaranteed quality surveillance clause. Without having the opportunity to review the CDF contracts, the Commission cannot determine whether the guaranteed quality surveillance clause is directly related to compliance with the detention standards at those centers. *See* Senator Edward Kennedy "Questions during the Nomination of Julie Myers for the post of Assistant Secretary, Immigration and Customs Control Service, Department of Homeland Security, p. 5 (October 3, 2007).

[448] *See, e.g.,* Boston Review, **"**A Death in Texas: Profits, poverty, and immigration converge**"** (November – December 2009), *available at:* http://bostonreview.net/BR34.6/barry.php; GEO Group, Press Releases, *available at:* http://phx.corporate-ir.net/phoenix.zhtml?c=91331&p=irol-news&nyo=0.

[449] *See* MPI, *DHS and Immigration: Taking Stock and Changing Course*, p. 54 (February 2009), available at: http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf. The IACHR found that FY2008 was the latest period for which complete information is available.

[450] ICE, FOIA Reading Room, "Detention Center Statistics: Average Daily Population (ADP) by Fiscal Year (2006-2008)," available at: http://www.ice.gov/doclib/foia/dfs/avgdailypopasof121208.pdf.

daily population of 352 detained immigrants during FY2008, received a *per diem* of US$35.12.[451] While the Inter-American Commission appreciates the fact that there are regional differences in cost of living, it is not clear how the detention centers under contract can provide adequate care and comply with national detention standards with such disparate *per diems.*

266. Similarly, the IACHR is troubled by the information on private contractors that operate several immigration detention centers, but are said to be making a considerable profit under this contractual arrangement.[452] The information that the Inter-American Commission has compiled suggests that ICE's private contractors might be making even higher profits to house immigration detainees. For example, the CCA, the largest company in the private prison industry,[453] reported that in calendar year 2008 it spent an average of US$33.25 a day to house each detainee.[454] However, the IACHR observes that in FY2008 ICE paid the CCA a per diem of US$64.47 and US$54.25 for two of the detention centers that CCA runs for ICE under the IGSAs –the *Eloy Detention Center* (Arizona) and *Stewart Detention Center* (Georgia).[455] The Inter-American Commission understands that some of the difference goes to pay state and local government agencies associated with these contracts. Even so, research done by Boston Review suggests that the local and state governments received between US$1 and US$2 of the *per diem* paid under these IGSAs.[456]

267. The IACHR is also disturbed by reports that CCA and other firms operating immigration detention centers are saving even more money by hiring the detainees –who are unauthorized migrants- to do basic maintenance work at the detention centers, paying

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[451] *Idem*. In the case of the Etowah detention center in Alabama, the IACHR has learned that only $3 of the $35.12 in per diem is earmarked to feed the detainees. However, the Inter-American Commission is concerned that the Etowah center may be spending significantly less to feed the immigration detainees. Under Alabama law, if the the chief of police can feed detainees under his supervision for less than the assigned *per diem,* the chief of police may pocket the difference as personal income. *See,* Alabama, Office of the Attorney General, Opinion on feeding prisoners in the county jail, Opinion No. 2008-062 (March 17, 2008), available at: http://www.ago.alabama.gov/pdfopinions/2008-062.pdf.

[452] New York Times, "Immigration Enforcement Benefits Prison Firms" (July 19, 2006), available at: http://www.nytimes.com/2006/07/19/business/19detain.html.

[453] According to its 2008 Annual Report, CCA earned $1.6 billion. *See* CCA, 2008 Annual Report," *available at:* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTg3MDJ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1.

[454] *See* CCA, 2008 Annual Report," *available at:* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTg3MDJ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1. The IACHR notes that CCA entered into contracts with federal, state and local agencies to house detainees of various types. The IACHR also notes that CCA receives a *per diem* that is considerably higher in the detention centers it owns and operates.

[455] ICE, FOIA Reading Room, "Detention Center Statistics: Average Daily Population (ADP) by Fiscal Year (FY06-FY08)," pp. 5, 12, *supra*. The IACHR observes that the average *per diem* received under 2008 contracts was $39.13. *See* CCA, "2008 Annual Report," p. 36 *available at:* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTg3MDJ8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1.

[456] Boston Review, "A Death in Texas: Profits, Poverty and Immigration Converge," *supra*. *See also,* New York Times, "City of Immigrants Fills Jail Cells With Its Own" (December 27, 2008) (where it is reported that another local government received between $2 and $3 under a similar contract), available at: http://www.nytimes.com/2008/12/27/us/27detain.html.

them US$1 a day.[457] So, even factoring in the business costs that are not directly related to the housing of detainees, CCA is likely earning over 20% on these two subcontracts. The Inter-American Commission observes that in many cases a considerable percentage of the *per diem* or daily rate is not being invested in the care and housing of detainees, with the result that the level of care is significantly lower than the *per diem* rates that ICE published initially indicated. At the Eloy Detention Center, the immigrant detainee death rate is higher than at any other detention center. ICE has established a direct link between some of these deaths and the routinely inadequate medical care that this detention center provides. Even so, this detention center consistently receives acceptable ratings with regard to the standards of medical care for detainees.[458]

268. Considering the challenges of contractually enforcing detention standards and of guaranteeing that the food and care of detainees are properly funded, the IACHR is very troubled by DHS' refusal to make legally enforceable regulations on the conditions of immigration detention.[459]

269. As an example of all the above concerns about ICE supervision, the Inter-American Commission observes that in January 2010 it was revealed that ICE officials concealed evidence of mistreatment and neglect of a number of immigrants who died while in immigration detention.[460] The New York Times pointed out that in the case of one detainee's suicide, the medical staff at the prison falsified the medication log to show that the detainee had received the proper medication.[461] However, the New York Times reports that the detainee was already dead at the time the medication was supposedly administered to him.[462] Regrettably, the IACHR has learned these are not the only cases of

[457] The Houston Chronicle reports that at Houston's Contract Detention Facility (CDF), CCA pays about 200 immigration detainees $1 a day to do jobs like cleaning and washing dishes, laundry, and maintenance of the facility and to work as a barber and help in the medical clinic, law library and commissary. *See* Houston Chronicle, "Feds pay illegal immigrants for jobs while in custody" (March 26, 2009), available at: http://www.chron.com/disp/story.mpl/politics/6345312.html. During its visits, the IACHR was told that this was common practice in many detention centers, including those in Arizona, and it observed immigration detainees working as barbers in the Willacy Detention facility in Texas.

[458] Between October 2003 and March 2010, nine immigration detainees died at the Eloy Detention Center. *See* ICE, FOIA Reading Room, "Detainee Deaths – October 2003 to March 2010," *available at:* http://www.ice.gov/doclib/foia/media-requests/detaineedeaths2003-present.pdf. In the wake of one of the detainee deaths at the Eloy facility, an ICE investigation found systemic problems in the delivery of medical services there and concluded: "The facility has failed on multiple levels to perform basic supervision and provide for the safety and welfare of ICE detainees." New York Times, 'Hurdles Shown in Detention Reform" (August 21, 2009) (contains links to ICE e-mails and internal documents), *available at:* http://www.nytimes.com/2009/08/21/nyregion/21detain.html.

[459] Communication from Jane Holl Lute, ICE Deputy Secretary, to Professor Michael J. Wishnie, and Paromita Shah, dated July 24, 2009, available at: http://www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf; New York Times, "U.S. Rejects Call for Immigration Detention Rules" (July 29, 2009), available at: http://www.nytimes.com/2009/07/29/nyregion/29detain.html.

[460] New York Times, "Officials Hid Truth of Immigrant Deaths in Jail" (January 10, 2010), available at: http://www.nytimes.com/2010/01/10/us/10detain.html. The article contains internal e-mail messages documented by ICE and available at http://documents.nytimes.com/deaths-in-immigration-detention#p=1.

[461] *Idem.*

[462] *Ibidem*.

cover-ups of negligent medical care.[463] Furthermore, in the cases reported by the New York Times in January 2010, ICE's internal investigations found that the medical staff of both institutions had committed serious violations of the medical standard for detention, among others; in both cases, however, ICE determined that no investigation or future action was necessary.[464]

270. Regarding ICE supervision and accountability, the United States informs in its observations to the draft version of this report that the agency has "appointed new leadership of the Office of Acquisitions, and instituted an Acquisitions Working Group which meets weekly to review contracting activity, develop new and consistent contracting templates, develop Statements of Work which reflect new detention reform principles and maximize collaboration with our Federal partners including the OFTD" and that the "collaboration includes using the new OFDT Electronic Intergovernmental Service Agreement (EIGSA) system which expedites Federal contracting".

271. The State also points out that ICE has followed through on its pledge to establish and train more than 40 new Federal Detention Site Monitors (DSMs) posted at each of its major detention facilities. The State adds that these monitors "on a consistent daily, weekly and monthly basis, inspect to ensure that our contractors are meeting their obligations, respond to and report on problems, and collaborate with contracting officers regarding cost adjustments as appropriate". Further, the United States informs that DSMs are provided with in-depth training on "civil rights considerations that arise in detention", including the following topics: Red Flags that Signal Victims of Human Trafficking; Effectively Managing a Culturally Diverse Detention Setting, Detainee Access to Counsel; Limited English Proficiency and Disability Considerations; Religious Practices; Women's Issues in Detention; The Violence against Women Act; Asylum Seekers in Detention; Preventing and Responding to Sexual Abuse of Detainees, and Mental Health.

272. As informed by the State, these monitors report weekly to ICE headquarters documenting the problems identified within the facilities and suggesting the corrective actions taken to solve them. The DSMS reports are then analyzed by the agency's new Detention Monitoring Council, which "engages ICE senior leadership to ensure remedial plans are implemented and to determine whether ICE should continue to use a particular facility".

273. In its response, the United States also adds:

> ICE agrees that transparency and oversight must guide our detention reform efforts. Since its establishment in August of 2009, the ICE Office of Detention Oversight (ODO) serves as an independent office within the agency, conducting inspections and investigating allegations. ICE has also conducted a comprehensive review of grievance procedures and designed a pilot project to ensure direct involvement of ICE officers in both formal and informal grievances.

[463] Washington Post, "E-Mails Show Attempt to 'Patch Up' a Case of Medical Negligence" (May 11, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1sidebar.html.

[464] New York Times, "Officials Hid Truth of Immigrant Deaths in Jail", *supra*.

ICE is also exploring the feasibility of posting all facility inspection reports and corrective plans of action on the Internet.

274. The Inter-American Commission considers that the position of the State described above constitutes a constructive form of addressing the problems and meeting its international obligations to protect the human rights of allpersons under its jurisdiction. The IACHR will continue to monitor the situation in its follow up to this report.

3. Medical care of immigration detainees

275. Concerning the detention conditions and medical care, the Inter-American Commission is troubled by the persistent complaints of improper medical care for immigration detainees.[465] The IACHR is alarmed by the growing list of immigrants who have died in detention, in many cases from health conditions that would have responded to proper, timely treatment.[466] The Inter-American Commission notes the investigative reporting done by the Washington Post in 2008 about the death of 30 immigration detainees under "questionable" circumstances and observes that the average age of the deceased detainees was just 36.[467]

[465] Washington Post, "Careless Detention: System of Neglect" (May 2008), *available at:* http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html; Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody* (February 2009), available at: http://www.fiacfla.org/reports/DyingForDecentCare.pdf; Human Rights Watch, *Detained and Dismissed: Women's Struggle to Obtain Health Care in United States Immigration Detention* (March 2009), available at: http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed; Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: the Heath Consequences of Detention for Asylum Seekers* (June 2003), available at: http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf.

[466] As of April 1, 2010, ICE had reported that there had been 110 deaths among immigration detainees since the agency was formed in October 2003. *See* ICE, FOIA Reading Room, "Detainees who died in ICE custody – October 2003 to March 2010," *available at:* http://www.ice.gov/doclib/foia/media-requests/detaineedeaths2003-present.pdf. *See also,* Washington Post, "Careless Detention: A Closer Look At 83 Deaths" (May 10, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/mapág.html; New York Times, "Immigration Agency's Revised List of Deaths in Custody" (April 3, 2009) (article includes links to a different list of deceased migrants), available at: http://www.nytimes.com/2009/04/03/nyregion/03detainlist.html; New York Times, "Documents Reveal Earlier Immigrant Deaths" (January 10, 2010), available at: http://www.nytimes.com/2010/01/10/nyregion/10detainside.html; New York Times, "Officials Hid Truth of Immigrant Deaths in Jail", *supra.* The Commission acknowledges the data presented by the State in which it compares mortality rates with other prisons and jails in the United States and shows that the mortality rate among immigration detainees is considerably less. However, the IACHR concurs with the analysis done by the Bellevue/NYU Program for Survivors of Torture to the effect that the ICE fact sheet presents a crude mortality rate, not a true mortality rate. "A genuine measure of mortality rate would be presented as x number of deaths per 100,000 detainees per year of detention." Furthermore, the Commission finds that the comparison of mortality rates does not necessarily shed light on the quality of medical care being delivered. *Compare* ICE, Fact Sheet: Mortality Rates at ICE Detention Facilities" (May 2008) with the Bellevue/NYU Program for Survivors of Torture, "Response to Immigration and Customs Enforcement Fact Sheet on Detainee Deaths" (letter dated May 12, 2008), both available at http://immigration.freedomblogging.com/files/2008/05/0108_001.pdf. The Commission is disturbed by a December 2009 report from the DHS OIG that implied that ICE's obligation with respect to the medical needs of immigration detainees was to ensure that they not be treated with "deliberate indifference." *See* DHS OIG, *The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees,* OIG-10-23, p. 2 (December 2009), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf.

[467] Washington Post, "Careless Detention: A Closer Look at 83 Deaths", *supra*.

276. There are two main causes of the chronically inadequate medical care of immigration detainees: a medical system designed for treatment of short-term emergencies; and the fact that the clinics of the detention centers are not adequately staffed and constantly up against the problem of retaining sufficient qualified personnel, due in part to the remote location of a number of the detention centers.

277. The IACHR observes that the medical and dental care of the detainees is regulated by the DIHS Medical Dental Detainee Covered Services Package.[468] The DIHS Medical Dental Detainee Covered Services Package clearly states that:

> The DIHS Detainee Covered Services Package primarily provides health care services for emergency care. Emergency care is defined as "a condition that poses an imminent threat to life, limb, hearing or sight." Accidental or traumatic injuries incurred while in the custody of ICE or BP (Bureau of Prisons) and acute illnesses will be reviewed for appropriate care.

278. While the name of the program seems to suggest that its coverage includes full medical and dental care, the Inter-American Commission notes that the document in fact contains 35 pages, most of which describe conditions that are not covered.[469] All the other medical conditions not included on the list and that do not constitute emergencies or dental issues, including pre-existing and chronic health conditions, are evaluated on a case-by-case basis for treatment.[470]

279. The IACHR also notes that the DIHS Medical Dental Detainee Covered Services Package can be inconsistent with the level of care described in the Immigration Detention Standard for Medical Care of 2000 and 2008.[471] The ICE/DRO Performance-based Detention Standard for Medical Care sets the following "Purpose and Scope" and "Expected Outcomes" for medical care:

> **Purpose and scope.** THIS DETENTION STANDARD ENSURES THAT DETAINEES HAVE ACCESS TO EMERGENT, URGENT, OR NON-EMERGENTN MEDICAL, DENTAL AND MENTAL HEALTH CARE THAT ARE WITHIN THE SCOPE OF SERVICES PROVIDED BY THE DIHS, SO THAT THEIR HEALTH CARE NEEDS ARE MET IN A TIMELY AND EFFICIENT MANNER.

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[468] *See* DIHS, "Medical Dental Detainee Covered Services Package" (2005), available at: http://www.icehealth.org/ManagedCare/Combined%20Benefit%20Package%202005.doc.

[469] See DIHS, "Medical Dental Detainee Covered Services Package", *supra*.

[470] *Idem*.

[471] *Compare* DIHS, ""Medical Dental Detainee Covered Services Package", *supra*, with ICE, 2008 Performance-based Detention Standards, Medical Care, available at: http://www.ice.gov/doclib/pi/dro/opsmanual/medical.pdf *and* http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf.

> **EXPECTED OUTCOMES.** The expected outcomes of this Detention Standard are:
>
> 1. Detainees will have access to a continuum of health and care services, including prevention, health education, diagnosis, and treatment. …[472]

280. The Inter-American Commission is concerned that the DIHS' focus of attention is on short-term, emergency care. The DIHS found that in FY2008, approximately 34% of the detained immigrants had some chronic health problem such as hypertension, diabetes and tuberculosis (in some cases undiagnosed).[473] The DIHS also estimates that between 2% and 5% of the detained population suffers from some serious or persistent mental illness and that as many as 16% may have required mental health services.[474] The IACHR notes that while the majority of immigrants are detained for relatively short periods, many others spend months and even years in detention.[475] The Inter-American Commission is therefore deeply troubled by the fact that the DIHS medical and dental package does not cover the needs of the detained immigrant population that ICE has in its custody.[476]

281. For example, the IACHR interviewed one patient who had been diagnosed with diabetes. She said that she had not received adequate, consistent treatment for her illness and that she almost lapsed into a diabetic coma as a result. The Inter-American Commission has learned that this is not an isolated case among detainees who suffer from chronic medical conditions. A June 2008 investigation done by the DHS OIG, which reviewed the medical histories of 20 detained immigrants who suffered from

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[472] ICE, ICE/DRO Operation Manual Performance Based National Detention Standards: Medical Care, available at: http://www.ice.gov/doclib/PBNDS/pdf/medical_care.pdf.

[473] Statement of James T Hayes, Jr., Director of the DRO, before the House Appropriations Committee, Subcommittee on Homeland Security of the U.S. Congress (March 3, 2009), available at: http://appropriations.house.gov/Witness_testimony/HS/James_Hayes_03_03_09.pdf: ICE, "DRO: Detainee Health Care" (May 7, 2008), available at: www.ice.gov/pi/news/factsheets/detaineehealthcare.htm.

[474] Washington Post, "Suicides point to gaps in treatment" (May 13, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html. The DIHS response to the Washington Post's questions concerning the percentage of detainees with mental illness is available at: http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif.

[475] DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations, supra,* p. 12; MPI, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities? supra,* pp. 16-17.

[476] The IACHR finds the examples that appear in the Washington Post and other articles to be alarming. *See, e.g.,* Washington Post, "Careless Detention Series" (May 2008) available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html; FIAC, *Dying for Decent Care: Bad Medicine for Immigration Custody, supra*; New York Times, "New Scrutiny as Immigrants Die in Custody" (June 26, 2007), available at: http://www.nytimes.com/2007/06/26/us/26detain.html; New York Times, "Ill and in Pain, Detainee Dies in U.S. Hands" (August 13, 2008), available at: http://www.nytimes.com/2008/08/13/nyregion/13detain.html; New York Times, "Documents related to the death of Ahmad Tanveer" (April 3, 2009), available at: http://www.nytimes.com/2009/04/03/nyregion/03detaindocs.html; New York Times, "Officials say detainee fatalities were missed" (August 18, 2009), *available at*: http://www.nytimes.com/2009/08/18/us/18immig.html; New York Times, "Lawsuits Renew Questions on Immigrant Detention" (March 31, 2010), available at: http://www.nytimes.com/2010/03/04/us/politics/04detain.html.

chronic medical conditions, found that only 11 of them were being treated.[477] Various reports by NGOs have corroborated these concerns about the lack of proper and consistent medical care for detainees with chronic health conditions like hypertension, diabetes and HIV/AIDS.[478]

282. Apart from the lack of medical care, the IACHR observes that dental care is also limited at a number of centers. During the Inter-American Commission's visits, it was learned that the Willacy Detention Facility and the Pinal County Prison did not have resident dentists.[479] A number of detainees interviewed by the IACHR complained of serious dental problems that were not properly treated during their detention. NGOs and detainees have said that the dental services provided are limited to extractions.[480] In effect, the Inter-American Commission observes that the Medical Dental Detainee Covered Services Package mainly covers treatments with anesthesia and/or extractions to relieve pain and suffering.[481]

283. Any service that cannot be initially delivered at the detention center's clinic has to be pre-approved at DIHS headquarters in Washington, D.C.[482] The detention center's medical staff is to file a Treatment Authorization Request (TAR) form, which is then checked by the DIHS' Managed Care Coordinators (MCCs), a team of nurses, for approval under the Covered Services Package.[483]

284. The IACHR has received conflicting information about the TAR process and believes there is evidence that it does not function properly.[484] The Inter-American

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[477] DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, p. 11 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

[478] *See, e.g.,* FIAC, *Dying for Decent Care: Bad Medicine for Immigration Custody, supra,* pp. 20-21, 24-27; Human Rights Watch, *Chronic Indifference:* HIV/AIDS Services for Immigrants Detained by the United States (December 2007), available at: http://www.hrw.org/en/reports/2007/12/05/chronic-indifference.

