

# United States of America

## Submission to the United Nations Universal Periodic Review

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Human Rights Council  
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### Migrants, Refugees and Asylum Seekers

#### Submitted by:

The Advocates for Human Rights\*

#### Endorsed by:

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Center for Victims of Torture  
Chaldean Federation of America  
Church World Service, Immigration and Refugee Program  
Disciples Justice Action Network  
Friends Committee on National Legislation  
Human Rights First  
Lutheran Immigrant and Refugee Service  
National Immigrant Justice Center  
National Immigrant Solidarity Network  
National Immigration Forum  
National Lawyers Guild  
Physicians for Human Rights  
Refugee and Immigration Ministries of the Christian Church (Disciples of Christ)  
Tahirih Justice Center  
Women's Refugee Commission  
World Organization for Human Rights USA  
World Relief

##### State/Local Organizations

South Bay Communities Alliance	AL
No More Deaths	AZ
Human Rights Advocates	CA
San Diego Renters Union	CA
Topanga Peace Alliance	CA
International Immigration Resources Inc.	FL

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Universal Periodic Review – 9<sup>th</sup> Session – United States  
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Peace and Hope International	MN
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UFCW Local 789	MN
Leonard Peltier Defense Offense Committee	ND
OBF The People!	NH
Casa Esperanza	NJ
Cidadao Global	NY
Farmworker Legal Services of NY, Inc.	NY
LatinoJustice PRLDEF	NY
New Sanctuary Coalition of New York City	NY
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## Executive Summary

1. International law recognizes that while the United States has the right to control immigration that right is tempered by its obligations to respect the fundamental human rights of all persons. With few exceptions, the United States may not discriminate on the basis of national origin, race, or other status. In designing and in enforcing its immigration laws, the rights to due process, fair deportation procedures, freedom from arbitrary and inhumane detention, and other fundamental human rights must be protected.
2. The United States' immigration system, while generous in many ways, is riddled with systemic failures to protect human rights. Some violations result from the statutory framework itself, while others are a matter of administrative policy or agency practice.
3. We welcome the recent efforts of the United States to begin to correct some of the most egregious human rights violations in the immigration system. Nonetheless, serious human rights violations continue. Expansion of the U.S. immigration enforcement system has tremendous, negative implications on the protection of the human rights of non-citizens in the United States.<sup>1</sup>
4. Similarly, problems with the asylum and refugee protection systems have resulted in denial of protection to *bona fide* refugees. The arbitrary one-year filing deadline for filing asylum claims, denial of protection against *refoulement* for those who have been convicted of minor crimes, and a sweeping definition of “material support” of “terrorist activities” have seriously undermined the United States' compliance with the obligations under the Refugee Convention.
5. Finally, the United States regularly fails in its obligation to consider the unity of the family in its immigration laws, policies, and practices. Mandatory deportation and detention laws, bars to permanent residency for those who entered the U.S. without inspection and have been unlawfully present in the U.S., and extraordinarily long backlogs for immigrants visas based on close family relationships mean that families face years, decades, and even permanent separation. Refugees also face prolonged separation from families. Denial of asylum based on the one-year filing deadline, denial of reunification for families based on alleged “material support” of terrorism, the indefinite closure of refugee resettlement based on family unification, and a legal definition of family relationships that fails to recognize the reality of family disruption in refugee crises all contribute to the United States' failure to respect the unity of the family.
6. In this submission, U.S.-based civil society organizations provide information under Sections B, C and D as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review.<sup>2</sup> These organizations provide services to or advocate on behalf of the rights of immigrants, refugees, and asylum seekers in the United States. In addition, this report is endorsed by individuals around the United States.

## I. Priority Recommendations

7. **Reform of the U.S. immigration system to ensure that the ICCPR’s obligations to protect due process and family unity are met. Ending of automatic criminal prosecutions for border crossers and other streamlined procedures which fail to protect non-citizens’ rights to due process, access to counsel, presentation of their case before a judge, and other fundamental safeguards of fairness.** Pending legislation to address key concerns: H.R. 182 - Child Citizen Protection Act; S. 1085 - Reuniting Families Act; H.R. 3531 - Humane Enforcement and Legal Protections for Separated Children Act (HELP Separated Children Act); H.R. 1215 - Immigration Oversight and Fairness Act.
8. **Reform of immigrant detention system to end reliance on detention as a cornerstone of immigration enforcement policy, end arbitrary detention by providing individualized custody hearings for all detainees and ensure that all those who must be detained are held in non-penal facilities and afforded humane treatment which recognizes their inherent human dignity and immediate passage of enforceable rights-respecting detention standards. Ensure that all places of immigrant detention, including short-term facilities, adhere to these standards.** Pending legislation to address key concerns: H.R. 3531 - Humane Enforcement and Legal Protections for Separated Children Act (HELP Separated Children Act); S. 1550 - The Strong STANDARDS Act (Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System); S. 1549 - The Protect Citizens and Residents from Unlawful Detention Act; S. 1594 – Secure and Safe Detention and Asylum Act; H.R. 1215 – Immigration Oversight and Fairness Act.
9. **Reform of the U.S. refugee and asylum system to ensure that the United States meets obligations under the 1951 Convention and ensure that exclusions from refugee protection complies with the 1951 Convention.** Pending legislation to address key concerns: S. 3113 Refugee Protection Act; H.R. 4800 – Restore Protection to Victims of Persecution Act.

## II. BACKGROUND AND FRAMEWORK

### a. Scope of international obligations

10. Pursuant to the International Covenant on Civil and Political Rights (ICCPR), non-citizens in the U.S. have a right to **due process and fair deportation procedures**,<sup>3</sup> including international standards on proportionality.<sup>4</sup> Non-citizens enjoy the right to private life guaranteed by ICCPR article 17.<sup>5</sup> Non-citizens also enjoy the right to freedom from discrimination under article 2 of the ICCPR and the obligations imposed by the Convention on the Elimination of all forms of Racial Discrimination (ICERD).<sup>6</sup>
11. Both the Universal Declaration of Human Rights and the ICCPR guarantee the right to **liberty and security of person**.<sup>7</sup> The ICCPR guarantees the right to life.<sup>8</sup> Further, no one should be subjected to arbitrary arrest or detention.<sup>9</sup> Non-citizens who are detained have a **right to humane conditions of detention**,<sup>10</sup> and are entitled to **prompt review of their detention by an independent court**.<sup>11</sup> Further, detention of refugees and asylum seekers

should be avoided when possible; if refugees and asylum seekers must be detained, adequate safeguards should be in place to avoid arbitrary detention.<sup>12</sup>

12. Pursuant to the international legal obligations undertaken by the U.S. government, individuals also have a right **to seek and enjoy asylum from persecution and protection from *refoulement***.<sup>13</sup> Similarly, the Convention Against Torture prohibits a State from expelling, returning, or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.<sup>14</sup>
13. Regardless of immigration status, individuals in the U.S. have a **right to family unity**.<sup>15</sup> In interpreting the obligations of the ICCPR, the Human Rights Committee has explicitly stated that family unity imposes limits on the power of States to deport.<sup>16</sup>