[479] In May, the ACLU reported that the South Texas Detention Center did not have a dentist at the time of its visit.

[480] *See, e.g.,* Florida Immigrant Advocacy Center, *supra,* pp. 20-21, 24-27; ACLU-New Jersey, *Behind Bars: The Failure of the Department of Homeland Security to Ensure Adequate Treatment of Immigration Detainees in New Jersey,* p. 11 (May 15, 2007), available at: http://www.aclu-nj.org/downloads/051507DetentionReport.pdf.

[481] *See* DIHS, "Medical Dental Detainee Covered Services Package," *supra*, p. 4.

[482] DHS OIG, *The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees,* OIG-10-23 (December 2009), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf.

[483] DHS OIG, OIG-10-23, *supra*, p. 9.

[484] A December 2009 report by the DHS OIG examined 30 months of TARs (October 2006 to March 2009) and found that the DIHS had authorized between 93% and 97% of the requests during that period. The DHS OIG also reported that between FY2005 and FY2008, the maximum average time to answer a TAR was just over 4 days. However, the report by the DHS OIG warns that coordination between the detention facilities and the MCCs on development of treatment plans and managing ongoing cases, particularly for detainees with health problems like cancer and chronic conditions, is non-existent. That same report notes that the MCCs are overwhelmed with the review of the TARs due to the chronic and severe shortage of staff. As of March 2009, the DHS OIG observed

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Commission hopes that the State will address these issues and make certain that persons with conditions that cannot be treated in the detention centers are able to receive proper and timely treatment.

285. The serious and chronic shortage of qualified medical personnel at the immigration detention centers, which has been documented, is unacceptable. The IACHR has received various statistics about the shortage of medical personnel, all of which show alarming outcomes: according to the May 2008 investigative reporting done by the Washington Post, during the first half of 2008 DIHS reported that between 20% and 30% of the posts for medical personnel in the immigration detention system were vacant.[485] According to the October 2007 report by the DHS OIG, CDF and SPC centers had an elevated vacancy rate as high as 36% for medical personnel.[486] According to the congressional testimony given by the ACLU, three major immigration detention centers in Texas (the Willacy Detention Center, Port Isabel SPC and the South Texas Detention Complex), which had an average daily population of 3,686 detainees, had a personnel shortage in excess of 40%, which included the posts of clinical director, physicians and management positions.[487]

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that only two MCCs were reviewing all the TARs from the immigration detention system, approximately 850 requests weekly.

In contrast to the analysis presented in the government reports, a series of articles published in the Washington Post in May 2008 on the health care of immigration detainees concluded that the government had used the TAR system as a way to eliminate high-cost treatment for immigration detainees. The Washington Post cites an internal DIHS document titled "TAR cost savings based on denials," which shows that during FY2006, the TARs saved the DIHS close to $1.4 million in medical costs.

The articles that ran in the Washington Post also reported on frustrations with the TAR system, including a letter from the Deputy Warden of the York County Prison complaining that DIHS had set up an "elaborate system that is primarily interested in delaying and/or denying medical care to detainees." The Commission notes that the medical staff of the centers it visited registered no complaints regarding the TARs. Because it did not have access to the 3-7% of TARs that are denied each year, the Commission was unable to reach any conclusion as to whether the TARs reflect a systematic tendency to deny requests for high-cost medical care. See, DHS OIG, OIG-10-23, supra, pp. 4, 5, 9, 10 and 11. Washington Post, "Careless Detention: In Custody, In Pain" (May 12, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d2p1.html. A link to the document titled "TAR cost savings based on denials" is available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d2p1.html; and link to the Day Two documents, available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/documents.html#day2. The Washington Post also published an e-mail from a group of nurses who resigned from the Eloy Detention Center, in part because the patients with mental illnesses were not being given their medications as part of a cost-savings policy.

[485] Washington Post, "Careless Detention: System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, the Detainees in Their Care Often Pay a Heavy Cost" (May 11, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html.

[486] DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, p. 33 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

[487] ACLU, Written Statement for a Hearing on "Problems with Immigration Detainee Medical Care," submitted to the House Judiciary Committee on Immigration, Citizenship, Refugees, Border Security and International Law of the U.S. House of Representatives (June 4, 2008), available at: http://www.aclu.org/files/images/asset_upload_file933_35512.pdf.

286. During the Inter-American Commission's visit to the Willacy Detention Center, the medical director reported that 12 of the 29 medical posts were vacant, that she was the only physician on staff and that she worked a four-day week, on 10-hour shifts. This detention center was housing 1,358 detainees on the day of the IACHR's visit. Similarly, the Pinal County Prison, which housed 544 immigrants on the day of the Inter-American Commission's visit, reported that it had only one resident physician on its staff. The IACHR has also received information to the effect that the pharmaceutical services at the detention centers are understaffed. The medical director at the Willacy Center commented that the center's remote location made it difficult to keep a qualified team on board.[488] The Inter-American Commission is deeply concerned by the fact that scarcity of medical personnel is such a frequent problem at the centers where ICE houses the majority of the detained immigrants and that the detention centers are located in such remote areas.[489]

287. Many detainees and former detainees that the IACHR was able to interview complained because on several occasions they had to wait for days, and even as much as a week before receiving medical treatment. A December 2006 report by the DHS OIG found that at three centers inspected, 41% of the non-emergency medical requests were not addressed promptly.[490] The Washington Post reported that in January 2008, the South Texas Detention Complex had a backlog of 2,097 medical appointments.[491]

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[488] The June 2008 report of the DHS OIG also found that the South Texas Detention Complex (FY2008, ADP of 1,470 detainees) had 22 vacant posts for medical staff. The staff itself believes this is due to the fact that the center is located in a rural area. *See* DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, p. 33 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf.

[489] For example, the South Texas, Eloy and Willacy detention centers are three of the four largest, each one having an average daily population of 1,400 detainees in FY2008.

A nurse who worked in one of the largest immigration detention facilities told the Commission that the medical personnel who worked there often had to do the required medical checkups on incoming detainees very quickly and she worried that the staff might overlook a diagnosis or symptoms suggesting a contagious illness. Similarly, the Washington Post carried an e-mail from a nurse in which she resigned from the Eloy detention center (ADP of 1,457 detainees in FY2008) in part because of the severe shortage of nurses. *See*, Washington Post, "Careless Detention: In Custody, In Pain" (May 12, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d2p1.html. A June 2008 report by the DHS OIG found that at two centers studied, 17% of the detained immigrants did not receive the routine incoming detainee checkup promptly. *See* DHS OIG, *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities*, OIG-08-52, p. 33 (June 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf. A March 2009 report by the DHS OIG concluded that 20% of the immigrants detained at the five detention centers that it investigated did not receive the incoming detainee medical checkup on time. *See* DHS OIG, "*Immigration and Customs Enforcement's Tracking and Transfers of Detainees*," OIG-09-41, pp. 9-10 (March 2009), *available at:* http://trac.syr.edu/immigration/library/P3676.pdf. The Willacy detention center has had outbreaks of chickenpox and H1N1 flu. During the Commission's visit, 6 pods of 50 detainees each were in quarantine for an outbreak of the H1N1 flu.

[490] DHS OIG, *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities*, OIG-07-01, p. 36 (December 2006), available at: http://trac.syr.edu/immigration/library/P1598.pdf.

[491] Washington Post, "Careless Detention: In Custody, In Pain" (May 12, 2008), available at: http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d2p1.html.

288. The Inter-American Commission is troubled by the fact that ICE continues to expand its immigration detention system despite the fact that it does not appear to have sufficient medical personnel to meet the needs of the new incoming detained immigrants. For example, the IACHR learned that when ICE opened the Jena Detention Center (Louisiana) in 2007, with a current capacity of 1,162 detained immigrants, [492] it did not have a medical director, a staff doctor, a psychiatrist or dental specialist.[493] The Inter-American Commission must stress the point that if the State acts in such a way as to increase its immigration population in detention, it ought to comply with its obligation to meet their basic medical needs. This is the State's obligation under Article XXV of the American Declaration, the Inter-American Principles on Detention and under other international standards and principles mentioned in section III of this report.

289. Apart from these concerns, the IACHR also observes that recruitment and retention of outside health professionals to treat the persons whom ICE detains is also problematic. A December 2009 study by ICE OIG identified three factors contributing to this problem. The first is the fact that a number of detention centers are located in rural areas, which limits the number of qualified medical personnel. The second is the fact that outside health professionals are often concerned that their other patients might feel uncomfortable by the ICE requirement that immigration detainees be kept handcuffed or shackled when taken to their outside medical appointments. Finally, the outside health professionals have had difficulty filing claims with the DIHS for prompt payment.[494]

4. Mental health care of detained immigrants

290. While the condition of basic medical care is very alarming, the Inter-American Commission has learned that the mental health care of immigration detainees is even worse. As previously noted the DIHS estimates that anywhere from 2% to 5% of the detained immigration population suffers from serious and persistent mental illness and that as many as 16% of the population may have required mental health services.[495] However, in May 2007, the head of DIHS' Mental Health Unit stated that the ratio of mental health specialists to mentally ill immigrant detainees is 1 to 1,142.[496] To put the magnitude of the problem into perspective, the IACHR has learned that the percentage of

[492] Human Rights First points out that the Jena detention center is located in a rural area, approximately 140 miles from Baton Rouge and 228 miles from New Orleans. *See* Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, pp. 4, 52 (April 2009), available at: http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

[493] Washington Post, "Careless Detention: System of Neglect" *supra*.

[494] DHS OIG, *The U.S. Immigration and Customs Enforcement Process for Authorizing Medical Care for Immigration Detainees,* OIG-10-23, pp. 12-14 (December 2009), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-23_Dec09.pdf. For example, during the first six months of FY2009, 38.5% of the medical claims filed by outside medical personnel for ICE detainees were denied; between October 2007 and March 2009, ICE paid an average of US$6,115 monthly in interest on past due amounts.

[495] Washington Post, "Suicides point to gaps in treatment" (May 13, 2008), available at: http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif. (DIHS' reply is attached to the newspaper's questions)

[496] Washington Post, "Suicides point to gaps in treatment", *supra.*

staff to treat detainees with mental health problems in the Federal Bureau of Prisons and in the prisons for patients with mental illnesses is 1 to 400 and 1 to 10, respectively.[497] In response to the Washington Post's investigative reporting, ICE acknowledged the severe shortage of mental health personnel to treat immigrant detainees and promised that by October 2008 it would have its ratio up to something like that in the Federal Bureau of Prisons.[498] The Inter-American Commission has received no information about whether the ICE achieved that promised goal.

291. The IACHR has learned that the constant scarcity of mental health medical personnel is worst in a number of the largest immigration detention centers:

- Northwest Detention Center (FY2008, Average Daily Population 967) – one full-time psychologist.[499]

- South Texas Detention Complex (FY2008, Average Daily Population 1,470) – 0 resident psychiatrist or psychologist[500]

- Willacy Detention Center (FY2008, Average Daily Population 1,430) – 2 psychologists and 1 psychiatrist part time.

292. Even more disturbing is the fact that ICE does not have specially designed facilities to address the mental health needs of detained immigrants. Due to the absence of an environment appropriate for treatment, the Inter-American Commission has learned that various immigrant detainees with mental illnesses spend a significant portion of their time in solitary confinement ("administrative segregation") and are allowed out of their cells for an hour every day.[501] The condition of many of these detainees deteriorates in solitary confinement, which also delays their immigration proceedings due to competency concerns.[502] As will be analyzed in the section titled "Discipline", which appears below,

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[497] *Idem*.

[498] ICE, "Washington Post Detainee Health Care Series – Day 3" (May 2008), available at: http://www.ice.gov/pi/wash_post_myth_fact3.htm.

[499] Seattle University School of Law, *Voices from Detention: a Report on Human Rights Violations at the Northwest Detention Center,* p. 48 (July 2008), available at: http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf.

[500] ACLU, Written Statement for a Hearing on "Problems with Immigration Detainee Medical Care," submitted to the House Judiciary Committee on Immigration, Citizenship, Refugees, Border Security and International Law of the U.S. House of Representatives (June 4, 2008), available at: http://www.aclu.org/files/images/asset_upload_file933_35512.pdf.

[501] By ICE's detention standard for "Special Management Units", "[a] detainee may be placed in Administrative Segregation when the detainee's continued presence in the general population poses a threat to life, property, self, staff or other detainees, for the secure and orderly operation of the facility, for medical reasons or other circumstances […]", *see* ICE, 2008 Performance-based Detention Standards, "Special Management Units," available at: http://www.ice.gov/doclib/PBNDS/pdf/special_management_units.pdf.

[502] In a working meeting held in March 2009, the Commission received information about the tragic circumstances of a number of immigrants detained with a mental illness or disorder. *See* American University International Human Rights Law Clinic, American University Disability Rights Law Clinic, and the CAIR Coalition, Documents for the Working Meeting during the 134th Session of the Commission, *Invisible Migrants: Mental Illness*

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during its visits to the detention centers in Texas and Arizona the IACHR was alarmed to receive information about the use of solitary confinement for mentally ill detainees. The Inter-American Commission must emphasize that solitary confinement takes a terrible mental and physical toll on the person, and would remind the State that solitary confinement must be used as a measure of last resort, for very limited periods of time and subject to judicial review.[503]

293. Apart from the detainees suffering from serious and persistent mental illnesses, the IACHR would also draw the State's attention to the psychological and mental impact that detention has on asylum seekers and other victims of persecution, including victims of domestic violence. Given this situation, the State has an obligation to address the serious effects that deprivation of liberty can have on certain vulnerable groups.[504]

294. In response to the concerns of the Inter-American Commission regarding this issue, the United States responds that "ICE has made clear that providing individuals in ICE custody with sound health care and access to appropriate medical services is a guiding principle of our reform". Accordingly, when the reforms were announced the agency "pledged to hire a medical expert to provide an independent review of medical complaints and denials of requests for medical services" and in January 2010, the ICE Division of Immigration Health Services (DIHS) "assigned regional clinical directors to provide ongoing case management of complex medical cases and to expeditiously review denials of requests for medical services". The State adds that ICE also committed to devising and implementing a medical classification system to support immigration detainees with unique medical or mental health needs, and that a new Medical Classification Instrument was developed in close collaboration with members of its non-governmental organization (NGO) Medical Advisory Group. ICE indicates that the new Medical Classification Instrument "is expected to inform agency decisions regarding appropriate housing for detainees with medical or mental health needs" and that to date it has completed a draft survey instrument that will soon be sent to field sites for review and comment. The response of the United States also informs that ICE hopes to initiate field testing of the survey tool soon and that it anticipates that the classification system will be implemented system-wide by mid-2011.

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and the U.S. Immigration System (March 2009) (on file with the Commission); *see also* Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine for Immigration Custody* (February 2009), available at: http://www.fiacfla.org/reports/DyingForDecentCare.pdf.

[503] IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, *supra*, Principle XXII(3).

[504] *See, e.g.,* Physicians for Human Rights & Bellevue / NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers,* p. 5 (June 2003), available at: http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf. This study found that in a survey of 70 detained asylum seekers, 86% were suffering from clinical depression, 77% were suffering from anxiety, and 50% from post traumatic stress disorders (PTSD). In all, 70% of the detained asylum seekers said that their mental health had deteriorated during their detention.

See also, USCIRF, *Report on Asylum Seekers in Expedited Removal: Volume II,* pp. 178-202 (February 2005), available at: http://www.uscirf.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf. The USCIRF also noted that 14 of the 19 centers had no mental health services.

295. The State adds:

ICE has also made substantial progress on our coordination efforts with DHS CRCL to systemize and expedite the medical complaints review process. CRCL has been an active participant in ICE working groups focused on revisions to the PBNDS on Medical Care and related standards, the development of the medical classification system, and the risk assessment tool. ICE consults regularly with CRCL on a range of issues related to medical and mental health care.

As an example of this collaboration, ICE and CRCL jointly hosted a mental health care forum in September 2010, in which we brought together NGO partners, mental health experts, and representatives of numerous government agencies to discuss important mental health issues related to immigration detention. Regarding specific medical complaints, complaints and inquiries to CRCL about significant medical issues are raised directly to ICE leadership to ensure these matters are promptly reviewed. Recently, CRCL and ICE developed new processes to promote collaboration in mortality reviews. Finally, CRCL will have a role in training programs for medical personnel and other key personnel.

ICE has developed robust training programs for medical staff regarding the potentially complex medical and mental health issues of detained immigrants. For example, senior ICE clinical directors participated in the National Commission on Correctional Health Care (NCCHC) medical directors' boot camp and the NCCHC mental health conference in July 2010 in preparation for further development of training programs for medical staff to occur over the course of the coming year. Also, as part of the drafting process for the 2010 PBNDS, all medical care standards were reviewed and updated in consultation with our NGO Advisory Groups. During this process, we placed particular focus on mental health issues and the development of new Women's Medical Care Standard to address the unique medical needs of the female detainee population.

ICE agrees that access to mental health care is a critical element in providing humane conditions of confinement. The ICE Mental Health Program provides direct patient care for acute and chronic conditions, training of Public Health Services and ICE staff on mental health issues, and other mental health related matters as requested by ICE. The ICE Mental Health Program provides, among other services: mental health screenings and evaluations; consultation services; referrals for psychiatric evaluations, psychotropic medications, and inpatient psychiatric treatment; forensic psychiatric evaluation; mental health treatment at designated facilities, development of continuity of care plans, identification of substance abuse difficulties, and stabilization of individuals identified as victims of sexual assault.

The goal of this program is to have multi-disciplinary mental health teams composed of psychiatrists, psychologists, and/or social workers to provide mental health services to ICE detainees across the nation, either directly or through our expanding telehealth system. The Mental Health Services program works closely with counterparts in other mental health facilities and providers in the community. The DIHS Mental Health Services program oversees the clinical aspects of the mental health treatment in IGSAs and shelters that house detainees. This program also supports other needs requested by ICE such as emergency mental health consultations, facilitating mental health services,

> responding to Freedom of Information Act requests, and coordination with courts and community based agencies.
>
> The ICE Mental Health Program has a nationwide tracking system that closely monitors severely mentally ill detainees and ensures that all their special needs are met. We have a Children and Families Residential Program in Berks, Pennsylvania, as well as a residential program exclusively for female detainees in Taylor, Texas. Both residential centers are equipped with specialized staff to provide treatment programs specifically focused on delivering services to these targeted populations.

296. The Inter-American Commission thanks the State for the information, which reveals a series of specific initiatives to guarantee the right to mental health of persons in immigration detention. These actions are especially important, since persons with mental disabilities in detention are an especially vulnerable group, and as indicated in the relevant section of this report, the Inter-American Principles and Best Practices of Persons Deprived of Liberty spell out specific requirements on involuntary seclusion and solitary confinement in these cases.

5. Food services

297. During its visits to the Pinal County Prison ("Pinal") and the Willacy Detention Center ("Willacy") the Inter-American Commission received numerous complaints about the quality and quantity of food and water. A number of detainees had reported losing a considerable amount of weight while in detention. The immigration detainees complained that they had only 20 minutes to finish their food. The lunch on the day of the IACHR's visit to Pinal consisted of a piece of bologna, two pieces of white bread, steamed vegetables and milk. The Inter-American Commission interviewed one of the detainees at Pinal and was told that for the two months prior to the visit, they had consistently been served moldy bread. In the pods visited at Pinal, the IACHR observed that there were no drinking fountains or other sources of water except for the sinks in the bathrooms.