#### b. Legislative and policy framework

14. In the United States, Congress holds the authority to make the laws that govern admission, protection, and removal of non-citizens. Federal immigration law, however, must be understood in its context within the U.S. tripartite system of government. The Executive branch agencies, including the Department of Homeland Security, the Department of Justice, and the Department of State, promulgate regulations that directly govern the application of U.S. immigration law. There are a myriad of public and internal policy guidance that spells out how the U.S. immigration system operates in practice. Federal courts also play a role in providing a final review of individual decisions made in removal proceedings in administrative courts.
15. Federal immigration law in the U.S. continues to be based on the Immigration and Nationality Act of 1952 (INA)<sup>17</sup>. Reforms to the INA were made in 1965 and again with the Immigration Act of 1990, which amended the INA to set a permanent annual worldwide level of immigration divided into categories for (1) family-related immigrants, (2) employment-based immigrants, and (3) diversity immigrants. Refugees were excluded from these numerical limits; the Refugee Act of 1980 defines the U.S. laws relating to refugees.<sup>18</sup> In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to toughen criminal sanctions for employers who hired undocumented persons and limit access to federally funded welfare benefits.
16. The Immigration Act of 1990 substantially expanded the “aggravated felony” category of deportable crimes, first added to the INA in 1988.<sup>19</sup> In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>20</sup> and the Antiterrorism and Effective Death Penalty Act<sup>21</sup> added additional crimes to the aggravated felony ground for deportation and reduced term of imprisonment threshold requirement to one year,<sup>22</sup> drastically increasing the number of people subject to prolonged and indefinite detention. The IIRIRA also created a new “expedited removal” system for arriving aliens without proper documentation for admission.<sup>23</sup>
17. The USA PATRIOT Act of 2001,<sup>24</sup> passed just weeks after the 9/11 terrorist attacks, and the REAL ID Act of 2005<sup>25</sup> expanded the class of individuals who are inadmissible to the U.S. for having provided “material support” to terrorism. In guidance effective February 26, 2007,

the U.S. Secretary of Homeland Security exercised his waiver authority regarding the application of the “material support” bar.<sup>26</sup>

18. The Department of Homeland Security (DHS) was created in 2003 as part of federal agency reform in the aftermath of the 9/11 terrorist attacks, shifting immigration enforcement into the arena of anti-terrorism policy. The INS was replaced with three different agencies within DHS: U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and U.S. Immigration and Customs Enforcement (ICE).
19. Because immigration is a matter of federal law, state and local governments in the U.S. have historically played a very limited role in immigration enforcement. Recent policies, however, have shifted federal responsibility for enforcing civil immigration laws to state and local police through formal and informal programs, such as the 287(g) program, the Criminal Alien Program (CAP), and Secure Communities.<sup>27</sup>

### III. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND

#### a. Right to Due Process and Fair Deportation Procedures

20. The U.S. immigration enforcement system is an enormous operation, today accounting for 30% of the Department of Homeland Security’s budget of US\$56,335,737,000.<sup>28</sup> In fiscal year 2009, ICE completed 387,790 removals, an increase of 18,569 over the previous year. Through its Criminal Alien Program, ICE placed 234,939 detainees, made 249,486 arrests, of which 101,779 were non-citizens with criminal convictions, and screened over 300,000 people.<sup>29</sup> ICE attorneys represented the United States in 389,352 new matters before the Immigration Courts and completed 351,234 cases.<sup>30</sup> U.S. immigration courts complete more than 280,000 proceedings each year, with the Board of Immigration Appeals deciding more than 30,000 cases annually.<sup>31</sup>
21. CBP apprehended over 556,000 people between ports of entry, and encountered over 224,000 inadmissible non-citizens at the ports of entry.<sup>32</sup> CBP operates a combination of 32 permanent and 125 tactical traffic checkpoints nationwide as “part of a three-tiered, defense-in-depth strategy to secure our nation’s border” between ports of entry.<sup>33</sup> “This strategy involved the use of line-watch operations on the border, roving patrol operations near the border and traffic checkpoints on highways leading away from the border.”<sup>34</sup>
22. In violation of ICCPR article 13, United States immigration laws impose **mandatory removal (deportation) without a discretionary hearing** in a broad category of cases.<sup>35</sup> Lawful permanent residents, refugees, and others lawfully present in the U. S. who are convicted of criminal offenses ranging from murder to misdemeanor drug possession are defined as “aggravated felons,”<sup>36</sup> and thus are barred from an opportunity to submit the reasons against their expulsion.<sup>37</sup> While cases may be heard before administrative immigration judges, over 4000 cases were completed through an “administrative removal” process without any appearance before an immigration judge.<sup>38</sup> An additional 29,000 people in fiscal year 2009 alone were removed under “stipulated orders of removal,”<sup>39</sup> where the non-citizen signed an agreement to be deported without a hearing before an immigration judge to present any reasons against their removal.<sup>40</sup>