298. The reports the Inter-American Commission received about the food service at Willacy were equally disturbing. All the detainees interviewed in a pod complained of not receiving sufficient food. A former nurse told the IACHR that while she worked at Willacy, prisoners were frequently given antacids to calm the hunger pains. The Inter-American Commission also observed that each pod of cells, which represented 50 detainees, received 5 gallons of potable water (approximately 1.5 glasses of water per detainee), which was replaced every day. There was also a water source in each cell, but the water did not taste good.

299. By contrast to Pinal and Wallacy, the IACHR observed that the food at the Florence SPC (the ICE property that the delegation visited) seemed to be of a better quality. Also, detainees were allowed to leave their dormitories to eat in the cafeteria.

300. The Inter-American Commission observes that the meals provided by the facility are the only dietary alternative for the immigrant detainees. While snack food is

available from small vendors at a number of the detention centers, many immigrant detainees have no money to be able to buy food to supplement the facility's diet. One former detainee whom the IACHR interviewed said that indigent detainees sometimes sell their food to other detainees in exchange for money to purchase telephone cards or other small items from the commissary at the facility.

301. Although the Inter-American Commission has been unable to get a complete picture of the food service at ICE detention centers, it is concerned about the significant deficiencies in the quantity and quality of the meals that detainees receive at the various facilities.[505] The IACHR reminds the State that once the immigrants are detained it is the State's obligation to make certain that all detainees receive adequate food.

302. The response of the United States with respect to food services is the following:

> ICE notes Commission concerns regarding allegations of insufficient food, water, and the use of antacids to calm hunger pains. Please be assured that these are not tolerated practices and detention services managers have been tasked to review facilities to ensure they are all in compliance with stated ICE food service policies. The Commission should be aware that food services in ICE detention centers ensure that detainees are provided a nutritionally balanced diet that is prepared and presented in a sanitary and hygienic food service operation. The Commission can be assured that all nutritionally balanced diets are reviewed at least quarterly by food service personnel and at least annually by a qualified nutritionist or dietitian. Food service at immigration detention centers also offers special diets and ceremonial meals for detainees whose religious beliefs require adherence to religious dietary laws.

303. The Inter-American Commission welcomes the information supplied by the State with respect to the causes of concern identified in this report. The IACHR is especially encouraged by the commitment expressed by the State to ensure appropriate food services, including special cultural or religious needs.

6. Living conditions

304. All the adult detention centers that the Inter-American Commission visited operate as prisons (with varying levels of security). For the IACHR, the living conditions at the Pinal and Willacy detention centers are particularly disturbing.

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[505] For other reports on the quantity and quality of ICE food services, *see e.g.,* Seattle University School of Law, *Voices from Detention: a Report on Human Rights Violations at the Northwest Detention Center,* pp. 50-74 (July 2008), available at: http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf; ACLU—Massachusetts, *Detention and Deportation in the Age of ICE,* pp. 44-45 (December 10, 2008), available at: http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf; New Orleans Workers' Center for Racial Justice, *Detention Conditions and Human Rights under the Obama Administration: Immigrant Detainees Report from Basile, Louisiana*, p. 26 (2009), available at: http://www.nowcrj.org/wp-content/uploads/2009/07/detention-conditions-report.pdf.

305. According to the information received, in 2006 Pinal County added a wing to the existing prison, in anticipation of concluding an IGSA with ICE to house immigration detainees. Despite this stated purpose, the Pinal wing that houses immigration detainees functions as a high-security prison. The cellblocks where the immigration detainees are housed consist of two floors with adjacent cells sharing a rear wall (and to which detainees are reportedly confined from 8:30 p.m. to 7:00 a.m.) and an open area out front with tables and white benches bolted to the floor. The Inter-American Commission observed that the cells had no windows or good ventilation. Except for one hour for recreation and the chance to go to the legal library for an hour, detainees never leave the cellblock. It was apparent to the IACHR delegation that the immigrant detainees spend too much time with nothing to do. Finally, the bathrooms in the cells had a mildew buildup and detainees reported that the toilets and sinks often do not work.

306. The living conditions at Willacy are a source of particular concern, especially because of the limited space. The Willacy Detention Center consists of 10 semi-permanent and totally-enclosed Kevlar sprung housing structures that house the male detainees, and a permanent structure on the back side of the detention center where the female detainees are quartered. Each sprung housing structure contains four "pods" and each pod houses 50 detainees in a kind of dormitory. Each pod measures approximately 3500 square feet; in others words, a pod is about three quarters of the size of a regulation basketball court.[506] The Inter-American Commission observes that the pods in the Florence SPC (which are also dormitory-style) and at the Willacy center were similar in size. However, at the Florence SPC, ICE housed 36 detainees in that space, rather than the 50 housed at Willacy. The IACHR also observed that every pod had a window and that the seating area was inadequate for the number of detainees. Many male detainees protested about the low temperature in the pods. A nurse who worked at Willacy said that a number of detainees were treated for respiratory infections because the pods were kept at such a low temperature. The Inter-American Commission also learned that Willacy has had several outbreaks of infectious illnesses. During the IACHR's visit, 6 pods were in quarantine, which meant that the detainees stayed there for 7 days. The living conditions of female detainees at Willacy were better than those of the male detainees, but the dormitories of the female detainees did not have windows.

307. By contrast to Pinal and Willacy, living conditions at the Florence SPC center are considerably better. The area for the dormitories was less crowded and detainees had a separate room with ample sunlight, vending machines, televisions with private headphones and activities to occupy their time. Although conditions are still too restrictive for civil detainees, the Inter-American Commission did notice the differences in the IGSA centers and the ICE-owned center, which supports the observations made with respect to the deficiencies of the oversight mechanisms.

[506] The description of the construction of the Willacy Detention Center states that each sprung housing structure is approximately 70 x 200 feet (14,000 sq. feet). Thus, each pod is approximately 3,500 square feet, or 70 square feet per detainee. A regulation basketball court, to National Basketball Association (NBA) standards, is 4,700 square feet. *See* ICE, FOIA Reading Room, Inter-Governmental Service Agreements, "Willacy County, Texas" DROIGSA-06-0003, p. 13, *available at:* http://www.ice.gov/doclib/foia/isa/willacycountytx.pdf; NBA, "Rule No. 1 – Court Dimensions and Equipment," *available at:* http://www.nba.com/analysis/rules_1.html?nav=ArticleList

7. Telephone access

308. The IACHR observes that given the high number of immigrant detainees in centers located in rural areas, it is essential that reliable, low-cost telephone access be available so that they are able to contact their attorneys, consulates, family members and friends. Under ICE detention standards, detainees are supposed to be able to make free calls to free legal service providers, national consulates and the no-charge telephone line to file grievances with the DHS OIG.[507] The detention centers have an obligation to keep a current list with the numbers of the consulates and free legal service providers. Finally, detainees are to have reasonable and equitable access to reasonably priced telephone services.[508]

309. However, ICE's history when it comes to providing free, low-cost telephone service to immigrant detainees has been deplorable. In January 2004, DHS signed a "no cost" contract with Public Communications Services, Inc. ("PCS").[509] Under the "no cost" contract, PCS agreed to provide free telephone service to enable immigrant detainees to call their attorneys, consulates and the OIG grievance line, in exchange for exclusive rights to sell debit telephone cards to the detainees and charge for collect calls.[510] Under the contract, PCS was required to deliver reports on call volume and maintenance, but not on PCS' earnings from the detainees' calls.[511] Furthermore, the PCS contract does not contain any penalties for inadequate connectivity, excessive charges or other problems,[512] despite the fact that with this system the company has no incentive to provide quality service. The May 2008 report of the DHS OIG revealed that a number of detention centers have signed collateral agreements with PCS, without informing ICE. These are commission-and revenue-sharing agreements under which PCS pays the operators a percentage of the debit cards sold at their facilities.[513] The GAO's 2007 report found that some centers received high commissions ranging from 20% to 60%.[514]

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[507] *See* ICE, ICE/DRO, Operation Manual Performance-based Detention Standards, "Telephone Access," p. 1 (2008), available at: http://www.ice.gov/doclib/PBNDS/pdf/telephone_access.pdf; ICE, Detention Standard, "Telephone Access", p. 2 (2000), available at: http://www.ice.gov/doclib/pi/dro/opsmanual/teleacc.pdf.

[508] *See* ICE, ICE/DRO, *supra*, p. 1; ICE, Detention Standard, "Telephone Access", p. 1 (2000), available at: http://www.ice.gov/doclib/pi/dro/opsmanual/teleacc.pdf.

[509] DHS OIG, Review of Immigration and Customs Enforcement Detainee Telephone Services Contract, OIG-08-54, p. 1 (May 2008), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-54_May08.pdf.

[510] DHS OIG, OIG-08-54, *supra*, p.2.

[511] *Idem*.

[512] DHS OIG, OIG-08-54, *supra*, pp. 2-3.

[513] DHS OIG, OIG-08-54, *supra*, p.4.

[514] GAO, *Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance*, GAO-07-875, p. 17 (July 2007), available at: http://www.gao.gov/new.items/d07875.pdf.

310. The Inter-American Commission notes that the DHS OIG and the GAO investigations spoke in alarming terms about the low completed call rate[515] on the *pro bono* telephone system, and that NGOs and detainees have reported very high rates charged for telephone calls.

311. As for the effects that the poor connectivity problem can have on detainees' contacts with legal aid services, the IACHR notes with concern that a DHS OIG investigation in December 2006 of one IGSA center in New Jersey found that the telephone line could not make a connection with 50 of the 63 consulates (79%) that were dialed, and could not establish a connection with any of the 12 legal aid services that were called.[516] Similarly, a July 2007 report by the GAO found systemic problems with the telephone connection to the *pro bono* legal services at 16 of the 17 facilities that used the PCS services.[517] Likewise, at 12 of the 17 facilities access to the OIG grievance line was limited or blocked.[518] The ICE contracting officer assigned responsibility for the PCS contract said that oversight of the PCS' performance was limited.[519]

312. During its visits, the Inter-American Commission tried to make calls in the Pinal and Willacy detention centers to reach *pro bono* legal services and consulates. In Pinal, the IACHR and a number of representatives from the center tried for 30 minutes to use the free telephone service and never managed to complete a call. The Inter-American Commission noted that the telephone service only allows one to choose between a collect call and using a telephone card, without any clear instructions as to how to make a free call.[520] At Willacy, the IACHR had similar problems using the free telephone service.[521]

313. Under a May 2009 contract with Talton Communications, ICE has made some improvements. However, the Inter-American Commission is still concerned because the problems with the telephone service for the detainees seem to persist,[522] especially as

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[515] GAO, GAO-07-875, *supra*, p. 15. In FY2006 the GAO reported that the percentage of free calls connected through the PCS system never rose above 74% and that in the summer of 2006 it was just 35%.

[516] DHS OIG, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities, OIG-07-01, p. 25 (Dec. 2006), available at: http://trac.syr.edu/immigration/library/P1598.pdf.

[517] GAO, GAO-07-875, *supra*, p. 11.

[518] *Idem.*

[519] GAO, GAO-07-875, *supra*, p. 16.

[520] Subsequent to the visit the Commission received a couple of collect calls from the Pinal detainees. In both cases, the quality of the connection was so poor that the detainees' voices were difficult to hear.

[521] In an attempt to call one of the legal service providers, the service said that the call could not be completed without prior approval of the reverse charge or a debit card.

[522] Like the PCS contract, the contract with Talton is another "no cost" contract with ICE. Therefore the government has no way to seek to recover money for damages caused, with a view to enforcing the terms of the contract. The Commission observes, however, that Talton has to set aside 50% of the revenues earned from the sale of debit cards and collect calls, and then place that money in an escrow account (under third-party custody); it will only receive the money if it passes the semi-annual performance review conducted by ICE to determine if the contractor is performing in accordance with the contractor's performance work statement, schedule/transition plan and Quality Assurance Surveillance Plan. While ICE has published parts of the Talton contract at its website, Talton has failed to include the Quality Assurance Surveillance Plan. For that reason, the

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regards ICE's supervisory role and the lack of personnel qualified to exercise that supervision.

314. A January 2010 report of the DHS OIG found that the ICE Contracting Officer's Technical Representative (COTR) assigned to oversee the telephone contracts had not reviewed the financial-related data.[523] That Contracting Officer's Technical Representative commented that

> it is in the service provider's best financial interest, in order to profit from the contract, to ensure that phones are working and that detainees are making as many collect and debit card calls as possible. For these reasons, the COTR said that the contract is "self-policing" and therefore the current level of oversight being provided is sufficient.[524]

315. The IACHR concurs with the DHS OIG's finding that it is in the contractor's best interest that detainees should make as many paid calls as possible, which is precisely why ICE should monitor the telephone service to make certain that the free system functions properly and that the charges for paid services are correct and reasonable.[525] The IACHR's concern is that the report in question finds that none of the ICE officers responsible for the contracts had sufficient expertise to conduct the type of analysis that would ensure that Talton abides by the terms of the contract.[526]

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Commission is unable to fully assess whether the contract is an improvement over the PCS contract. Based on the solicitation for bids to ICE, the "Statement of Objectives" must be included in the "Performance Work Statement" in the contract and the contractor is required to provide an internet tool that enables ICE to monitor the functioning of the free telephone system; the contractor is also required to provide the detention centers with cards for free calls should the free telephone system not be in working order. Furthermore, the solicitation contract stipulates that the contractor is required to check that the free numbers provided by ICE are valid and current.

The IACHR notes that the contract with Talton requires that the contractor provide ICE with access to a database containing all the telephone numbers of the detainees, revenues and refunds; it also requires Talton to deliver monthly reports with that information. ICE has prohibited revenue-sharing agreements with third parties that help sell the debit cards and the connection costs. Finally, the contract also provides that Talton shall have a refund policy for all incorrectly charged phone calls and provide detainees with the balance on their calling cards upon their release.

The above is based on: ICE, FOIA Reading Room, Contracts, "Talton Communications – HSCEDM-09-C-00009," available at: http://www.ice.gov/doclib/foia/contracts/hscedm-09-c-00009taltoncommunications.pdf; and Federal Business Opportunities, "ICE Detainee Telephone System," Solicitation No. HSCEDM-09-R-00009, Attachment C, *available at:* https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=9742c78fb1f84367872bbcba39a27487&_cview=1.

[523] DHS OIG, *Immigration and Customs Enforcement Management Controls over Detainee Telephone Services*, OIG-10-36, p. 4 (January 2010), available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-36_Jan10.pdf.

[524] DHS OIG, OIG-10-36, *supra*, p. 4.

[525] *Idem.*

[526] *Idem.*

316. The Inter-American Commission underscores the fact that ICE's August 2009 contract with Talton Communications to provide telephone service to the majority of the detention facilities that ICE uses, is the sole enforceable instrument governing the delivery of telephone service to immigrant detainees, rather than the detention standard on "Telephone Access."[527]

317. Finally, the IACHR also has certain concerns regarding a number of the restriction authorities that ICE demanded for its current telephone contract. The Inter-American Commission notes that ICE uses a system that automatically cuts off the calls when the receiving end tries to initiate a 3-way or conference call.[528] While under certain circumstances this might be a reasonable restriction, the IACHR notes that various legal services providers serve as facilitators to put detainees in contact with private attorneys that can offer them free legal counsel, but they have not been included on the ICE list of *pro bono* defenders. Consequently, when a detainee calls the legal services provider, the latter must create a 3-way call with the attorney on the specific case. The Inter-American Commission notes that ICE should be able to allow 3-way calls based on a case-by-case check of the telephone number. It therefore urges ICE to allow such a mechanism for all telephone numbers in the *pro-bono* services system. The IACHR also notes that the contract limits each detainee's telephone access to 10 pre-approved numbers.[529] The Inter-American Commission is worried about this restriction on the detainees' liberty, which blocks certain calls for no good or verifiable reason.

318. Regarding the general issue of telephone communications in immigration detention facilities, the State informs:

> ICE already provides detainees with free calls to pro-bono legal service providers, consular officials, and DHS Office of the Inspector General. In addition to these services, the 2010 PBNDS includes a revised Standard on Telephone Access to ensure that detainees will have reasonable and equitable access to reasonably priced telephone services. The Standard will also ensure that detainees with hearing or speech disabilities have appropriate accommodations to allow for accessible telephone services. At a minimum, there must also be one operable telephone for every 25 detainees, although the optimal level in the Standards provides for one telephone for every ten detainees. Telephones are to be tested daily and placed in strategic locations throughout the facility to afford privacy and minimal distraction for conversations to take place.
>
> One of the new provisions in the PBNDS 2010 encourages facilities to seek out and use emerging telecommunications, voiceover, and Internet protocol

[527] ICE, FOIA Reading Room, Contracts, "Talton Communications – HSCEDM-09-C-00009", *supra*. Although the contract shows May 2009 as the starting date, the IACHR learned that the contract was amended in August 2009. *See* DHS OIG, OIG-10-36, *supra*, pp. 5-6.

[528] Federal Business Opportunities, *supra*, p. 7.

[529] Federal Business Opportunities, *supra*, pp. 6, 19. The IACHR has received reports indicating that some centers have used this list of pre-approved numbers for immigration detainees. *See* National Immigration Project, "Petition DHS to Issue Enforceable, Comprehensive Immigration Detention Standards" p. 25 (January 25, 2007), *available at:* http://www.nationalimmigrationproject.org/detention_petition_final.pdf.

> technologies to reduce telephone costs. ICE prioritizes reasonably priced telephone services for detainees to maintain contact with family members, friends, and legal representation.

319. The Inter-American Commission values these measures and all other reform initiatives to improve communication services in immigration detention, since the respective restrictions should not be equivalent to those imposed on criminal detainees.

8. Outdoor recreation

320. The IACHR expressed concern over what was considered the "outdoor recreation" area at the Pinal County Prison. The Inter-American Commission observed that there was no "outdoor" area at that facility; all there was was a small empty space adjacent to each pod, with little exposure to the outdoors and sunlight through a skylight near the roof of the pod. During the IACHR's visit, the delegation observed that two detainees were playing an improvised game of handball in a triangular room.

321. Both the Pinal County representative and the ICE representative for the Detention Standards Compliance Unit insisted that the space in question qualified as an outdoor recreation area under the detention standards. The 2000 ICE Standard for "Recreation,"[530] however, reads as follows: "If a facility does not have an outdoor area, a large recreation room with exercise equipment and access to sunlight will be provided. (This does not meet the requirement for outdoor recreation)."[531] The Inter-American Commission understands that this is not the only example of inadequate "outdoor recreation." A July 2007 GAO report contains photographs of inside areas of two other centers that are used as if they were "outdoor recreation" areas.[532]

322. While the Willacy center does have a real outdoor area, the center provides few opportunities for exercise and to enjoy time outdoors. The IACHR noted outside each pod was a vacant and enclosed concrete area, about the size of a basketball court, surrounded by barbed wire, with a small, covered seating area. The Willacy representatives reported that each pod of 50 detainees was given between one and two hours a day of recreation. The Inter-American Commission's observation was that it would be quite difficult for 50 people to be able to take exercise in that space at the same time. Similarly, the IACHR observed that during the summer, when the temperatures go as high as 100˚F (38˚C), there would be very little shade and seating for the detainees who wanted to spend a moment of relaxation outdoors.

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[530] The Commission observes that at the time of its July 2009 visit, the 2000 detention standards applied to IGSA centers.

[531] *See* ICE, Detention Standard, "Recreation", p. 1 (2000), available at: http://www.ice.gov/doclib/pi/dro/opsmanual/recreat.pdf. The IACHR observes that the 2008 performance-based detention standards use the same language, except for the parenthetical phrase, which was omitted. See, ICE, Performance-based Detention Standards, "Recreation", p. 1 (2008), available at: http://www.ice.gov/doclib/PBNDS/pdf/recreation.pdf.

[532] GAO, GAO-07-875, *supra*, pp. 24-25.

323. The United States supplied the following observations in its October 2010 response:

> The expansion of outdoor recreation opportunities and hours is an important part of the detention reform initiative. Detainees should have the opportunity to recreate for the most practicable amount of time possible in an environment that supports leisure activities and outdoor sports and exercise. Florence Service Processing center currently serves as a model for recreation space; it has a state-of-the-art outdoor recreation facility, with artificial turf, a re-paved running track around the perimeter, and new workout stations. Outdoor recreation opportunities in other facilities have also expanded, with some facilities providing free movement access to outdoor recreation areas during daylight hours.

324. The Inter-American Commission reiterates that the State must provide what is necessary for the physical well-being of all persons in its custody. This obligation includes regular access to outdoor recreation. Accordingly, the IACHR notes with satisfaction the information provided by the United States in the sense that this issue will be addressed as part of its detention reform initiatives.

9. Attorney-client meetings and family visits

325. The IACHR is very concerned by the heavy restrictions placed on confidential meetings between attorney and client, and the visiting areas for families and friends in some prisons that also house immigrant detainees.

326. The Inter-American Commission received information indicating that the wing that houses some 600 immigrant detainees in the Pinal County facility does not have any area for attorney-client meetings or for visits. Rather, the IACHR learned that attorneys meet with their clients through videoconferencing or when the detained immigrant is taken to the wing of the county prison where criminal inmates (some 900) are incarcerated, where there are about two meeting booths for the 1500 detainees in the two wings of the facility. The Inter-American Commission observed that the booths look like a teller window at a bank, with a glass partition separating the attorney from the client and with very little space. The IACHR observed that the space for passing documents to the client is only wide enough for two pages. For example, in order for a detainee to review or sign any document, he must call the guard to bring the papers and/or pen to him. A number of attorneys who have represented the detainees incarcerated in Pinal told the Inter-American Commission that they would not be representing any future detainees because, on several occasions, they had to wait for as much as an hour to meet with their clients, and found it difficult to have an effective attorney-client meeting in person.

327. The IACHR is deeply troubled by the fact that immigrant detainees at Pinal are not permitted to meet with family or friends in person. Consequently, all visits have to be by video teleconferencing. A number of detainees expressed their reluctance about the procedure, because it left them and their families with a sense of anguish and pain.

328. In the case of the Willacy Detention Center, the Inter-American Commission notes that since the summer of 2009 it has had proper rooms where attorneys can meet with their clients. It is troubling that this change did not take place until three years after the center went into operation. With respect to this and other problems at the center, the staff there told the IACHR that the government built the centers very quickly in order to meet the goal of detaining and deporting more illegal immigrants. This has meant that the facility has been catching up ever since to make sure that the necessary services are provided.[533] The Inter-American Commission notes that there are still shortcomings; for example, when attorneys meet with clients, they do not have sufficient space to work. Also, given the size of the facility and the frequent shortage of security personnel, attorneys commented that they sometimes have to wait quite a while for their clients to be escorted to the meeting.

329. The IACHR is very disturbed by the staff's comment to the effect that they could only rely on the county's goodwill when requesting improvements, since Willacy County itself had no contractual obligation to make improvements to the attorney-client space *vis-a-vis* its contract with the private contractor.

330. As for personal visits, Willacy has a hallway of booths with glass partitions for visiting relatives and friends. The Inter-American Commission learned that the center only allows personal visits on weekends, for a half hour per detainee, and no physical contact is allowed.[534] The IACHR observed that there are 10 booths for an average population of 1400 detainees.

331. The United States observes in its October 2010 submission that part of the detention reform initiative, includes exploring options for expanded family visitation. According to the United States, "ICE is also exploring the use of video-teleconferencing to allow detainees contact with family members who may not be able to visit the detention facility" and "working to improve access to legal counsel and legal materials", including access to materials that explain state laws on custody and family issues.

332. The State adds:

> On July 23, 2010, ICE launched the ODLS, a public, internet-based tool designed to assist family members, attorneys, and other interested parties in locating detained aliens in ICE custody. The creation and implementation of the ODLS is a concrete example of ICE's commitment to detention reform that is both transparent and meaningful. The ODLS, located on ICE's public website www.ice.gov, provides users with information on the location of the detention facility where a particular individual is being held, a phone number to the facility and contact information for the ICE Enforcement and Removal Office in the region where the facility is located. The rollout of the ODLS also included the

[533] In fact, the Willacy Detention Center was built in just 120 days. *See,* ICE, FOIA Reading Room, Inter-Governmental Service Agreements, "Willacy County, TX" DROIGSA-06-0003, p. 16, *available at:* http://www.ice.gov/doclib/foia/isa/willacycountytx.pdf.

[534] The staff of the facility said that if a visitor came from outside the city, arrangements could be made to schedule the visit for other days of the week, and that the visit could be extended to an hour.

> translation of the website, system informational brochure, and facility fact sheet in numerous languages. Providing language access to ICE's systems and information to all nationalities is an on-going goal of the agency.

333. The Inter-American Commission considers that these are all valuable and relevant steps in the right direction. However, the State must take the measures necessary to correct any other obstacles that might impair proper representation of the immigrants in their proceedings and, most especially, to eliminate restrictions on visits by family and friends. The IACHR believes these unwarranted and disproportionate restrictions are unacceptable even for criminal detention, and are especially onerous in the case of immigration detention.

10. Access to legal resources

334. The Inter-American Commission is troubled by the limited legal resources and the equally limited access to those resources that it observed at the centers it visited. At Pinal, each group of four pods, housing close to 200 detained immigrants, was given a small room that served as a "law library." One "law library" that the IACHR observed had one computer with English-language material from the Lexis-Nexis system, one typewriter, one table with three chairs, and a carrel containing decisions, in English, of the Board of Immigration Appeals (BIA) up to 1998. The Pinal team told the delegation that detainees could only go to the law library upon request and for a maximum of one hour. The libraries did not have permanent staff to assist detainees with the use of the computer or the legal materials.

335. The "law library" that the Inter-American Commission saw at the Willacy Detention Center was only a slight improvement over the one at the Pinal Center. It, too, was inadequate and consisted of a room with a row of eight computers equipped with Lexis-Nexis, and a small collection of books on immigration law in English. The "law library" was hardly commensurate with the number of detainees that this facility houses (1400). The Willacy team said that each pod of 50 detainees has the opportunity to go to the library for one or two hours a week. The IACHR noticed that one person was in the library to assist with logistical questions, but not to assist with the legal materials.

336. The Inter-American Commission is troubled by the fact that many immigrants have to represent themselves during their immigration proceedings, which in itself constitutes a considerable disadvantage. Many detained immigrants do not have much education and have a limited knowledge of English. This makes it virtually impossible for them to search for and understand legal materials on their own. Most of the detainees whom the IACHR interviewed said they did not have any idea what was happening with their cases. And so, access to adequate and sufficient legal resources becomes all the more important and can have significant due process implications.

11. Discipline

337. As mentioned in the press release following its visits to Arizona and Texas,[535] the Inter-American Commission is deeply troubled by the use of confinement ("administrative segregation" or "disciplinary segregation")[536] in the case of vulnerable immigration detainees, including members of the LGBT community, religious minorities and mentally challenged detainees. Using confinement to protect a threatened population amounts to a punitive measure. Equally troubling is the extent to which this measure is used as a disciplinary tool.

338. The State observed in its October 2010 response that "a brief period of segregation for disciplinary reasons is sometimes necessary for detainees whose behavior does not comply with facility rules in order to provide detainees in the general population a safe and orderly living environment". According to the information submitted by the State, "a detainee may be placed in disciplinary segregation only by order of the Institutional Disciplinary Panel (IDP), or its equivalent, after a hearing in which the detainee has been found to have committed a prohibited act". The United States also points out that the maximum sanction is "30 days in disciplinary segregation per violation with a review every seven days" and that "it is very clearly articulated in the standards that placement in a special management unit is based on the amount of supervision required to control a detainee and safeguard the detainee, other detainees and facility staff".

339. The IACHR takes note of this information supplied by the State, but insists that the profound psychological and physical impact of confinement is well documented.[537] During its visits, the Inter-American Commission had an opportunity to speak with a number of detainees in administrative segregation, who were there because they feared for their safety if they remained among the general population. In the Florence SPC, the IACHR observed that 4 of the detainees in administrative segregation had been there for nearly 150 days. The Inter-American Commission learned that the immigration detainees held in segregation are released from their cells for just one hour a day for exercise, but have no meaningful contact with other human beings. One detainee with whom the IACHR spoke said that the delegate was the first visitor he had had in 60 days of confinement.

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[535] *See,* IACHR, Press Release 53/09, "IACHR Visits U.S. Immigration Detention Facilities," dated July 28, 2009, *available at:* http://www.cidh.oas.org/Comunicados/English/2009/53-09eng.htm.

[536] ICE draws a distinction between "administrative segregation" and "disciplinary segregation," although the IACHR does not notice much difference between them.

[537] A 2006 report cited a psychological study that found that since the 1970s no study done of involuntary confinement for more than 10 days has failed to document negative psychiatric symptoms in patients. This same report also mentioned one of the largest nationwide studies, which found that two out of every three prison suicides were by detainees in segregation units. *See,* Vera Institute of Justice, A Report of the Commission on Safety and Abuse in America's Prisons, *Confronting Confinement* (June 2006), available at: http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf.

The U.S. federal courts have held that administrative segregation imposes "extreme deprivations which cause profound and obvious psychological pain and suffering." *See, Ruiz v. Johnson,* 37 F. Supp. 2d 855, 861 (S.D. Tex. 1999).

340. The Inter-American Commission has received numerous pieces of alarming testimony from immigrant detainees with mental illnesses, whose conditions deteriorated with the time spent in segregation.[538] According to the detention standards on mental health, mentally ill detainees should be housed in a therapeutic space or released to receive proper treatment.[539]

341. In addition to segregation, various immigrant detainees have asserted that prison officials place entire sections or cellblocks under lockdown for minor incidents, as when detainees are being too loud.[540] The IACHR learned that "lockdown" means that the detainees are confined to their cells for protracted periods of time, during which they are not allowed to receive visits, not even from their attorneys. A December 2006 report by the DHS OIG pointed out that lockdown is also used on an individual basis.[541]

342. Finally, the Inter-American Commission is troubled by the numerous reports, from present and former detainees, recounting the verbal abuse to which security personnel at the centers subjected them, in addition to their threats of confinement or transfer.[542] A number of detainees told the IACHR that the security personnel treated them like criminals and that the constant verbal abuse had a very negative psychological effect.

12. Grievance procedures

343. The Inter-American Commission has received disturbing information to the effect that ICE's grievance procedure has been systematically mismanaged. The IACHR spoke with numerous detainees and former detainees who filed complaints, often several times over the same issue, and yet never received a reply. Other detainees were afraid that if they complained they would face reprisals from the detention center's staff.

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[538] *See* American University International Human Rights Law Clinic, American University Disability Rights Law Clinic, and the CAIR Coalition, Documents for the Working Meeting during the 134th Session of the Commission, *Invisible Migrants: Mental Illness and the U.S. Immigration System* (March 2009) (on file with the Commission); the Commission's Working Meeting with immigration attorneys and advocates from the University of Pennsylvania School of Law (January 23, 2009) (recording in the Commission's custody); *see also* Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine for Immigration Custody* (February 2009), available at: http://www.fiacfla.org/reports/DyingForDecentCare.pdf.

[539] Vera Institute of Justice, *supra*.

[540] ACLU-New Jersey, *Behind Bars: The Failure of the Department of Homeland Security to Ensure Adequate Treatment of Immigration Detainees in New Jersey,* pp. 14-15 (May 15, 2007), available at: http://www.aclu-nj.org/downloads/051507DetentionReport.pdf.

[541] Of the 146 unit actions reviewed, 120 imposed punishments of 24-hour lock downs. *See,* DHS OIG, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities, OIG-07-01, p. 14 (Dec. 2006), available at: http://trac.syr.edu/immigration/library/P1598.pdf.

[542] *See also,* ACLU—Massachusetts, *Detention and Deportation in the Age of ICE,* p. 24 (December 10, 2008), *available at:* http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf.

344. A report that the GAO did in July 2007 concluded that the ICE grievance database was not sufficiently reliable for audit purposes.[543] The report nevertheless revealed that of 1700 grievances reported in the OIG database, the OIG investigated 173 complaints between FY2003 and FY2006, and referred the others to other units of the DHS.[544] Neither the report nor the DHS' comments on the report explain what happened to the other 1,527 grievances that detainees filed.[545] Furthermore, and consistent with the situation described in the section on "Telephone Access," the GAO found that the OIG's free grievance line was blocked in 12 of 17 detention centers visited.[546] Finally, the GAO reported that of the 409 grievances brought to the attention of the DHS Office of Professional Responsibility (OPR), that office answered only 98.[547]

345. In its October 2010 observations, the State points out that "the grievance procedures in PBNDS 2010 Standard have been substantially improved" and that "ICE also has developed a detainee handbook written in clear, plain language". This handbook conveys that detainees are afforded certain protections and rights, including the ability to grieve. The United States informs that the new grievance standard will ensure that the rights of detainees are respected, including due process, with the ability to process a grievance quickly; translation and interpreter services so a detainee can understand and communicate with staff; and aids or services to ensure effective communication between a detainee and facility staff if there is any impediment in that respect.

346. The Inter-American Commission welcomes the information supplied by the State on the improvements in the grievance procedure. However, considering that the ICE detention standards are not enforceable and that the attorneys and other independent observers have very little access to ICE detention centers, the IACHR feels compelled to express its concern over the failings of the grievance system.

13. Some reforms recently introduced or proposed for the future to the detention conditions of immigrant detainees

347. On August 6, 2009, DHS announced that it intended to reform the current decentralized immigration detention system, which relies heavily on contracted bed space in state and local prisons that were built as jails and prisons to confine pre-trial and

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[543] GAO, *Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance*, GAO-07-875, p. 37 (July 2007), available at: http://www.gao.gov/new.items/d07875.pdf.

[544] GAO, *Telephone Access Problems, supra*, p. 35.

[545] GAO, *Telephone Access Problems, supra*, pp. 35, 40-42. The IACHR observes that many detainee complaints are submitted and addressed at each individual facility and may not make it into DHS's databases. The Inter-American Commission notes the 2010 report of the New York Civil Liberties Union (NYCLU) which found that 21% of the grievances filed by detainees at the Varick federal detention center went unresolved. *See,* New York Civil Liberties Union, *Voices from Varick: Detainee Grievances at New York City's Only Federal Immigration Detention Facility*, p. 1 (2010), available at: http://www.nyclu.org/files/publications/Varick_Report_final.pdf.

[546] GAO, *Telephone Access Problems, supra*, p. 11.

[547] GAO, *Telephone Access Problems, supra*, p. 36.

sentenced felons, and therefore are not suited to the specific needs of immigration detention.

348. Accordingly, DHS announced that it intended to consolidate immigrant detainees in "fewer locations, closer to major cities with access to courts, attorneys, and under conditions that more consistently meet federal detention standards."[548] In its effort to create a "truly civil detention system," DHS is exploring the possibility of converting hotels and nursing homes into immigration detention centers for non-criminal, non-violent migrant detainees.[549] In addition, DHS is planning to create two new immigration detention facilities, which are intended to reflect DHS's reforms toward a fully civil detention system.[550]

349. The United States informs that in order to reform ICE's detention system, its ICE Office of Detention Policy and Planning ("ODPP") surveyed each of the immigration detention facilities, met with stakeholders in regional community roundtables, and engaged trade and business stakeholders. As explained by the State, this inventory of facilities allowed ICE to better understand the detention system and areas of possible improvement.

350. DHS likewise plans to establish a risk assessment tool for classification of migrant detainees which it states will be used to place migrant detainees in an appropriate detention environment, including identifying migrants suitable for ATD programs.[551] Because of the significant cost-effectiveness of ATD programs, DHS is planning to expand ATD programs nationwide.[552] DHS announced that the new risk assessment tool for custody determinations will also factor in the needs of vulnerable populations, such as asylum seekers, families, and the elderly.[553]

351. The reforms were described by the United States in its observations the the IACHR draft report:

> ICE is committed to devising and implementing a new detainee intake process to improve the consistency and transparency of ICE's custody and release decisions. Indeed, ICE is developing a new Risk Assessment and Classification Worksheet,

[548] Washington Post, "Administration Announces Overhaul of Immigration Detention System," (Aug. 6, 2009).

[549] New York Times, "Ideas for Immigrant Detention Include Converting Hotels and Building Models" (Oct. 6, 2009), *available at* http://www.nytimes.com/2009/10/06/us/politics/06detain.html; DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps" (Oct. 6, 2009), *available at:* http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf.

[550] *See* DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps", *supra.*

[551] *See* DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps", *supra* .

[552] DHS confirms that ATD costs approximately $14 per day per participant, whereas detention typically costs approximately $100 per day per detainee.

[553] *See* DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps", *supra*; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiative," (Oct. 6, 2009), *available at:* http://www.dhs.gov/ynews/releases/pr_1254839781410.shtm.

> referred to as a "risk assessment tool." The risk assessment tool contains objective criteria to guide decision-making regarding whether or not an alien should be detained or released; the alien's custody classification level, if detained; and the alien's level of community supervision (to include an ICE ATD program), if released.
>
> Using the tool, immigration officers will be more likely to identify any special vulnerabilities that may affect custody determinations. In fact, the risk assessment tool includes the following special vulnerabilities the Commission report had recommended be taken into consideration: disability, advanced age, pregnancy, nursing, sole caretaking responsibilities, mental health issues, or victimization, including aliens who may be eligible for relief related under the Violence Against Women Act (VAWA), as victims of crime (U visa), or as victims of human trafficking (T visa).
>
> ICE is also developing training for our officers to identify vulnerable populations and has consulted with the DHS' Office for Civil Rights and Civil Liberties (CRCL) and NGOs on special training topics. In addition, CRCL has provided specialized training to a corps of new detention managers that included civil rights considerations in the treatment of asylum seekers and recognizing victims of trafficking. The training also covered the special needs of women in detention and mental health issues that our facilities are often called upon to address.

352. Further, the State refers to the 2010 Performance-Based National Detention Standards (PBNDS) which will supersede the earlier Performance-Based National Standards that were issued in September 2008. In this regard, the United States clarifies that the 2008 PBNDS are the standards cited by the IACHR in its draft report, as the basis for criticism of the lack of accountability for providing ICE detainees with safe and humane conditions of detention. The State asserts that "the new 2010 standards, developed in close consultation with the agency's advisory groups and with DHS CRCL, have been drafted to address many of the criticisms or alleged shortcomings of the earlier standards cited by the Commission". The United States adds:

> The 2010 standards will be more tailored to the unique needs of ICE's detained population, as they maximize access to counsel, visitation, religious practices, and recreation, while improving the agency's prevention and response to sexual abuse or assault that may occur in detention facilities and strengthening standards for quality medical, mental health, and dental care.
>
> Although the Commission report urges ICE to regulate the application of its detention standards, the Department of Homeland Security has determined that implementing the 2010 PBNDS, which are performance-based standards, through internal policy publication rather than through a rulemaking, is the best way to ensure appropriate detention conditions for persons in detention. First, the 2010 PBNDS identify specific outcomes and expected practices to be achieved for each standard. In focusing on expected outcomes and identifying clear practices and objectives, the PBNDS enable the agency to measure specific outcomes over time and evaluate the progress each service provider achieves in meeting the defined service criteria. In addition, the agency has in place and continues to develop strong measures for accomplishing detention oversight and for expediting remediation and modification if standards' requirements are not met.

> The steps ICE has taken to enhance monitoring of conditions in detention centers and to ensure compliance with the new standards, as further detailed in the next section of this response, provides the agency the necessary framework for enforcing the standards. On the other hand, overly stringent rulemaking could impede the agency's ability to expeditiously respond to changed circumstances, emergency situations, and crises to protect the health, safety, and welfare of detained aliens, agency personnel and contractors, and to ensure compliance with the standards. Moreover, ICE policy is, like regulations, binding upon the agency and its partners.