23. While U.S. law provides that aliens in removal proceedings have “the privilege of being represented,” representation must be “at no expense to the Government.”<sup>41</sup> The United States’ **failure to ensure that all non-citizens have access to representation** during their expulsion hearings violates ICCPR article 13. In 2008, approximately 57% of all removal cases completed were unrepresented.<sup>42</sup> According to a recent report of the American Bar Association, there is “strong evidence that representation affects the *outcome* of immigration proceedings.”<sup>43</sup> **Access to counsel**, and by extension to fair deportation proceedings, is severely **jeopardized by U.S. detention practices**, including frequent transfers between immigration jails and geographically remote detention. 1.4 million individuals were transferred between detention facilities in the last 10 years, 53% in last 3 years. Approximately 84% of detained cases were unrepresented.<sup>44</sup>
24. **Racial profiling pervades immigration enforcement at the border and throughout the United States.** For example, CBP and other law enforcement agencies in the border region practice arbitrary and race-based enforcement against Latino residents on a regular basis, using checkpoints that often result in the questioning of drivers about their immigration status occur throughout the border region.<sup>45</sup> The “transportation checks” occur more frequently in communities with high numbers of Latino immigrants.<sup>46</sup>
25. Racial profiling also permeates immigration enforcement throughout the interior of the United States. Enforcement programs known collectively as ICE ACCESS provide an “umbrella of services” for state and local law enforcement agencies to cooperate with federal immigration authorities.<sup>47</sup> These programs, including the 287(g) program, the Criminal Alien Program, and the Secure Communities program, all have drawn substantial criticism for engendering racial profiling practices.<sup>48</sup> Outside of the ICE ACCESS programs, in some cases state and local authorities enforce immigration law without any training or agreement, relying on an interpretation of their “inherent authority” to enforce the law or creating informal processes for turning people suspected of being non-citizens over to the Department of Homeland Security.<sup>49</sup> These practices have created a climate of fear in many immigrant communities, where activities such as traffic checkpoints set up outside of Latino churches have been documented.<sup>50</sup>
26. **Automatic prosecutorial programs** belie the right to an individual, case-by-case assessment of the need to detain and criminally prosecute. Operation Streamline, begun in 2005, requires the federal criminal prosecution and imprisonment of all unlawful border crossers.<sup>51</sup> The program mainly targets migrant workers with no criminal history.<sup>52</sup> Operation Streamline violates international standards of proportionality of the intended objective - deterrence of illegal immigration - to the deprivation of liberty.

#### **b. Right to Liberty and Security of the Person and Freedom from Arbitrary Detention**

27. Immigrant detention has become a cornerstone of U.S. immigration enforcement. Today ICE operates the largest detention and supervised release program in the United States, with a total of 378,582 non-citizens from 221 countries in custody or supervised by ICE in fiscal year 2008.<sup>53</sup> Sixty-six percent of the 31,075 people detained on September 1, 2009, were

subject to mandatory detention.<sup>54</sup> In violation of ICCPR articles 9(1) and 9(4), U.S. law imposes **mandatory detention without an individualized custody determination by a court** in a broad category of cases, including arriving asylum seekers<sup>55</sup> and non-citizens convicted of certain crimes.<sup>56</sup> Individuals subject to “mandatory detention” in the United States are not entitled to a bond hearing before an immigration judge.<sup>57</sup>