353. In announcing the proposed reforms, however, DHS did reiterate that it intended to continue immigration detention on a "large scale."[554] ICE Assistant Secretary for Immigration and Customs Enforcement John Morton said the following: "This is not about whether or not we detain people, this is about how we detain them."[555]

354. The Inter-American Commission recognizes that these preliminary proposals to transform immigration detention into a civil detention system are an important step forward in enhancing recognition of migrant detainees' human rights. The response of the United States contains specific reference to the vulnerabilities the IACHR recommended to be taken into consideration, and also to other training programs in place for its officers, all of which are steps in the rights direction. However, as mentioned in earlier sections, it must be reiterated here that a system that starts from a presumption of detention does not comport with the State's obligation to protect the fundamental right to personal liberty, recognized in Article I of the American Declaration. It is important to again make the point that based on the information supplied by DHS, only a small percentage of immigration detainees committed violent crimes[556] and that between FY2007 and FY2009, approximately 67% of those immigrants detained by ICE had no criminal record at all.[557]

355. The Inter-American Commission concludes that many of these immigrant detainees should not be detained at all or more appropriately should be placed in an ATD program. ICE's risk assessment tool should involve a diverse range of options—from release, bond, reporting requirements, monitoring, and GPS bracelets to home detention or civil detention—and each immigrant detainee should be placed in the least restrictive environment possible. The IACHR notes that its finding implies a substantial reduction in detention levels and a diversion of those resources to more appropriate means to ensure that immigrants report for immigration proceedings. This will inevitably have a positive impact on the detention conditions of those persons that truly have to be incarcerated.

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[554] New York Times, "U.S. to Reform Policy on Detention for Immigrants," (Aug. 6, 2009) (quoting ICE Assistant Secretary John Morton), *available at:* http://www.nytimes.com/2009/08/06/us/politics/06detain.html.

[555] Washington Post, "Administration Announces Overhaul of Immigration Detention System" (Aug. 6, 2009).

[556] Only 11% of the 51% of immigrant detainees with "aggravated felonies," as that term is understood under U.S. immigration law, committed violent crimes. DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, *supra*, p. 6.

[557] DHS, Dr. Dora Schriro, *Immigration Detention Overview and Recommendations, supra,* p. 12.

The Inter-American Commission is encouraged by ICE's announcement that it will expand its ATD programs nationwide and urges the State to implement a robust and comprehensive ATD program.

356. The IACHR welcomes the government's acknowledgement that immigrant detainees are being housed in facilities that are inappropriate for civil detention and in locations that create significant obstacles for immigrant detainees to obtain effective legal representation. To the extent that civil detention is necessary, the Inter-American Commission concurs with the government's conclusions that detention facilities need to be closer to urban centers, or where there is better access to legal services and detainees' families, and where more effective ICE oversight is facilitated.

357. Further, the Inter-American Commission welcomes the government's recognition that its current performance-based immigration detention standards closely resemble criminal detention standards and thus are inappropriate for civil detainees. In this regard, the Inter-American Commission takes note of the State's response regarding the imminent entry into force of the 2010 PBNDS, but still considers that reform would be most effective by enacting rules to guide internal policy. Such rules could be adopted allowing for the necessary flexibility to provide for extreme, special or emergency situations. The IACHR hopes that under the 2010 PNDBS adequate accountability mechanisms will be applied effectively.

358. The IACHR, however, observes that neither this recognition, nor the new PNDBS as described in the State's response, will result in a civil immigration detention system. Recognizing that developing a civil detention system is a long-term objective, in autumn 2009 DHS also announced that it would take some near-term action to regain control and accountability over the current U.S. immigration detention system.[558] First, ICE announced that it sought to centralize all detention contracts under ICE headquarters' supervision.[559] As discussed earlier, ICE has conceded that only 80 of the more than 300 active detention contracts are being supervised by ICE headquarters.[560]

359. In the interim, ICE pledges that it "will aggressively monitor and enforce contract performance in order to ensure contractors comply with terms and conditions—especially those related to conditions of confinement."[561] ICE asserts that it will pursue all

[558] DHS, "Fact Sheet: ICE Detention Reforms: Principles and Next Steps" (October 6, 2009), *available at:* http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," (October 6, 2009), available at: http://www.dhs.gov/ynews/releases/pr_1254839781410.shtm.

[559] DHS, "Fact Sheet: ICE Detention Reforms: Principles and Next Steps", *supra*; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," *supra.*

[560] DHS, "Fact Sheet: ICE Detention Reforms: Principles and Next Steps", *supra*; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," *supra*.

[561] DHS, "Fact Sheet: ICE Detention Reforms: Principles and Next Steps", *supra*; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," *supra.*

available means to remedy contracting entities' poor performance under the detention contract, including termination of contracts.[562]

360. In addition, ICE announced that it would hire and train 23 additional federal employees to strengthen day-to-day oversight of the facilities that ICE affirms house over 80 percent of migrant detainees.[563] ICE plans also to implement a medical classification system "to support unique medical or mental health needs."[564] It also intends to accelerate its efforts to provide an on-line locator system for friends, families, and attorneys to better locate detainees within the detention system.[565]

361. While the Inter-American Commission takes note of these government efforts to include accountability and oversight standards into the current detention system, which is currently decentralized and to a large extent privatized, the IACHR is deeply concerned that these efforts will not do enough to address the human rights issues in existing detention centers. As was examined earlier, ICE does not have mechanisms in place to ensure compliance with the detention standards in the facilities operated under IGSAs and in contract detention facilities (CDFs).

362. The Inter-American Commission recognizes that the additional daily federal oversight will help ensure adequate detention conditions for the immigrants.

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[562] DHS, "Fact Sheet: ICE Detention Reforms: Principles and Next Steps" *supra*; DHS, "Press Release: Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiatives," *supra.*

[563] ICE has presented this proposal in two different forms, so the exact breadth of federal oversight is not clear. On August 6, 2009, ICE announced that it would recruit 23 new ICE detention managers to provide oversight at 23 "significant" facilities, where it reported 40% of immigrant detainees are housed. *See* ICE, "Fact Sheet: 2009 Immigration Detention Reforms," (Aug. 6, 2009), *available at:* http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm. In its October 6, 2009 announcement, DHS announced that ICE would add 23 oversight employees, bringing ICE's direct supervision staff to over 50 officials. Presumably, the 23 new ICE employees will be stationed at facilities other than those supervised by the current staff, because the October 6th ICE Fact Sheet states that there will now be federal oversight at facilities where 80 percent of immigrant detainees are housed. DHS, "Fact Sheet: ICE Detention Reform: Principles and Next Steps" (Oct. 6, 2009), *available at* http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf. It should be noted that ICE's 80 percent figure likely is a daily snapshot figure. That is to say, the 23 additional employees will provide oversight at the most populous facilities, which represent approximately 80 percent of the detention population on any given day, not 80 percent of the facilities ICE uses to house immigrant detainees. Therefore, this enhanced federal oversight will reach a fraction of the facilities used to house immigrant detainees. Given the high number of transfers, many detainees spend time at multiple facilities, often spending time at a facility close to the point of apprehension before being transferred to a larger facility. *See* Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, (Dec. 2009), *available at:* http://www.hrw.org/sites/default/files/reports/us1209web.pdf; TRAC, Huge Increases in Transfers of ICE Detainees, (Dec. 2009), *available at:* http://trac.syr.edu/immigration/reports/220/; DHS, Dr. Dora Schriro, *supra*, pp. 6-10.

[564] DHS, "Fact Sheet", *supra*; DHS, Press Release, "Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiative" *supra.*

[565] DHS, "Fact Sheet", *supra*; DHS, Press Release, "Secretary Napolitano and ICE Assistant Secretary Morton Announce New Immigration Detention Reform Initiative" *supra.*

However, the IACHR remains concerned that the direct federal oversight and accountability at ICE-contract centers falls short given the detention system's size and complexity.

363. The Inter-American Commission welcomes the DHS' proposal to establish a new classification system in order to follow-up and monitor detainees who have specific medical and mental needs. However, the DHS' proposal does not specify which needed reforms will be introduced to ensure timely and quality medical care for detainees, beyond emergency care.

364. Finally, the IACHR is pleased with ICE's decision to accelerate the creation of an online detainee search engine that enables attorneys, family and friends to locate those who are within the ICE detention system. However, the proposed reform does not address the specific concerns having to do with the high rates of detainee transfers within the system and the collateral human rights problems these transfers cause with respect to detainees' ability to receive adequate due process and their right to a family life.

C. Detention of families and children

1. Immigrant families

365. In addition to adult detention, DHS also detains migrant families and some unaccompanied minors. Currently, migrant families are detained at one facility—the Berks Facility in Leesport, Pennsylvania with an 84-bed capacity.[566] In August 2009, DHS announced that it was converting the 512-bed T. Don Hutto facility in Taylor, Texas, which had housed families, into an all female detention facility.[567] ICE officials told the Inter-American Commission that they did not currently foresee the need to expand family detention, as ICE has adopted a policy of taking families out of mandatory detention and either releasing them or placing them into an alternatives to detention program.[568]

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[566] Women's Refugee Commission & LIRS, *Locking Up Family Values*, (Feb. 2007), *available at:* http://www.lirs.org/LockingUpFamilyValues.pdf.

[567] New York Times, "U.S. to Reform Policy on Detention for Immigrants" (Aug. 6, 2009), *available at:* http://www.nytimes.com/2009/08/06/us/politics/06detain.html?scp=1&sq=Immigration+Hutto&st=nyt; DHS, "Fact Sheet", *supra.*

[568] ICE officials told the IACHR that, as part of its policy, ICE has been placing families apprehended at or near the border in regular removal proceedings under section 240 of the INA, rather than expedited removal. The few families that are still in the expedited removal process owing to special circumstances are still being detained at the Berk Center until they have passed a "credible fear" interview. In such cases, once the credible fear interview has been passed, the vast majority of families are released from detention and placed in the hands of community organizations that sponsor them. Between the August 6, 2009 announcement and late September 2009, ICE reported to the Commission that it had released close to 100 families and that it had placed approximately 6 families in ATD programs. The ICE officials emphasized that of the families released only 5% have been reported as absconded. ICE officials told the Commission that they did not believe that new space had to be built to detain families, beyond what ICE already has at the Berk facility (with 84 beds). According to ICE, since the announcement the 60 spaces needed for family detention has held constant.

See Commission briefing on detention visits with ICE officials, ICE headquarters (Oct. 2, 2009). Presumably, this development indicates that ICE does not intend to move forward with its May 2008 solicitation for three additional family detention facilities. *See* L.A. Times, "Immigration Agency Plans New Family Detention Centers" (May 18, 2008), *available at:* http://articles.latimes.com/2008/may/18/nation/na-detention18.

366. The IACHR welcomes the State's effort to reduce its reliance on detention of immigrant families and use of the expedited removal process. However, it is concerned that ICE does not have enforceable regulations that codify the current informal policies that drive decisions on the subject of family detention.

367. With regard to families that are still in detention, the Inter-American Commission observes that like adult detention, ICE has issued Family Detention Standards that establish the conditions under which families are to be detained.[569] These, too, are not legally enforceable standards. However, because family detention includes detention of minors, the federal court settlement in the case of *Flores v. Meese*, which established legally enforceable minimum conditions of care for minors in the immigration system, is applicable (hereinafter the "*Flores* settlement").[570]

368. The IACHR appreciates ICE's decision to discontinue use of the T. Don Hutto facility for the detention of families. As the Inter-American Commission indicated in the press release[571] it issued after its visit, conditions there had improved over the descriptions that predated the signing of the ACLU Settlement in August 2007.[572] However, the IACHR is concerned that the practice of detaining immigrant families continues with no extraordinary reasons to justify it. Whatever the case, because of the terrible psychological impact that detention can have, the Inter-American Commission considers that when a family with children has to be detained, it ought to be transferred to the custody of the ORR, an office that is more experienced in addressing children's needs. Furthermore, every effort must be made to ensure that the period of detention is as brief as possible.

369. The IACHR is deeply disturbed by the reports received concerning immigrants who have lost custody of their U.S.-born children while a mother and/or father was in detention.[573] A January 2009 DHS OIG report confirmed that if a U.S. citizen child is identified by CBP or ICE with an apprehended undocumented parent, that child is released to the parent's designated custodian or to state child protective services.[574] The Inter-American Commission was informed that under the federal Adoption and Safe Families Act

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[569] DHS, "Family Residential Standards" (November 2008), *available at:* http://www.ice.gov/pi/familyresidential/index.htm.

[570] *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. 1997). Stipulated Settlement *available at: http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf*. The ACLU's lawsuit against the T. Don Hutto Family Residential Center relied on the *Flores* settlement as its legal basis. The legal documents from the Hutto litigation are available at http://www.aclu.org/immigrants/detention/28856res20070306.html.

[571] *See* IACHR, Press Release 53/09, *supra*.

[572] Women's Refugee Commission & LIRS, *Locking Up Family Values*, (February 2007), *available at:* http://www.lirs.org/LockingUpFamilyValues.pdf.

[573] *See* Women's Refugee Commission & FIAC, "The Separation of Women From Children and the Lack of Child Protection Services," Briefing Papers for the thematic hearing "Due process problems in the application of policies on immigrant detention and deportation in the United States," 133rd Session (Oct. 28, 2008) (on file with IACHR).

[574] DHS OIG, *Removals Involving Illegal Alien Parents of United States Citizen Children*, OIG-09-15, p. 11 (January 2009), *available at:* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf.

a parent loses custody of his or her child if the child is in state protective custody for 15 out of the previous 22 months.[575] A detained parent has no means to participate in state protective custody proceedings and the IACHR has learned that state protective custody phone numbers are not incorporated into the *pro bono* phone service.[576] The Inter-American Commission understands that ICE has guidelines to try to place sole caregivers into Alternatives to Detention programs. The IACHR urges the State to rigorously implement those guidelines.

370. With regard to detained parents that may retain custody through immigration proceedings, the Inter-American Commission is alarmed to learn that many are not consulted or heard with respect to custody determinations for their U.S. citizen children in the event that they are ordered deported from the United States. The IACHR, therefore, also urges the State to give meaningful consideration to the wishes of a parent ordered deported when it examines the question of what constitutes the "best interests" of that parent's U.S. citizen child.

2. Unaccompanied children

371. Under the 2002 Homeland Security Act (HSA), custody of unaccompanied minors has been legally transferred into the Office of Refugee Resettlement (ORR) although, as will be explained, some still remain in ICE custody.[577] There are a number of handbooks and standards for the care of unaccompanied children. Still, it was the *Flores* settlement that established legally enforceable standards for their treatment.[578]

372. The Inter-American Commission learned that CBP apprehends approximately 90,000 unaccompanied children ("UAC") annually along the southern United States border. Approximately 8,300 of those children are transferred into ORR.[579] The rest, the IACHR understands, are Mexican unaccompanied children who are immediately repatriated to their country.[580] From its visits and other reports, the Inter-American

[575] *See* Women's Refugee Commission & FIAC, "The Separation of Women From Children and the Lack of Child Protection Services," Briefing Papers for the thematic hearing "Due process problems in the application of policies on immigrant detention and deportation in the United States," 133rd Session (Oct. 28, 2008) (on file with IACHR).

[576] University of Arizona, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*, p. 31 (Jan. 2009), *available at:* http://www.nationalimmigrationproject.org/detention_petition_final.pdf.

[577] A number of activists have reported that ICE keeps custody of some unaccompanied minors to get around the HAS. Sometimes, ICE will keep an unaccompanied minor in custody if he or she is charged with a criminal offense, is regarded as a threat to national security or is technically regarded as "accompanied" even though the parents have not sought custody.

[578] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody,* p. 5 (February 2009), available at: http://www.womensrefugeecommission.org/docs/halfway_home.pdf; IACHR, Meeting with immigration advocates in Pennsylvania (January 23, 2009) (a recording of the meeting is on file with the IACHR); *Flores v. Meese*, No. 85-cv-4544 (C.D. Cal. 1997). The stipulated settlement agreement is available at: http://www.aclu.org/pdfs/immigrants/flores_v_meese_agreement.pdf

[579] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra.*

[580] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra,* pp. 4-5.

Commission has learned that approximately 60 percent of children placed in ORR custody are ultimately reunited with a parent, relative or sponsor in the United States.[581]

373. The IACHR was generally very satisfied with the conditions of care provided for unaccompanied children at the two facilities it visited. The Inter-American Commission has received reports that in general the conditions of care for unaccompanied children have significantly improved under ORR.[582] The IACHR sees many new safeguards enacted under the 2008 Trafficking Victims Protection and Reauthorization Act ("TVPRA") and urges the State to ensure that all its measures are fully implemented.[583]

374. The Inter-American Commission is, however, concerned that many shelters for unaccompanied children face challenges in recruiting and retaining qualified medical, mental health, social work, and other professional staff due to their often rural locations. Moreover, the IACHR is very concerned that ORR has not fully established an effective, confidential grievance and monitoring system.[584] The Inter-American Commission has learned that this situation has led to the closing of a number of UAC facilities over the past few years and to lawsuits alleging physical and sexual abuse of children.[585]

375. The IACHR is troubled by reports of the inadequate and at times abusive treatment of unaccompanied children in the short-term custody of the U.S. Customs and Border Protection ("CBP") prior to transfer to the ORR.[586] While the CBP or DHS custody is supposed to be no longer than 72 hours,[587] the Inter-American Commission has learned that many of the CBP stations are not equipped to provide the most basic necessities, such

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[581] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra,* p. 20.

[582] *See, e.g.,* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra.*.

[583] For a summary of TVPRA's protections for UAC *see* http://ailainfonet.org/content/fileviewer.aspx?docid=27441&linkid=187343.

[584] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra,* pp. 27-34. However, the staff at both unaccompanied shelters that the Commission visited and their ORR field specialists stated that there is strong communication between the facilities and ORR with respect to grievances and other concerns at the facilities.

[585] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra,* pp. 27-34; the complaint in the *Abraxas Hector Garza Center* case is available at: http://www.trla.org/press/releases/2008/abraxascomplaint.pdf; the complaint in *Away From Home, Inc. Nixon, Texas* is available at: http://www.legalactioncenter.org/sites/default/files/docs/lac/Walding-3ac.pdf.

[586] IACHR, 130th Session, Petitioners' Briefing papers for thematic hearing "Human Rights Situation of Migrant Workers, Refugee Children and Other Vulnerable Groups in the United States," (Oct. 12, 2007), Audio and Video of the hearing is available at: http://www.cidh.oas.org/prensa/publichearings/advanced.aspx?Lang=EN; *see also* No More Deaths, *Crossing the Line: Human Rights Abuses of Migrants in Short-term Custody on the Arizona / Sonora Border* (Sept. 2008), *available at:* http://nomoredeaths.org/index.php/Abuse-Report/.

[587] *See Flores v. Meese*, *supra.* DHS OIG reports that 84% of unaccompanied children are transferred to ORR within the 72-hour requirement. *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *Halfway Home*, p. 9 (Feb. 2009), *available at:* http://www.womensrefugeecommission.org/docs/halfway_home.pdf.

as food, water, and sleeping accommodations.[588] This is particularly concerning given the fact that a significant percentage of the persons that CBP apprehends at the border have been exposed to desert conditions for multiple days.[589]

376. The IACHR was also disturbed by reports that ICE continues to retain custody over certain unaccompanied minors that should be transferred to the ORR.[590] It has been reported to the Inter-American Commission that this is due to the use of unreliable dental exams to determine UAC age, which sometimes overestimate a child's age, and because ICE sometimes retains custody of UAC with criminal convictions in the United States by designating them as "accompanied" because they have parents or relatives in the United States who refuse to come forward.[591]

D. Impact of detentions on immigrants' due process

377. In addition to the human rights concerns with regards to detention conditions, detention of immigrants also has a significant impact on detainees' chances of putting on an adequate defense and filing claims for relief. As a result, the quality of due process in immigration proceedings is affected.

1. Lack of access to legal representation during detention

378. The IACHR observes the significant disparity in access to legal representation for detained immigrants. According to government statistics, in FY2008 approximately 40% of non-detained immigrants were represented in their immigration proceedings, whereas just 16% of detained immigrants were represented by counsel.[592] The lack of legal counsel, the Inter-American Commission observes, has a profound impact on the chances of relief. The Constitution Project reports that just 3% of detained, unrepresented asylum seekers were granted relief.[593] By contrast, a November 2009 New York City Bar Justice Center report concluded that 39% of immigrant detainees it

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[588] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, supra, pp. 9-11. No More Deaths, *supra*; *see also,* DHS OIG, *A Review of DHS' Responsibilities for Juvenile Aliens*, pp. 12-15 (Sept. 2005), *available at:* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-45_Sep05.pdf.