28. Arriving **asylum seekers in expedited removal proceedings** are subject to mandatory detention and may not be released while awaiting their initial “credible fear” review to determine whether they may apply for asylum before an immigration judge.<sup>58</sup> Following determination of credible fear, asylum seekers may be released on parole pending their asylum hearings before an immigration judge or while on appeal, but if the detaining authority (ICE) denies parole, the asylum seeker is prevented under regulations from having an immigration court assess the need for his continued custody.<sup>59</sup> ICE revised its parole guidelines effective January 2010, but ICE has not put these guidelines into regulations.<sup>60</sup>
29. **U.S. border enforcement policies, tactical infrastructure, and restricted legal entry options have placed migrants in mortal danger along the Mexico/United States border**, in violation of ICCPR Article 6. The Mexico/U.S. border has become increasingly militarized.<sup>61</sup> The dangers migrants risk in crossing are known to the US, yet the United States has failed to minimize the threats to safety. Instead, deployment of heavy security near population centers has pushed migrant flows to more treacherous and remote corridors where they are dependent on smugglers.<sup>62</sup> This funnel effect has increased the risk of death. According to DHS numbers, over one migrant per day perished in FY08.<sup>63</sup> Mexican estimates for 2008 are over 725 deaths.<sup>64</sup>

### c. Right to Humane Conditions of Detention

30. In FY 2009, the United States detained an estimated 378,582 individuals in ICE custody, including those under ICE supervision.<sup>65</sup> Immigrant detainees are held in over 350 facilities around the United States,<sup>66</sup> operating variously by the U.S. Department of Homeland Security, state and local governments, and private prisons.<sup>67</sup> Virtually all immigrant detainees are held in prison- or jail-like settings,<sup>68</sup> which fail to adhere to guarantees in ICCPR articles 10(1) and 10(2)(a).<sup>69</sup> Immigrant detainees wear prison uniforms, are regularly shackled during transport and in their hearings, and are held behind barbed wire.<sup>70</sup> Depending upon where they are detained, they may not be permitted contact visits with family,<sup>71</sup> may be subject to degrading conditions including strip searches,<sup>72</sup> and may face barriers to communicating with their family, counsel, or other support systems.<sup>73</sup> Immigrants in detention may be held for prolonged periods of time without access to the outdoors.<sup>74</sup> Appropriate psychological and medical services for torture survivors are universally unavailable.<sup>75</sup> Immigrant detainees routinely are commingled with convicted people.<sup>76</sup> In August and October 2009, ICE announced plans to reform the immigrant detention system, but thus far there has been limited progress toward a shift to non-penal facilities in cases where detention is required.<sup>77</sup>
31. **Highly publicized cases illustrate a systemic disregard for the rights to necessary medical care in detention, humane conditions of detention, and treatment respecting basic human dignity.**<sup>78</sup> Between 2003 and April 2009, ICE reported over 90 deaths of non-

citizens in their custody.<sup>79</sup> Shocking reports of the United States' failure to provide care to ill or injured persons in its custody abound.<sup>80</sup> Although the United States has adopted detention standards, the standards are not enforceable and have significant deficiencies in monitoring and oversight, little transparency, and no consequences for non-compliance with standards.<sup>81</sup> Reports indicate that the United States failed to report deaths in a transparent way.<sup>82</sup> Between 2007 and 2009, at least 26 reports on the failures of the U.S. immigrant detention system have been released.<sup>83</sup>

32. Migrants, including minor children, apprehended by CBP often are detained in **short-term custody facilities** which hold immigration detainees for less than 72 hours.<sup>84</sup> During apprehension, transport, and detention in CBP's custody, migrants have reported verbal and physical abuse, denial of access to medical aid, misleading legal information, and deprivation of Constitutional and human rights. Some holding cells are compared to large cages in the desert.<sup>85</sup> The GEO Group, and other privately contracted transportation buses are utilized as virtual detention centers where individuals are held until the bus departs.<sup>86</sup> Provision of food, water and medical care for those awaiting repatriation on the buses are inconsistent and inadequate. CBP has an agreement that they will not repatriate individuals until Mexican officials have been notified, but officers will consider this satisfied by a phone call made even after the Mexican immigration offices are closed, rendering the notification meaningless.<sup>87</sup>

#### **d. The Right to Protection from *Refoulement* to Persecution or Torture**

33. United States law denies asylum to *bona fide* refugees who fail to file their **asylum claims within one year of arriving** in the United States.<sup>88</sup> Rather than preventing fraud, which was the stated purpose behind the filing deadline,<sup>89</sup> in practice the deadline penalizes *bona fide* asylum seekers and disproportionately affects those most in need of protection,<sup>90</sup> including survivors of torture. Rushed asylum applications can lead to denials based on credibility, particularly for torture survivors who struggle with memory loss, PTSD, depression, and other barriers to quickly applying for asylum.
34. Exceptions<sup>91</sup> to the one-year filing deadline are granted inconsistently.<sup>92</sup> For some asylum seekers, this means years of delay while their case is heard before an immigration judge; for others, it means denial of asylum.<sup>93</sup> Most federal courts of appeal have held that they do not have jurisdiction to review determinations relating to the one year filing deadline for asylum applications.<sup>94</sup>
35. **United States law denies protection to refugees with criminal convictions in violation of the Refugee Convention.** Withholding of removal,<sup>95</sup> which implements the United States' obligation against *refoulement* under Article 33 of the Refugee Convention for those deemed ineligible for a discretionary grant of asylum, is *per se* unavailable to non-citizens who are determined to have been convicted of a particularly serious crime.<sup>96</sup> The massive expansion of the "aggravated felony" definition made by changes to the INA in 1996 has resulted in cases considered "particularly serious crimes" which are far outside the scope of the Refugee Convention.<sup>97</sup>

36. **While federal regulations implementing Article 3 of the Convention Against Torture (CAT) allow individuals to raise protection claims, the U.S. has failed to create an adequate legal mechanism implementing fully the obligations of Article 3.** The U.S. imposes heightened standards<sup>98</sup> which are inconsistent with the Convention.<sup>99</sup> The U.S. also applies a heightened standard regarding government acquiescence in the torture. In 2002, the Board of Immigration Appeals held that *refoulement* protection does not extend to persons who fear torture by private entities a government is unable to control.<sup>100</sup> Although at least one U.S. federal appellate court has held that Article 3 prohibits return when the government in the receiving country is aware of a private entity’s behavior and does nothing to stop it,<sup>101</sup> the United States continues to apply a different understanding of the term “acquiescence” in immigration cases.<sup>102</sup>
37. **The USA PATRIOT Act of 2001<sup>103</sup> and the REAL ID Act of 2005<sup>104</sup> expanded the class of individuals who are inadmissible to the U.S. for having provided material support to a terrorist organization, rendering *bona fide* refugees and asylum seekers ineligible for protection.**<sup>105</sup> The political activities which form the very basis of many refugees’ claims for protection have, under U.S. law, now been defined as “terrorist activities” barring them from refugee status, asylum, family reunification, or permanent resident status.<sup>106</sup> Human Rights First, which has extensively documented the crisis created by the “material support” bar, cites numerous examples of denial of protection for *bona fide* refugees because of testimony they gave when seeking refugee or asylum status.<sup>107</sup>
38. Under U.S. immigration law, “terrorist activity” is extremely broadly defined.<sup>108</sup> That overbroad definition, combined with the creation of the so-called Tier III terrorist category,<sup>109</sup> and a definition of “material support” which the U.S. is applying to *de minimis* or coerced acts, has resulted in widespread denial or prolonged delay in protection of bona fide refugees.<sup>110</sup> While the law gives the Executive Branch of the U.S. broad discretion to waive application of the “terrorism”-related provisions of the immigration law to individual cases,<sup>111</sup> this approach turns eligibility for forms of protection mandatory under international law into a matter of executive grace for many applicants, and has failed to provide protection to several categories of individuals who should be protected under the Refugee Convention and Protocol. The practical implementation of the waiver authority has been extremely slow, and has yet to reach the large number of applicants who had voluntary associations with groups now considered to be “Tier III terrorist organizations.”<sup>112</sup>