[589] *See, e.g.,* No More Deaths, *supra.*

[590] IACHR, Meeting with Immigration Advocates in Pennsylvania (Jan. 23, 2009) (audio of meeting on file at the Commission); Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra*, pp. 6-8.

[591] Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra*, pp. 6-8.

[592] EOIR, U.S. Department of Justice, FY2008 Statistical Yearbook, p. G1 (2009), *available at:* http://www.justice.gov/eoir/statspub/fy08syb.pdf; VERA Institute, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II*, p. 59 (May 2008), *available at:* http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf. The VERA report notes that representation of migrants who never leave detention during their proceedings is even lower

[593] *See* The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, p. 29 (Nov. 2009), *available at:* http://www.constitutionproject.org/manage/file/359.pdf.

interviewed at the Varick Federal Detention Facility had potentially meritorious immigration claims for relief.[594]

379. The IACHR has identified the main reasons why these figures on legal representation are so low. First, the majority of the immigration detention population is housed in facilities in rural locations, which creates significant obstacles for *pro bono* representation. Human Rights First reports that 4 of the 6 largest immigration detention facilities are 50 or more miles from a major urban center.[595] During its visits, the Inter-American Commission observed that near Florence, Arizona, there were 5 immigration detention facilities, with an ADP of 2,718 immigrant detainees in FY2009.[596] These were in practice served by one small *pro bono* legal service provider. Similarly, in the Rio Grande Valley in South Texas the IACHR observed that ICE housed in FY2009 an ADP of 3,891 immigrant detainees in four large detention facilities where there were only a handful of *pro bono* and immigration attorneys.[597] These nine facilities alone housed approximately 20% of ICE's daily immigration detention population in FY2009.[598]

380. Second, the obstacles to representing detained immigrants[599] greatly shrink the attorney pool and restrict the number of clients each attorney can represent. The Inter-American Commission has received a number of reports indicating that *pro bono* legal providers find it very difficult to convince private attorneys to represent detained immigrants because of the additional time commitment in representing such persons. For those attorneys who do agree to represent detained immigrants, the IACHR received multiple reports that they often have difficulty getting into the detention center,[600] a

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[594] *See* City Bar Justice Center, *NYC Know Your Rights Project*, p. 2 (Nov. 2009) *available at:* http://www.nycbar.org/citybarjusticecenter/pdf/NYC_KnowYourRightsNov09.pdf.

[595] *See, e.g.,* DHS, Dr. Dora Schriro, *supra,* pp. 6-9; Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, pp. 55-62 (April 2009), *available at:* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf. Human Rights First notes that one of the other two mega-detention facilities, Otero County Processing Center (ADP 863), has only one *pro bono* organization within 22 miles, which also serves the immigrant detention population at the El Paso Service Processing Center (ADP 783).

[596] The five facilities in or near Florence, Arizona are Florence ICE Service Processing Center, the Pinal County Jail, the Eloy Detention Center, the Florence Correctional Center, and the Central Arizona Detention Center. *See* ICE, FOIA Reading Room, Detention Facility Statistics, "Average Daily Population (ADP) Fiscal Year 2009," *available at:* http://www.ice.gov/doclib/foia/dfs/avgdailypop_fy09.pdf.

[597] The four facilities in the Rio Grande Valley are the South Texas Detention Complex, the Willacy Detention Center, the Port Isabel ICE Service Processing Center, and the Laredo ICE Service Processing Center. *See* ICE, FOIA Reading Room, Detention Facility Statistics, "Average Daily Population (ADP) Fiscal Year 2009," *available at:* http://www.ice.gov/doclib/foia/dfs/avgdailypop_fy09.pdf.

[598] Nine facilities ADP 6,609 detainees / 32,400 ICE daily detention beds = 20% of daily detention population.

[599] For example, all attorney-client meetings must occur at the detention facility. Private attorneys face additional obstacles to maintain communication with their detained clients because they are unable to make calls to the immigrant detainees and the latter have difficulty communicating with a private attorney because the only free calls are to the *pro bono* legal service organizations. Furthermore, attorneys have to take on even more responsibilities when it comes to gathering evidence.

[600] For example, immigration attorneys have reported that some detention facilities require that the attorneys present a notice of representation before they can meet with a detainee, even if the meeting is for the

Continues…

problem that is compounded by the fact that they spend hours traveling to and from their client's detention center. Many attorneys reported that meeting with a detained client can at a minimum take a half-day of work, often more.

381. Even if detained immigrants do obtain legal representation, the Inter-American Commission observes that detention continues to impact their ability to present claims for relief. For example, the IACHR understands that to prove a claim for asylum, asylum seekers often need to gather numerous affidavits confirming the various elements of their claim and many times need to undergo an independent medical and psychological exam to prove persecution.[601] It is difficult to gather this type of evidence while detained. As a consequence, the Inter-American Commission observes for example that, in FY2003, a non-detained, represented asylum seeker was twice as likely to be granted protection as a detained, represented asylum seeker.[602]

382. The United States also addresses the issue of the right to legal counsel in its observations to the draft of this report, stating that "ICE understands and appreciates the Commission's concerns regarding the detention of aliens in ICE custody in rural locations". The State further indicates that "access to counsel is a key component of ICE's detention reform" and it informs that the federal immigration agency "is working to secure detention space that is located near to the cities or towns where people are most frequently arrested", which will allow to it detain people near the residences of their family or attorneys. In the observations submitted to the Inter-American Commission, the State further says:

> As a result, we have begun to consolidate the number of detention facilities in which we detain aliens in ICE custody -from more than 300 to approximately 250 facilities, several of which were more rural facilities- and we expect additional reductions in the number of our detention facilities in the near future. In addition, the agency is also looking into opening larger facilities in urban areas including opening large facilities to meet consistent detention needs in the Northeast and California. Finally, we are in the process of revising our current detention standards and preparing policy initiatives that we expect will, in practice, limit the frequency with which ICE transfers its detainees, so that they can remain close to their family and/or counsel.

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initial interview. Some facilities have established pre-approval requirements for the attorneys and have required that attorneys be members of the local bar association, even though this is not a requirement for practicing before a federal immigration court.

[601] The Commission observes that many other immigration claims are document intensive. *See* Florence Immigrant & Refugee Rights Project, "Written Testimony of Kara Hartzler, Esq. to the U.S. House of Representatives Subcommittee on Immigration," pp. 5-6 (dated Feb. 13, 2008), *available at:* http://judiciary.house.gov/hearings/pdf/Hartzler080213.pdf.

[602] The Constitution Project, *Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, p. 29 (Nov. 2009), *available at:* http://www.constitutionproject.org/manage/file/359.pdf. The Constitution Project reports that in FY2003 39% of non-detained, unrepresented asylum seekers were granted protection versus 18% of detained, represented asylum seekers.

> For those individuals who are unable to obtain representation, ICE's National Detention Standards and 2008 PBNDS require that the agency's detention facilities ensure that an alien has access to immigration courts, counsel (where possible and at no expense to the government), and comprehensive legal materials. In accordance with the requirements of these standards, aliens detained in ICE custody—regardless of their geographic location—should be provided with access to law libraries, names and contact information for pro bono counsel, confidential access to attorneys, and access to computerized legal databases or law libraries, among other resources.
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> Some facilities have made arrangements with local legal service organizations, such as The Florence Project, which provides free legal services to individuals detained in ICE custody in Arizona and seeks to educate aliens concerning ways to defend removal charges and seek relief from removal. ICE appreciates and supports the mission and role of nonprofit legal service organizations like the Florence Project and for several years has provided access to the facility and its detainees for the organization. ICE also partners robustly with DOJ to provide access to the facilities for their legal orientation programs (LOP). To that end, ICE fully supports DOJ's expansion of LOP programs in additional facilities.

383. The IACHR acknowledges these efforts as a step in the right direction toward compliance with the international obligations set forth in the American Declaration. The Inter-American Commission also highlights the positive initiatives by the State to reach unrepresented detained immigrants through its Legal Orientation Program ("LOP").[603] The LOP is a government-funded program that sponsors local legal service providers to give legal advice to detained immigrants. The LOP partner organizations provide immigration legal orientations through group immigration overview presentations, person question and answer periods after group presentations, group workshops, and case referrals to *pro bono* attorneys.[604]

384. As of March 2010, LOP was operating in 25 detention facilities across the United States, including the most populated detention facilities.[605] It has been reported to the Inter-American Commission that attorneys funded under the LOP are only permitted to spend approximately 25% of their work hours in direct representation of clients. The Vera Institute reports that in FY2006 the LOP reached 25,500 detainees out of the 283,115 detained (9% of the detention population).[606] In its May 2008 report, the Vera Institute noted that the expansion of immigration detention has outpaced the expansion of funding for the LOP, with the result that LOP services continue to reach a shrinking percentage of the immigration detention population.[607] While no substitute for legal representation, the

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[603] VERA Institute, *Legal Orientation Program: Evaluation and Performance and Outcome Measurement Report, Phase II* (May 2008), *available at:* http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf.

[604] VERA Institute, *supra.*

[605] *Idem.*

[606] VERA Institute, *supra;* GAO, *Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show Pattern of Noncompliance*, GAO-07-875, p. 1 (July 2007), *available at:* http://www.gao.gov/new.items/d07875.pdf.

[607] VERA Institute, *supra*, p. iv.

IACHR notes that the LOP has given detained immigrants a basic understanding of their immigration proceedings.[608] The Inter-American Commission would therefore urge the State to increase the funding and expand the reach of the Legal Orientation Program, as an important tool to improve the due process received in immigration proceedings.

2. Prevalence of stipulated orders of removal

385. The IACHR is concerned by reports that show a significant rise over the past few years in the annual volume of Stipulated Orders of Removal. Under a Stipulated Order of Removal, the Inter-American Commission learned, an immigrant admits that he or she is in the country illegally, waives the right to immigration proceedings, and agrees to the applicable mandatory bars to reentering the United States.[609] The IACHR has learned that many times a Stipulated Order of Removal is confused with "Voluntary Departure," which carries no bars to reentry into the United States.[610] Based on government data obtained through an FOIA request, the number of annual Stipulated Orders of Removal jumped from 5,481 in FY2004 to 31,554 in FY2007.[611]

386. The Inter-American Commission is particularly troubled by the demographics of those detained and the peculiar concentration of stipulated orders of removal in a select few detention facilities. The Stanford Immigrants' Rights Clinic reports that 95% of those who signed Stipulated Orders of Removal between 1999 and 2007 were not represented by counsel and 93% had no criminal record.[612] Accordingly, immigration advocates posit that it is likely that at least a percentage of these immigrants that signed stipulated orders of removal would have a claim to remain in the United States if they had had the opportunity to speak with legal representation.[613] The Stanford report further notes that nearly half of Stipulated Orders of Removal were signed at three detention facilities, with nearly 20% at the Eloy Detention Center in Arizona.[614]

387. With respect to the IACHR's concern regarding unrepresented aliens not understanding their rights, the United States explains that the issue is addressed in the regulations and in the Executive Office of Immigration Review's procedural memoranda. These provisions express that "[i]f the alien is unrepresented, the Immigration Judge must

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[608] VERA Institute, *supra.*

[609] INA § 240(d); 8 U.S.C. § 1229a(d); National Immigrant Justice Center, "Language Barriers May Lead Immigrants to Waive Rights to Hearings Before Deportation" (June 3, 2008), *available at:* http://www.immigrantjustice.org/news/detention/preleasestiporderdata20080603.html; Stanford Law School, "Backgrounder: Stipulated Removal," pp. 2-3 (2009), *available at:* http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated_removal_backgrounder.pdf.

[610] For information with respect to Voluntary Departure see http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9e258fa29935f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD.

[611] Stanford Law School, *supra,* p. 1.

[612] Stanford Law School, *supra*, pp. 2-3.

[613] National Immigrant Justice Center, *supra.*

[614] Stanford Law School, *supra*, p. 2.

determine that the alien's waiver is voluntary, knowing, and intelligent" and that "the stipulated request and required waivers shall be signed on behalf of the government and by the alien…". The State adds that "the standard stipulation form advises the alien that by signing it, they may be barred from returning to the United States for up to 20 years or even permanently barred".

388. The IACHR appreciates this explanation, and considers that the safeguards are important, but considers that its concern remains in the sense that at least some of those apprehended immigrants are signing Stipulated Orders of Removal without understanding the difference between a stipulated order of removal and a voluntary departure in terms of their consequences. The Inter-American Commission is also worried about the possibility that the immigrants are being subjected to pressure from arresting officers.[615]

3. ICE delays in filing notices to appear

389. During the IACHR's visits, a number of detainees complained that ICE had issued them incomplete "Notices to Appear" for their immigration proceedings. The Inter-American Commission notes that a "Notice to Appear" ("NTA") is the charging document, which includes the charges against the person and the time and place for a court hearing.[616] Under federal regulations, ICE initiates removal proceedings against an individual by filing an NTA with the immigration court.[617] ICE is under no legal obligation to file the NTA in the jurisdiction where the noncitizen was apprehended and the immigration court in the jurisdiction of apprehension does not have jurisdiction over a case until an NTA is filed.[618] Thus, ICE can choose the jurisdiction in which to initiate proceedings. Moreover, the IACHR learned that there is no legal deadline by which ICE must file with the immigration court.[619]

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[615] During its visit to Arizona, the IACHR interviewed two persons who had been civilly arrested by local 287(g) law enforcement partners. Both persons alleged that they were pressured to sign papers without receiving an explanation of their contents or the opportunity to read them first. Moreover, one reported that other persons in the same holding cell had signed papers that they thought were "Voluntary Departures" but were in fact agreements to testify against the human smugglers that brought them into the United States. The audio of the interviews is on file with the IACHR

[616] 8 CFR § 1003.15.

[617] *See* 8 CFR §§ 1003.14, 1003.20.

[618] *Maldonado-Cruz v. US*, 883 F.2d 788, 790 (9th Cir. 1989) ("The Attorney General has the authority to transport aliens out of the circuit in which they were apprehended."). *See also Sinclair v. Atty. Gen. of U.S.*, 198 Fed.Appx. 218, n.3 (3d Cir. 2006) (The statutes grant authority to the Attorney General to detain aliens pending decisions on removal. . . . Further, the place of detention is left to the discretion of the Attorney General."); *Gandarillas-Zambrana v. BIA*, 44 F.3d 1251, 1256 (4th Cir.1995) ("The INS necessarily has the authority to determine the location of detention of an alien in deportation proceedings ... and therefore, to transfer aliens from one detention center to another."); *Sasso v. Milhollan*, 735 F.Supp. 1045, 1046 (S.D.Fla.1990) (holding that the Attorney General has discretion over location of detention).

[619] DHS OIG, *Immigration and Customs Enforcement Policies and Procedures related to Detainee Transfers*, OIG-10-13, p. 2 (Nov. 2009), *available at:* http://trac.syr.edu/immigration/library/P4225.pdf; Human Rights Watch, *Locked up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States*, p. 17 (Dec. 2009), *available at:* http://www.hrw.org/en/node/86789.

390. During its visits, the Inter-American Commission reviewed a number of detainees' NTAs and observed that all the NTAs included the alleged immigration violations. However they failed to include the time and place for their court hearings. One group of detainees reported that they had been apprehended in Los Angeles two weeks earlier and subsequently transferred to Arizona without receiving notification of when and where they would be permitted to challenge their detention before an immigration judge. The detainees reported that they had tried multiple times to reach the ICE officer responsible for their cases but had yet to receive a response. NGOs and attorneys report that immigrants are frequently detained for days, weeks, and sometimes over a month before being issued a completed NTA.[620]

391. Immigration attorneys report that it is a common practice for ICE to delay the filing of an NTA, often to provide it the opportunity to expeditiously transfer persons to detention facilities thousands of miles away from the point of apprehension. With respect to this specific issue, the United States clarifies that it is not the policy of the immigration authorities to delay the issuance of an NTA to facilitate a transfer but rather that "ICE policy dictates that a determination whether to charge an alien shall be made within 48 hours of an alien's arrest and that the NTA shall be served upon a detained alien within 72 hours". The Inter-American Commission appreciates the clarification.

392. On the other hand, the October 2009 report of Dr. Schriro acknowledged significant detention space shortages in California, the Mid-Atlantic, and Northeastern states, while having surplus space in states in the south and along the U.S.-Mexico border.[621] A number of attorneys from Pennsylvania reported to the IACHR that they had entered into representation agreements with detained immigrants and petitioned the local immigration court for a bond hearing, only to be informed by the immigration judge that the court could not determine whether it had jurisdiction over the person or the case because ICE had not filed the NTA.[622] Subsequently, the attorneys would learn that their clients had been transferred to Texas where ICE filed the NTA.[623] After submitting complaints to ICE's regional field office, the attorneys learned that ICE was systematically transporting immigrant detainees from York, Pennsylvania to Texas and other distant detention facilities.[624]

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[620] Human Rights Watch, Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States, p. 17, fn. 22 (Dec. 2009) (citing Shoba Sivaprasad Wadhia, "Under Arrest: Immigrants; Rights and the Rule of Law," University of Memphis Law Review, vol. 38, Summer 2008, p. 853), *available at:* http://www.hrw.org/en/node/86789.

[621] DHS, Dr. Dora Schriro, *supra*, pp. 6-9.

[622] IACHR, Meeting with Immigration Advocates in Pennsylvania (Jan. 23, 2009) (audio of meeting on file at the Commission). 8 CFR §§ 1003.14, 1003.19.

[623] The IACHR notes that when it visited the Willacy detention center, immigration advocates commented that many immigrant detainees at Willacy and the other detention facilities in the area were originally apprehended in New York and other states in the Northeast.

[624] Letter from Thomas Decker, Philadelphia ICE Field Office Director (dated June 24, 2008) (on file with the IACHR).

393. The Inter-American Commission received information about the use of "air transportation hub" protocols[625] to transfer immigrant detainees significant distances from the point of apprehension, where many immigrants have their family in the United States, support networks, and possibly an attorney. Moreover, given the dearth of *pro bono* and immigration attorneys near the facilities where these detainees are transferred, the "air transportation hub protocol" transfers and similar transfers have the effect of severely limiting access to legal representation for these immigrant detainees.

4. Pervasive use of transfers between detention facilities

394. Related to the issue of the NTAs, the IACHR is alarmed by the high frequency of detainee transfers within the U.S. immigration detention system, many times outside the jurisdiction where the immigrant was apprehended. According to ICE data obtained by TRAC, in FY2008 over 50% of immigrant detainees were transferred at least once and 24% were transferred multiple times.[626] Under U.S. law, an immigrant detainee does not have the right to immigration proceedings in the jurisdiction of apprehension.[627] The ICE data demonstrates that, as suggested by Dr. Schriro's report,[628] the highest transfer rates are to states and facilities where there is ample detention space but few *pro bono* and immigration attorneys.[629]

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[625] *Idem*. The IACHR notes that a portion of this agreement was highlighted in a November 2009 DHS OIG report as a "best practice," however the report fails to address the agreement with respect to immigrant detainees from outside the Philadelphia Area of Responsibility. *See* DHS OIG, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG-10-13, p. 4 (Nov. 2009), *available at:* http://trac.syr.edu/immigration/library/P4225.pdf.

[626] TRAC, "Huge Increase in Transfers of ICE Detainees" (Dec. 2, 2009), *available at:* http://trac.syr.edu/immigration/reports/220/. A 2008 ACLU-Massachusetts report found that in 2007 ICE spent $10 million to transfer approximately 19,400 immigrant detainees from New England to other areas of the country. *See* ACLU—Massachusetts, *Detention and Deportation in the Age of ICE*, p. 6 (Dec. 10, 2008), *available at:* http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf. A March 2009 DHS OIG report states that in FY2007, ICE transferred detainees 261,910 times between facilities. DHS OIG, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees*, OIG-09-41, p. 2 (March 2009), *available at:* http://trac.syr.edu/immigration/library/P3676.pdf.