#### e. Right to Family Unity

39. In violation of ICCPR article 23 and article 17, **the U.S. fails to protect family unity in removal proceedings by imposing mandatory deportation without a discretionary hearing that takes into account the non-citizen’s family ties.**<sup>113</sup> An estimated 1,012, 734 family members have been separated by deportation between 1997 and 2007.<sup>114</sup> The impact of deportation upon the families in the United States have been dramatic and painful.<sup>115</sup>
40. **The U.S. immigrant detention system contravenes the United States’ obligations to protection family unity.** Family unity cannot be considered in mandatory detention cases, and the United States routinely fails to consider family unity when making discretionary

detention decisions. Transfer of detainees to facilities far from family members has increased sharply in the last decade.<sup>116</sup>

41. **Measures penalizing people for illegal entry into or presence in the United States seriously undermine the United States’ protection of the family.** Migrants who enter the United States without inspection are barred from adjusting status to lawful permanent resident and must process their applications for residency at a U.S. consulate abroad.<sup>117</sup> At the same time, any person who has been unlawfully present in the U.S. for more than 6 months is barred from returning to the U.S. after departing; if unlawfully present for more than 1 year, they face a 10 year bar to returning to the U.S.<sup>118</sup> While discretionary waivers of the 3 and 10 year bars are statutorily available, applicants must demonstrate extreme hardship due to separation, without appeal of adverse decisions.<sup>119</sup> Even in cases where waivers are granted, the bars result in prolonged separation of families.<sup>120</sup>
42. While the United States’ immigration system is based on reunification of families,<sup>121</sup> **long backlogs for visa issuance** exist. A United States citizen who petitions for his or her spouse, parent or child may wait months or years for the paperwork and background checks to be completed. Adult sons and daughters and siblings of United States citizens must wait in visa queues for anywhere between five and twenty years. The spouses and children of lawful permanent residents in the United States face similar visa backlogs, waiting between five and ten years for their family members to be issued visas to the United States.<sup>122</sup>
43. The United States’ increased **reliance on DNA testing to establish family relationships**, even where credible documentation of the relationship is provided, has caused unnecessary separation of families. The expense of DNA testing, provided by private contractors, is born by the families.<sup>123</sup> On October 22, 2008, the United States stopped accepting all applications for the Priority 3 (P-3) refugee resettlement program, which gives certain refugees access to resettlement in the U.S. based on a family relationship with an individual permanently residing in the United States.<sup>124</sup> The suspension of P-3 refugee family unification followed mandatory DNA testing of applicants for resettlement which, according to the U.S., resulted in high rates of fraudulently-claimed family relationships.<sup>125</sup>
44. **The exclusion of many asylum seekers from asylum, and relegation to protection against *refoulement* through the withholding of the removal order, fails to protect family unity.** Withholding of removal, while protecting the individual against deportation to the country of feared persecution, does not permit reunification with family members, travel outside the United States to visit family members, or the eventual acquisition of U.S. citizenship so as to immigrate family members. For some asylum seekers in the United States, the decision to avail themselves of the right to be free from *refoulement* is rendered meaningless if family members cannot also be brought to safety.

#### IV. ACHIEVEMENTS AND CHALLENGES

45. In September 2009, **the United States stopped detaining families at the T. Don Hutto Family Residential Facility (Hutto) in Texas.** However, the United States continues to detain women at Hutto and has announced plans to consolidate the female populations from three disparate facilities—Willacy, Pearsall, and Port Isabel—into Hutto. Family

detention has not been ended as a policy. While the closure of Hutto as a family detention facility is a welcome first step, detention of families should end.