[627] *See Maldonado-Cruz v. US*, 883 F.2d 788, 790 (9th Cir. 1989)("The Attorney General has the authority to transport aliens out of the circuit in which they were apprehended."); *Sinclair v. Atty. Gen. of U.S.*, 198 Fed.Appx. 218, n.3 (3d Cir. 2006) (The statutes grant authority to the Attorney General to detain aliens pending decisions on removal. . . . Further, the place of detention is left to the discretion of the Attorney General."); *Gandarillas-Zambrana v. BIA*, 44 F.3d 1251, 1256 (4th Cir.1995) ("The INS necessarily has the authority to determine the location of detention of an alien in deportation proceedings ... and therefore, to transfer aliens from one detention center to another."); *Sasso v. Milhollan*, 735 F.Supp. 1045, 1046 (S.D.Fla.1990) (holding that the Attorney General has discretion over location of detention).

[628] DHS, Dr. Dora Schriro, *supra*, pp. 6-9. *See also* DHS OIG, *Immigration and Customs Enforcement Policies and Procedures related to Detainee Transfers*, OIG-10-13, p. 1 (Nov. 2009), *available at:* http://trac.syr.edu/immigration/library/P4225.pdf.

[629] *Compare* Human Rights Watch, *Locked Up Far Away, supra*, p. 35 *with* "Lack of Access to Legal Representation in Detention," earlier section.

395. The Inter-American Commission observes that the decision to transfer is within the jurisdiction of ICE; opportunities to appeal the ICE decision to an immigration judge are few.[630] Under the national detention standards, ICE is supposed to take into consideration whether a detainee is represented by counsel prior to making a decision to transfer a detainee.[631] A November 2009 DHS OIG report, however, found that detention officers did not consistently determine whether a detainee had legal representation or scheduled court proceedings prior to transferring said detainee.[632]

396. The IACHR observes that transfers have a profound impact on the quality of due process for immigrant detainees. First, many immigrants subject to transfers are apprehended in the interior of the United States, which means that many have families and friends living in the United States. Detainees and immigration advocates have told the Inter-American Commission that these community connections offer significant financial, logistical, and psychological support for detained immigrants that challenge the immigration charges against them. [633]

397. Second, many of these transfers are to detention facilities located where there are few legal service providers.[634] A December 2009 Human Rights Watch report found that the highest rates of transfers were to Texas and Louisiana, the two states with the country's lowest ratios of immigration attorneys to immigration detainees.[635] While the IACHR is aware that an out-of-jurisdiction attorney can still represent a transferred immigrant detainee, the Inter-American Commission believes the additional obstacles would greatly affect the quality of representation.

398. Third, the IACHR considers that all the evidence necessary for a bond hearing and the underlying immigration claims are located in the district of apprehension, making effective presentation difficult. In deciding the amount of a bond, an immigration judge weighs a person's flight risk in part by evidence such as community ties, family

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[630] *See* ICE, *Operation Manual ICE Performance Based National Detention Standards*, "Transfers," p. 3 (Sept. 2008), *available at:* http://www.ice.gov/doclib/PBNDS/pdf/transfer_of_detainees.pdf; ICE, 2000 Detention Operation Manual, "Detainee Transfers," p. 1 (2000), available at: http://www.ice.gov/doclib/pi/dro/opsmanual/DetTransStdfinal.pdf; Human Rights Watch, *Locked Up Far Away, supra.*

[631] *See* ICE, Operation Manual ICE Performance Based National Detention Standards, "Transfers," *supra*, p. 2.

[632] DHS OIG, *Immigration and Customs Enforcement's Tracking and Transfers of Detainees*, OIG-09-41, p. 2 (March 2009), *available at:* http://trac.syr.edu/immigration/library/P3676.pdf. The IACHR further notes that under the national detention standards, it is ICE's responsibility to contact a detainee's legal representation in the event of a transfer. Nevertheless, the DHS OIG reports that the ICE officer it interviewed viewed it as the responsibility of the transferred detainee to contact his or her attorney after being transferred. *Compare* ICE, Operation Manual ICE Performance Based National Detention Standards, "Transfers," *supra*, p. 3 *with* DHS OIG, OIG-09-41, *supra*, pp. 7-8.

[633] Human Rights Watch, *Locked Up Far Away, supra*, pp. 66-71, 79-83.

[634] *Idem*, p. 35.

[635] *Idem*, pp. 6, 38. The Commission notes that page 38 of the report provides the ratio of the number of transferred detainees to immigration attorney for each federal circuit.

relationships, and possible employment.[636] If a transferred immigrant detainee has no way of offering witnesses in person, then he or she faces additional challenges to obtain a reasonable bond amount and be released for the duration of his or her immigration proceedings.

399. Fourth, the Inter-American Commission observes that the immigration law in each U.S. federal circuit can vary significantly.[637] The information received indicates that the highest rates of immigrant transfers are into the federal court of appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas),[638] which reportedly has very low grant rates of immigration relief.[639]

400. Finally, the IACHR is concerned by a February 2009 report indicating that ICE does not have a uniform method of ensuring that detention facilities are consistently transferring medical records with detainees.[640] The Inter-American Commission has been told that at times, detainees are not transferred with their complete medical records, leading to disruptions in care.[641]

401. With respect to these considerations, the United States explains that "ICE has spent the last several months evaluating best and current practices nationwide with respect to issues affecting detainee transfers" and that based on its findings "the agency is currently drafting a transfer policy that we expect will limit the frequency of detainee transfers nationwide with a goal of keeping detained aliens near their family and counsel and address many of these concerns, including mandating a timeline by which agents/officers must file Notices to Appear with the immigration court". The State informs that it hopes to develop "a national transfer policy which meets at least some of the needs of all interested parties, including the individual in our custody and his/her counsel(if any)", even if "there are times when transferring a detainee is in the best interests of the individual". The State asserts:

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[636] Human Rights Watch, *Locked Up Far Away*, p. 59 (Dec. 2009), *available at:* http://www.hrw.org/sites/default/files/reports/us1209web.pdf; *see also,* 8 CFR § 1003.19.

[637] The Commission observes that while the administrative immigration court system seeks uniform application of U.S. immigration law, every federal circuit has developed its own case law. *See Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("Although the BIA seeks uniform nationwide interpretation of the immigration laws, it considers itself bound by the law of the circuit in which the administrative proceedings were held." *Matter of Gonzalez*, 16 I. & N. Dec. 134, 135-36 (BIA 1977); *Matter of Waldei*, Int. Dec. 2981 (BIA Oct. 30, 1984)."

[638] Human Rights Watch, *Locked Up Far Away, supra*, p. 37.

[639] *Idem*, pp. 72-78.

[640] GAO, *DHS: Organizational Structure and Resources for Providing Health Care to Immigration Detainees*, cover letter, p. 26 (Feb. 23, 2009), *available at:* http://www.gao.gov/new.items/d09308r.pdf.

[641] *See, e.g.,* Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, pp. 37-39 (March 2009), *available at:* http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed; Florida Immigrant Advocacy Center, *Dying for Decent Care, supra*, pp. 24, 41.

> Transferring a detainee is not used as a punitive measure, nor will it be under the new policy. To the contrary, ICE appreciates the significant benefit that staying in a facility near family members and attorneys can have on an individual detainee. Therefore, ICE will make detainee transfer determinations after thoroughly taking account of all information currently available to the agency.

402. The Inter-American Commission values the information supplied by the State and will continue to monitor the situation to verify the practical application of these positive measures and policies.

5. Concerns with the use of video conferencing for credible fear interviews and merits hearings

403. With expanding immigration detention and the use of remote facilities, the IACHR is deeply concerned with the increasing reliance on video conferencing for immigration proceedings.[642]

404. The United States provided the following observations in its October 2010 submission to the IACHR:

> Video conferencing is an important tool in ensuring the efficient functioning of immigration proceedings which Congress specifically authorized for immigration proceedings. See INA § 240(b)(2)(A)(iii); 8 U.S.C. 1229a(b)(2)(A)(iii). Without video conferencing, proceedings would take longer to complete for several reasons, including, in some instances, the fact that the agency may be required to rely more heavily on detainee transfers to ensure court appearances, and, as a result, detention time would be prolonged as, for example, the time between court dates is extended. One of the uses for video conferencing is to allow immigration proceedings to move forward while criminal aliens are incarcerated and therefore not available to attend immigration proceedings. In addition, allowing video conferencing can provide a forum for distant witnesses (who would otherwise be unavailable) to testify on behalf of an alien and therefore serves to improve the quality and quantity of admissible evidence.

405. The Inter-American Commission observes that in U.S. federal criminal proceedings video conferencing can only be used for initial appearances and arraignments.[643] Yet, the IACHR has learned that the U.S. immigration courts are using video conferencing for hearings on the merits.[644] For example, Human Rights First reports

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[642] Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, p. 22 (June de 2009), *available at:* http://appleseednetwork.org/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf. As of May 2007, 47 of the 53 U.S. immigration courts had video-conferencing capability. *See* GAO, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement*, GAO-06-771, p. 18 (August 2006), *available at:* http://trac.syr.edu/immigration/library/P1067.pdf.

[643] Federal Rule of Criminal Procedure 43; Appleseed, Videoconferencing in Removal Hearings: *A Case Study of the Chicago Immigration Court,* p. 15, footnote 14 (August 2, 2005), *available at:* http://appleseednetwork.org/Portals/0/Documents/Publications/Center%20Pubs/Chicago%20Videoconferencing%20Report.pdf; Human Rights First, *U.S. Detention of Asylum Seekers, Seeking Protection, Finding Prison,* pp. 59-61 (April 2009), *available at:* http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf.

[644] Appleseed, *Assembly Line Injustice, supra*, p. 22.

that in FY2007 the U.S. asylum office used video conferencing to conduct 60% of its credible fear interviews.[645]

406. During its visits, the Inter-American Commission had the opportunity to twice observe immigration proceedings being conducted remotely via video conferencing. The IACHR delegation noted how disconnected the detainee at the detention facility seemed from the judge and the proceedings in the court room. The Inter-American Commission is deeply concerned that this disconnect may inhibit immigrant detainees from presenting effective testimony and prevent the immigration judge from making accurate credibility evaluations on important factors such as demeanor and body language.[646] The IACHR notes that video conferencing diminishes the quality of a detainee's legal representation, as an attorney must decide whether to be with the client at the detention facility to assist the client or in the courtroom with the immigration judge and DHS attorney.[647] Finally, the Inter-American Commission has received information indicating that video conferencing creates additional obstacles for complete and accurate interpretation, greatly reducing detainees' ability to understand and participate effectively in their proceedings.[648]

407. The IACHR takes note of a 2008 analysis published in the Georgetown Immigration Law Journal, which found that based on U.S. immigration court statistics in FY2005 and FY2006 asylum seekers who had their merits hearing via video conferencing were half as likely to be granted relief.[649]

408. Finally, it is very troubling that this mechanism is used in proceedings involving unaccompanied children[650] and persons with mental illness,[651] where the due process impact is considerably greater.

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[645] Human Rights First, *U.S. Detention of Asylum Seekers, supra,* pp. 59-61.

[646] *See* Appleseed, *Videoconferencing in Removal Hearings, supra*, pp. 17-19 (citing academic studies supporting the Commission's conclusions); Appleseed, *Assembly Line Injustice, supra*, p. 22.

[647] *See* Appleseed, *Videoconferencing in Removal Hearings, supra*, pp. 38-40; Appleseed, *Assembly Line Injustice supra*, p. 23.

[648] *Idem*, pp. 40-44.

[649] Frank M. Walsh and Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Georgetown Immigration Law Journal 259, 271 (2008).

[650] United States Department of Justice, EOIR, "Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children," pp. 5-6 (May 22, 2007), *available at:* http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf. "... when handling cases involving unaccompanied alien child respondents, if under ordinary circumstances the hearing would be conducted by video conference, immigration judges should determine if particular facts are present in the case to warrant an exception from the usual practice."

[651] The IACHR spoke with a number of immigration attorneys who have represented immigrants with mental illness or a mental disorder. These attorneys said that hearings via videoconferencing posed considerable difficulties in such cases, as their clients were visibly upset and paranoid, constantly ducking off camera.

6. Due process for vulnerable groups

a. Unaccompanied children

409. Considering the complexity of immigration proceedings, the Inter-American Commission is deeply concerned that State-funded legal representation is not provided to unaccompanied children. A February 2009 Women's Refugee Commission report estimated that approximately 60% of unaccompanied children do not have legal representation in their immigration proceedings.[652] The IACHR welcomes the State's effort to fill that void through its Legal Orientation Program, and the efforts by non-profit organizations like Kids In Need of Defense (KIND).[653] The Inter-American Commission also recognizes that the State has made asylum protection more available through the Special Immigrant Juvenile Status. However, the IACHR urges the State to provide the means necessary so that all unaccompanied children have legal representation during immigration proceedings.

410. As indicated earlier, the Inter-American Commission recognizes that many additional legal protections have been granted to unaccompanied children under the Trafficking Victims Protection and Reauthorization Act of 2008 ("TVPRA").[654] The IACHR would like to place particular emphasis on the requirement to screen all unaccompanied children coming from Mexico and Canada to identify potential victims of trafficking or asylum seekers. The Inter-American Commission received some reports from immigration attorneys to the effect that the language of the protocol developed by ICE and the CBP to fulfill this legal requirement was not effective in identifying potential victims.

b. Immigrant detainees with mental disabilities

411. The IACHR is likewise troubled that State-funded legal representation is not provided to immigrant detainees with mental disabilities. Given the Inter-American Commission's observations with respect to the inappropriate and deleterious care provided to ICE detainees with mental illnesses, proper legal representation is urgently needed. Moreover, as in the case of unaccompanied minors, the IACHR does not understand how a person with a mental disability or mental illness could defend himself properly and effectively without being represented by counsel in the immigration proceedings.

412. The Inter-American Commission, moreover, has learned that U.S. immigration courts have no established practice for immigrants with mental disabilities. Under section 240(b)(3) of the INA, the Attorney General is required to establish regulations "to protect the rights and privileges" of immigrants with mental disabilities

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[652] *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra*, pp. 22-23.

[653] The Vera Institute reports that where its LOP partner organizations are located, it estimates that 75% of unaccompanied minors who are in ORR custody throughout their immigration proceedings are represented. *See* Women's Refugee Commission & Orrick, Herrington & Sutcliffe LLP, *supra*, fn. 168. For information regarding the KIND organization *see* http://www.supportkind.org/.

[654] For a summary of TVPRA's protections for unaccompanied children *see* http://ailainfonet.org/content/fileviewer.aspx?docid=27441&linkid=187343.

throughout their immigration proceedings. However, as of the date of this report, the Attorney General has not fulfilled that obligation.[655] The IACHR underscores the fact that a person's ability to understand or explain his or her interests in any legal proceeding is essential to ensuring due process. The Inter-American Commission further observes that the lack of any guidance for immigration judges as to how to proceed in cases of immigrants with mental disabilities has often led to delays in those proceedings and has left the immigrant with a mental disability languishing and his or her condition deteriorating as a result.[656]

413. The IACHR observes that even when immigration courts deem an individual incompetent to represent his or herself, a current ambiguity in immigration regulations regarding the appointment of a representative can lead to a fundamentally unfair result. The current regulation states:

> When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.[657]

414. The Inter-American Commission, however, notes that the "custodian" of a detainee with a mental disability is ICE.[658] Thus, the regulation creates a violation of the immigrant's right of defense, since the very entity that is trying to deport the person is appointed, in some cases, to represent his or her interests. The IACHR urges the State to ensure that persons with mental disabilities have independent legal counsel. The State must develop an effective program of representation for detained immigrants with mental disabilities.

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[655] INA § 240(b)(3), 8 U.S.C. § 1229a(b)(3); Texas Appleseed & Akin Gump Strauss Hauer & Feld LLP, *Justice for Immigration's Hidden Population*, p. 55 (March 2010), *available at:* http://graphics8.nytimes.com/packages/pdf/national/30immig_report.pdf.

[656] *See, e.g.,* San Diego Union-Tribune, "2 mentally ill detainees in immigration custody for years are released" (April 1, 2010), *available at:* http://www.signonsandiego.com/news/2010/apr/01/2-mentally-ill-detainees-in-immigration-custody/; New York Times, "Disabled Immigration Detainees Face Deportation" (March 31, 2010), *available at:* http://www.nytimes.com/2010/03/30/us/30immig.html; New York Times, "Mentally Ill and in Immigration Limbo" (May 4, 2009), *available at:* http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html; Dallas Morning News, "Mentally Ill Immigrants Have Little Hope for Care When Detained" (July 13, 2009), *available at:* http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/DN-mental_13tex.ART.State.Edition2.4bc5526.html

[657] 8 CFR § 1240.4.

[658] Texas Appleseed reports that courts have permitted detention center employees to serve as "custodian" for detainees with mental disabilities. *See* Texas Appleseed & Akin Gump Strauss Hauer & Feld LLP, *supra*, p. 51.

V. FINAL CONCLUSIONS AND RECOMMENDATIONS

415. On the basis of the investigation set forth in this report, and on the updated information and observations presented by the United States, the Inter-American Commission will proceed to its final conclusions and the corresponding recommendations. The observations presented by the United States to the draft version of this report have been very valuable in assessing those areas in which advances have already been made, and where immigration reform is producing concrete results toward compliance with international human rights obligations. The IACHR encourages the State to continue such reforms and to broaden them with a view to enhancing the protection of all persons under its jurisdiction.

416. Throughout this report, the Inter-American Commission has expressed its concern with the increasing use of detention of migrants based on a presumption of its necessity, when in fact detention should be the exception. The United States Supreme Court itself has upheld the constitutionality of mandatory detention in immigration cases that have not been decided, despite the fact that the violations alleged are civil in nature, and despite the loss of liberty that detention presupposes.

417. The IACHR is preoccupied by the rapid increase in the number of partnerships with local and state law enforcement for purposes of enforcing civil immigration laws. The Inter-American Commission finds that ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling and that their practices do not use the supposed investigation of crimes as a pretext to prosecute and detain undocumented migrants. In this regard, the October 2010 observations of the United States point to the implementation of performance-based standards. The Inter-American Commission will be very interested in analyzing the result of the application of those standards as part of the follow-up to the recommendations of this report.

418. It must be reiterated that detention is a disproportionate measure in many if not the majority of cases, and that the programs that provide for alternatives to detention constitutes a more balanced way for the State to ensure compliance with immigration laws. Another concern the IACHR sets forth in this report is the impact of detention on due process, mainly with respect to the right to legal counsel which directly affects the right to seek release. To better guarantee the right to legal representation and, ultimately, to due process, the IACHR considers that stronger programs offering alternatives to detention are needed and the Legal Orientation Program must be expanded nationwide. In this regard, the October 2010 observations of the United States indicate initiatives to broaden its alternative to detention programs, an initiative which the IACHR welcomes.

419. In this report the IACHR also stresses that even in those cases in which detention is strictly necessary, there is no genuinely civil system where the general conditions comply with standards of respect for human dignity and humane treatment; there is also a lack of the special conditions required for in cases of non-punitive detention.

As developed above, the IACHR is further troubled by the frequent outsourcing of the management and personal care of immigration detainees to private contractors.

A. Interior Enforcement Recommendations

420. The Inter-American Commission acknowledges the significant challenges that the federal government faces in administering such a complex, expansive system of immigration enforcement and removal. Given the human rights concerns identified in this report, the IACHR offers the following recommendations for how the State can improve its current policies and practices with respect to immigration enforcement, detention, and due process, so as to enhance the protection of immigrants' basic human rights. The Inter-American Commission urges DHS to expend the financial and human resources required to achieve vigorous central oversight, accountability and control over the many aspects of ICE's civil immigration operations. This will require significant increases in ICE personnel to provide direct, in-person, daily supervision of the various facets of ICE's civil immigration operations.

1. Federal Enforcement Programs

421. Given ICE's new emphasis on investigation of employers, the IACHR urges the State to devote the necessary resources to lower the error rate in its E-Verify system, which is used to determine an employee's work authorization.[659] Further, the Inter-American Commission urges the State to standardize the employment audits and make them more transparent, so as to give workers access to the audit process, to give them a reasonable period of time to prove that their work status is valid and to implement stricter supervision of employers to make certain that they are not engaging in prohibited practices, such as taking adverse employment action when social security numbers do not initially match or failing to inform workers of their rights under the program. The IACHR urges the State to prioritize worksite control in the case of those employers who commit abuses of employees. If an unauthorized immigrant is apprehended at his or her workplace, the State must guarantee strict enforcement of the humanitarian guidelines issued by ICE.[660]

422. With respect to ICE's Fugitive Operations program (FOT), the Inter-American Commission recommends the elimination of home raids, unless the targeted immigrant fugitive has a serious criminal record or poses another identifiable, serious risk to the safety of the community. To the extent that FOTs continue to execute home raids, the IACHR urges that ICE require:

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[659] *See, e.g.,* DHS, *Findings of the Web Basic Pilot Evaluation*, p. 50 (Sept. 2007), *available at:* http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf. This independent study commissioned by DHS reported that the E-Verify system mistakenly found nearly 10% of foreign-born U.S. citizens initially unauthorized to work.

[660] See "Worksite Enforcement Strategy" (April 30, 2009), *available at:* http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf; ICE, "Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees," *available at:* http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/ice-hum-guidelines.pdf.

a. that the raid be carried out exclusively by FOT officers based on reliable evidence;

b. that the FOT officers identify themselves as "immigration officials" before seeking entry to the dwelling;

c. that the FOT officers present individualized administrative arrest warrants issued by an independent judge before seeking to enter the residence, and

d. that the FOT officers not be permitted to arrest collateral persons who are not named in the administrative arrest warrant.

423. Finally, the Inter-American Commission urges the State to eliminate the use of removal quotas to evaluate and promote ICE personnel, in order to prevent a deviation from ICE's priorities, which are that the focus should be on immigrants with serious criminal records.

2. State and Local Partnership Enforcement Programs

424. This section includes the recommendations of the IACHR with respect to ICE's programs to enforce civil immigration law through state and local partners (287(g), Jail Enforcement, Criminal Alien Program, and Secure Communities Program).

425. The IACHR recommends that ICE eliminate 287(g) authorization for Task Force Enforcement, as the federal authorities are unable to properly monitor to prevent and combat the use of racial profiling and the negative effects on security and crime prevention. The Inter-American Commission also recommends that the United States Department of Justice (DOJ) replace its April 3, 2002 memorandum -–in which it found that local law enforcement agencies have an inherent authority to enforce federal civil immigration laws-- and return its position to the DOJ policy announced in 1996.[661]

426. First, the Inter-American Commission recommends that the state and local partners only be permitted to participate in enforcement of civil immigration laws once an individual has been criminally convicted or the criminal proceeding has been fully adjudicated. Second, the IACHR urges ICE to require participating LEAs to collect essential data that may indicate racial-profiling of the persons whose immigration statuses are reviewed and to periodically report to ICE on this matter. This data should include: the total number of arrests and the total number of persons with respect to whom the charges were dropped. In both cases, it should be possible to break down the information by type of charge or accusation and the person's ethnic origin. Third, the Inter-American

[661] *See* United States Department of Justice "Memorandum for the Attorney General: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations" (April 3, 2002), available at: http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf. A copy of the DOJ's 1996 position regarding the "statutory authorities" is available at: http://www.justice.gov/olc/immstopo1a.htm.

Commission urges ICE to establish transparent instructions to its state and local coordination teams and other appropriate bodies, so that these data can be diligently reviewed to identify possible patterns of racial-profiling. Also, appropriate follow-up investigations should be conducted and training provided to and corrective action taken against the participating LEAs. Fourth, the IACHR recommends that ICE conduct unannounced inspections of partner LEAs to review their implementation of the partnership agreements. Finally, the Inter-American Commission strongly urges ICE to publish the data it compiles from the participating LEAs, so the public can monitor and be satisfied that racial-profiling is not being used in a discriminatory manner within these programs.

427. Finally, the IACHR urges federal and local authorities to refrain from passing laws that use criminal offenses to criminalize immigration, and from developing administrative or other practices that violate the fundamental principle of nondiscrimination and the immigrants' rights to due process of law, personal liberty, and humane treatment. The Inter-American Commission also underscores the need to find appropriate ways to amend the law recently enacted in Arizona to adapt it to international human rights standards for the protection of immigrants.

B. Detention recommendations

1. Mandatory detention of arriving aliens and deportable immigrants with criminal convictions

428. The IACHR urges the State to eliminate the practice of mandatory detention for broad classes of immigrants, including "arriving aliens" and deportable, legal immigrants (including LPRs) with criminal convictions but who have served their sentence.

2. Custody determinations and alternatives to detention

429. The Inter-American Commission urges the State to develop a risk assessment tool premised upon a presumption for release and to establish clear criteria to determine whether detention is in order. Those criteria should be dictated exclusively by procedural factors in order to ensure that detention does not become punitive (for example, when there is a flight risk). Public safety can only be invoked when the persons in question have criminal records and under no circumstances can be invoked in the case of persons who have only committed immigration infractions. Whatever the case, the determination of whether a person should be incarcerated ought to be done on a case-by-case basis, taking into account the person's circumstances and sufficiently substantiating the reasons why the decision was not based on a presumption of liberty. This decision should be subject to judicial review.

430. The risk assessment tool should be designed to place each person in the least restrictive environment necessary to fulfill the State's goals at each stage of the proceedings and should feature an evaluation of any humanitarian needs a person might have. The humanitarian considerations regarding vulnerable groups, including families, children, the elderly, asylum seekers, victims of human trafficking, of persecution and of

other serious crimes, and persons with physical or mental health problems, should create a strong presumption in favor of the need to be released or placed in an appropriate environment other than civil detention or the current detention system. Persons in vulnerable groups should only be placed in civil detention or under the current detention system in extraordinary, carefully defined circumstances. Furthermore, the case-by-case risk assessment should consider the likelihood of a person's success on the merits of his or her claims to remain in the United States.[662]

431. As part of an individualized risk assessment, the IACHR recommends that immigrants be permitted to be represented by counsel, to present evidence and to appeal any decision on his or her risk assessment to an immigration judge. The Inter-American Commission also recommends that risk assessment determinations be automatically reviewed on a defined, periodic basis and that these reviews take into account the State's increased burden of proof when detention continues over time; pertinent developments in the proceedings on the merits should also be factored in wherever relevant.

432. The risk assessment tool should present a broad spectrum of custody determinations, including: release, bond, telephone reporting, in-person reporting, case manager meetings, unannounced home visits, GPS monitoring, house detention,[663] residential group living, civil detention, and detention in a secured facility. The IACHR recognizes that this will require the State to develop expansive, robust, community-based Alternatives to Detention programs. The Inter-American Commission urges the State to significantly increase its funding for such programs, while gradually abandoning its current approach of mass detention. In order for the Alternatives to Detention programs to be successful, the IACHR recommends that such programs include meaningful case management by properly trained personnel and assistance in accessing social service organizations.[664]

433. The State must also guarantee that in the event persons are found to be in violation of immigration law or are not granted legal status, they are to be deported from the United States in a manner that is respectful of their human rights.

3. Civil detention system

434. The IACHR urges the State to significantly curtail prison-like detention conditions. Accordingly, the Inter-American Commission urges the State to carry through

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[662] The U.S. immigration courts already do a similar type of analysis when an LPR challenges being categorized as having committed an "aggravated felony" and thus subject to mandatory detention. *See Matter of Joseph*, 22 I & N Dec. 799 (BIA 1999).

[663] The former INS commissioned the VERA Institute to conduct a study with respect to the viability of this option. *See* VERA Institute for Justice, *Home Detention for Immigrant Detainees* (Sept. 1996), *available at: http://www.vera.org/download?file=640/353.4vi.pdf*.

[664] The United States has experimented with this type of robust Alternatives to Detention program with significant success. *See* VERA Institute of Justice, *Testing Community Supervision for the INS: an Evaluation of the Appearance Assistance Program: Volume I* (Aug. 1, 2000), *available at:* http://www.vera.org/download?file=615/finalreport.pdf.

with its commitment to develop a genuinely civil detention system. The IACHR recommends that each facility house only small groups, in such a way that the State is able to provide for their basic needs and protect the human rights of all detained immigrants. Furthermore, the State should locate civil detention facilities near urban centers in order to ensure that detainees have meaningful access to legal representation.

435. The Inter-American Commission urges the State to design and implement proper oversight and monitoring mechanisms by federal immigration authorities, to ensure that those centers that are run by private firms comply with international standards on immigration detention.

C. Civil detention conditions

436. The IACHR urges the State to make the new civil detention standards into legally enforceable regulations that depart from the ACA criminal detention standards, so that they constitute the guarantee necessary to ensure that the human rights of immigrant detainees are respected. The Inter-American Commission offers some recommendations concerning the elements necessary for the detention system to be truly civil in nature:

a. The facility must provide detainees meaningful privacy, freedom of movement within the facility grounds, and access to outdoor recreation (open to the sky without obstruction). The facility must provide ample access to all three during normal daytime hours, except under extraordinary circumstances such as a demonstrable security risk. The detainees' sleeping quarters must not have the appearance of a prison cell.

b. Visitation space must be sufficient to accommodate a reasonable amount of visitors, based on the size of the detention population, and provide basic facilities. Detainees should be permitted to receive unplanned visitors and to have in-person, contact visits.

c. Facilities must provide adequate space for confidential meetings with attorneys and mental health practitioners, so that these meetings can happen in an efficient and timely manner. Detainees should be permitted to meet with their attorneys and mental health practitioners 7 days a week during normal waking hours. Attorney-client meetings should not have any set time limit.

d. Detainees must be permitted to have confidential phone conversations with their attorneys and consulates, with only well grounded restrictions on the time or frequency of such calls.

e. Facilities must provide appropriate space for legal orientation group meetings. Facilities should actively seek out and accommodate potential legal orientation providers. ICE should approve legal orientation presenters based on objective, transparent criteria.

f. Detainees represented by law students, BIA accredited representatives, and law graduates, must be provided with the same access to counsel as detainees represented by attorneys.

g. Law libraries must be up to date, with internet access and access to electronic immigration case information. Facilities must provide ample quiet work space and office materials for detainees to work on their cases. Detainees should be permitted to freely access the law library during normal work hours with no set time limits, demand and space providing.

h. Mail regarding legal matters must be kept confidential, delivered to detainees expeditiously, and if necessary opened by the detainee in front of facility staff.

i. Detainees should be allowed to wear their own clothing.

j. Detention employees should not wear prison-type uniforms.

k. Detention employees should not be called "guards" and detainees should not be referred to as "inmates."

l. Detainees should eat meals at normal meal-time hours and have sufficient time to complete their meals. Facilities should be open to detainee suggestions for nutritious meals that correspond to the detainees' cultural preferences.

m. Detainees should not be shackled or handcuffed, either in the facility or during transport, unless there is a specific, individualized reason. Detainees should not be shackled during immigration court proceedings.

n. The use of segregation, either for disciplinary or administrative purposes, must be strictly prohibited.

o. Detainees should have broad access to internet, e-mail, and phone communication free of charge. All forms of communication must be kept in good working order.

p. Detainees should be allowed to keep possessions that are not illegal or dangerous with them in their room. "Contraband"

policies should be revised to enable detainees to accept basic, legal items such as postage stamps, envelopes, care-packages from family members and legal representatives. Detainees must have unfettered access to their legal documents.

q. Detainees should be given the option of participating in organized daily activities, indoor and outdoor. The facility should actively encourage outside organizations to provide regular activities to the detainee population

r. Facilities should provide detainees with access to programmatic activities, including educational, English language, and skills-based programs.

s. Detainees should be provided a quiet space to practice their religion. Facilities must make accommodations with respect to dress, schedule, and dietary considerations. The facility should reach out to the greater religious community to make regular visits and perform religious services for the detainee population.

t. Detainees must be provided with a means to register their grievances and suggestions directly to facility authorities both verbally and in writing.

1. Medical and mental health care

437. The IACHR first recommends that when designing and implementing a new health care system, the DIHS and other providers of health care services for immigrant detainees do away with the current model of emergency care. The Inter-American Commission recommends that the DIHS establish a new protocol which gives primacy to the medical care decisions of the attending, qualified medical, dental and mental health personnel. Moreover, the IACHR suggests that DIHS establish an independent review panel, which would permit detainees to appeal denials of care.

438. As the State is currently developing a civil detention system, the Inter-American Commission is recommending that the facilities be located near urban centers, where qualified medical personnel are available. The IACHR urges the State to earmark sufficient funds so that each facility has a clinic and medical staff to provide comprehensive health care services, including dental and mental health care. The Inter-American Commission recommends that detainees have direct access to the medical, dental and mental health care clinics in the facilities, so that they can make appointments and receive emergency treatment.

439. Finally, the IACHR urges the State to immediately end the practice of placing detainees with mental health issues in administrative segregation. The Inter-American Commission urges the State to place detainees with mental health issues in environments and with treatment commensurate with their needs.

D. Due process recommendations

440. The IACHR is offering the following recommendations with a view to contributing to the protection of detained immigrants' due process rights in immigration proceedings. The Inter-American Commission is recommending that the State greatly reduce the use of expedited removal when adjudicating immigrants' claims. In particular, the IACHR urges the State to eliminate the application of expedited removal in the case of all vulnerable groups and asylum seekers who demonstrate a credible fear at the time of their first interview at the border or entry point. The Inter-American Commission is also recommending the elimination of expedited removal in the case of immigrants apprehended within 100 miles of an international land border and within 14 days of entering the country. At a minimum, the State should have the burden of proof to demonstrate that the immigrant has been in the United States for less than 14 days.

441. The IACHR underscores the point that if detention is appreciably decreased, particularly detention in prison-like conditions, the problem of a dearth of legal representation would substantially improve. In any event, the Inter-American Commission is recommending that the State devote significant additional resources to improve access to legal representation. The IACHR first recommends that the State appoint government-funded counsel, or at a minimum specially trained guardians *ad litem* for all minors and persons with mental illnesses in immigration proceedings. Second, the Inter-American Commission recommends that the State expand its Legal Orientation Program nationwide for both detained and non-detained immigrants. Finally, the State should earmark financial resources to support non-profit legal service organizations with their *pro bono* representation programs and to provide them the means to represent persons with complex and meritorious cases.

442. With respect to stipulated orders of removal, the IACHR recommends that apprehended immigrants have the opportunity to consult with legal counsel before consenting to an order of removal. The Inter-American Commission further recommends that the State eliminate ICE's role in presenting this option to an apprehended immigrant. Rather, an immigration judge, with proper interpretation in a language understood by the apprehended person, should present this option to an individual at the first hearing in the proceeding. This option should draw a clear distinction between a "stipulated order of removal" and "voluntary departure." As part of this new procedure, the State should establish a protocol by which it is a judge who decides whether the immigrant understood the consequences of consenting to the stipulated removal and that the immigrant can only give his or her consent in the presence of a judge.

443. To ensure that every immigrant receives a fair hearing, conducted close to where family and support resources may be located, the IACHR recommends that the State require that a completed "Notice to Appear" (NTA) be promptly filed in the jurisdiction where an individual was apprehended, eliminating the possibility of ICE moving the immigrants to a jurisdiction in which the likelihood of securing an order of removal is much greater. This would also have the effect of reducing the number of transfers within the system and would ensure that detainees are notified of the charges against them.

444. The Inter-American Commission recommends that the State create a strong presumption against transferring migrant detainees outside the jurisdiction of apprehension. To the extent that transfers are necessary, the IACHR urges the State to require that a detainee be provided sufficient advance notice and that it establish a mechanism by which a detainee can turn to an immigration judge to challenge a transfer based on family, legal representation or other humanitarian considerations.

445. With respect to the release on bond process, the Inter-American Commission recommends that the State eliminate the current regulation which establishes ICE's right to an automatic stay of the appeal if ICE establishes an initial bond of US$10,000 or higher. Further, the State should establish a reasonable ceiling bond amount which ICE district offices may not exceed, so that a better balance is struck between the State's interest in appearance at all hearings and the resources the detainee has to post bond. Both the Department of Justice (DOJ) and the DHS should develop mechanisms to review the bond process to ensure that these dual goals are met.

446. The IACHR urges the State to significantly limit the use of video-teleconferencing in immigration proceedings. Video-conferencing should not be used for proceedings in which decisions are made on the merits or in any other hearing that requires the determination of the immigrant's credibility or other subjective analysis.

447. With respect to immigrants held after an order of removal has been issued (post-order of removal detention), the Inter-American Commission urges the State to enact regulations which affirmatively establish the State's proactive compliance with the U.S. Supreme Court's decisions in *Zadvydas v. Davis* and *Clark v. Martinez*. The IACHR recommends that the State ensures that post-order of removal detainees receive prompt, meaningful 90-day custody reviews. If release is not ordered during this custody review, a specific, written explanation of the detainees' refusal to cooperate and/or specific, written reasons why ICE believes removal is likely in the reasonably foreseeable future should be required. The Inter-American Commission urges the State to create an automatic review at the six-month post-order deadline established by the Supreme Court for when a post-order of removal detainee must be released. The IACHR recommends that the six-month post-order review be conducted by an immigration judge or the appropriate federal court.

E. Recommendations on families and unaccompanied children

448. The Inter-American Commission is recommending that ICE codify its current practice of placing families apprehended at or near the border to normal immigration proceedings, pursuant to INA § 240. In the case of those few families that must be subjected to detention, the IACHR is recommending that the State transfer custody of the families to the ORR and implement a range of services comparable to those that currently exist for unaccompanied children. Finally, the Inter-American Commission is urging the State to transform the new guidelines for parole of asylum seekers into federal regulations.

449. In an effort to respect the rights of the family and adhere to the "best interests of the child" principle, the IACHR further recommends that the federal government coordinate with state and local governments to ensure that detained immigrants are able to maintain custody of their U.S. citizen children while in detention (in light of other factors and unless there is an independent reason the parent is a risk to the child) and are permitted time and autonomy to make custody decisions with respect to U.S. citizen children if the parent is scheduled for removal from the United States.

450. The Inter-American Commission recommends that the ORR ensure that the other contract shelters provide levels of care and a range of services similar to that observed at the Southwest Key Shelter in Phoenix, Arizona, and the International Educational Services, Inc. Shelter in Los Fresnos, Texas. The IACHR urges the State to provide sufficient funding and place more shelters in urban areas where the necessary qualified medical, mental health, social service, educational, and legal professionals can be identified and retained to provide consistent, quality care to the unaccompanied children. The Inter-American Commission recommends that the State codify the *Flores* standards into federal regulations, with a focus on the best interests of the child principle.

451. The IACHR urges the State to earmark the necessary resources to fully implement the reforms introduced in 2008 under the TVPRA. In particular, the Inter-American Commission underscores the importance of screening unaccompanied children from Mexico and Canada for asylum seekers, victims of trafficking, and victims of other forms of persecution and criminal activity. To effectively identify possible victims, the IACHR urges the State to ensure that such screenings are conducted in a conducive environment, by trained personnel, with an age-appropriate screening template. This screening should not be conducted by agents in ICE's Customs and Border Protection or any other uniformed police unit.

452. With respect to unaccompanied children's due process rights, the Inter-American Commission urges the State to appoint an attorney, at the State's expense, to represent unaccompanied children in immigration proceedings. The IACHR further urges the State to enact regulations that prohibit DHS or ICE officials from obtaining an unaccompanied child's health records or records of other social service consultations.

453. With respect to unaccompanied minors repatriated to their home country, the Inter-American Commission recommends that the repatriation process be transferred to the exclusive jurisdiction of the ORR. The IACHR urges the State to continue to improve its repatriation protocols with other States Parties to ensure that unaccompanied minors are repatriated safely and into a safe home environment.

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Finally, in concluding this report, the Inter-American Commission thanks all the persons who assisted in its preparation and drafting, including the many organizations of civil society, immigration advocates, experts, and individuals who supplied valuable time and information. The IACHR also once again expresses its appreciation to the United States for its cooperative approach which facilitated the visits and made the investigation

reflected in this report possible, and also for its constructive and informative observations that contributed to strengthen the above findings.

The Inter-American Commission reiterates that the State must comply fully with the international human rights obligations under the American Declaration, as interpreted and developed in the inter-American system. As indicated in the October 2010 observations by the United States, reflected in this report, some of the specific concerns of the Inter-American Commission are being addressed thorugh immigration reform, which means that compliance with some of these recommendations is already underway. Within the framework of its functions and competencies, the IACHR will follow up on full compliance with these recommendations, and offers the United States its collaboration and advice to that effect.