46. **ICE began to implement new parole guidance in January 2010 that provides that all arriving asylum seekers who pass through the "credible fear" screening process be assessed for release by ICE, and allows for the release of those who can establish their identity, and do not present a flight risk or danger to the community.** While the new parole guidance is a positive first step in revising flawed policies that have led to the prolonged and unnecessary detention of asylum seekers, additional reforms are necessary to ensure that arriving aliens, including asylum seekers, are not detained arbitrarily for extended periods of time. Specifically, the United States should codify the parole criteria and revise the regulatory language that prevents arriving aliens, including arriving asylum seekers, from accessing custody/bond hearings before an immigration judge.
47. **In October 2009, the United States announced detention reform efforts focusing on greater federal oversight, specific attention to the care of detained individuals, uniformity at detention facilities, and review of the use of the penal system for immigrant detention.** The United States also created the Office of Detention Policy and Planning. While the detention reform announcement is a welcome acknowledgement of the fundamental failures of the immigrant detention system, the announcement does not alter the U.S. commitment to detention as a cornerstone of immigration enforcement. Immediate steps must be taken to ensure only those who must be detained are detained and to ensure that every person in custody is held under humane conditions.
48. **The United States has announced plans to launch an On-line Detainee Locator System (ODLS) in June 2010.** The tracking system will be available on a government website and will be designed to disclose the facility where an individual is being detained, its location and visiting hours. The United States does not have plans to develop a telephonic locator system at this time which would provide much greater accessibility for individuals without internet access.

## V. CONCLUSION

49. The United States immigration system fails to protect fundamental human rights to due process, fair deportation proceedings, freedom from arbitrary detention, humane detention conditions, freedom from *refoulement* to persecution or torture, and family unity. The vast apparatus of the U.S. immigration system, including the oft-amended Immigration and Nationality Act and the gargantuan bureaucracies which enforce, interpret and administer the law, do not fundamentally reflect the United States' commitment to human rights protection. As the United States implements existing laws and develops new statutes, regulations, and policies, it must turn to its international human rights obligations as the starting point for policy development. Without a commitment to human rights implementation at the core of immigration policy, the United States will continue to struggle to meet its obligation to ensure that the human dignity of every person within its borders is respected.

## APPENDIX: REFERENCES

<sup>1</sup> See NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT IMMIGRATION ENFORCEMENT REPORTS (Apr. 2010) (summarizing 20 reports of human rights and other violations issued by both non-governmental organizations and the U.S. government since the end of 2008), available at <http://www.immigrationforum.org/images/uploads/2010/EnforcementReportSummaries.pdf>.

<sup>2</sup> U.N. Human Rights Council [UNHRC] Dec. 6/102, Follow-up to Human Rights Council Res. 5/1 (Sept. 27, 2007).

<sup>3</sup> International Covenant on Civil and Political Rights (ICCPR), art. 13, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). See also UNHRC, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 12, U.N. Doc. A/HRC/7/12/Add.2, (Mar. 5, 2008) (prepared by Jorge Bustamante, Mission to the United States of America) (noting that the Human Rights Committee has interpreted the phrase “lawfully in the territory” to include non-citizens who wish to challenge the validity of the deportation order against them. The Committee has clarified: “. . . if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.” and further: “An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one”).

<sup>4</sup> *Report of the Special Rapporteur on the Human Rights of Migrants*, supra note 3, ¶ 10.

<sup>5</sup> *Id.*

<sup>6</sup> ICERD, art. 1, ¶ 2 (providing for the possibility of differentiating between citizens and non-citizens); but see CERD, Gen. Rec. 11 (noting regarding the rights of non-citizens, art. 1, ¶ 2, must not detract from the rights and freedoms recognized and enunciated in other human rights instruments and “must be construed so as to avoid undermining the basic prohibition of discrimination”); Gen. Rec. 30, at ¶ 2 (noting that “Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”).

<sup>7</sup> Universal Declaration of Human Rights (UDHR), art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); ICCPR, supra note 3, art. 9.

<sup>8</sup> ICCPR, supra note 3, art. 6.

<sup>9</sup> UDHR, supra note 7, art. 9; ICCPR, supra note 3, art. 9(1) (stating no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law); *id.* art. 9(2) (guaranteeing that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him); *id.* art. 9(4) (requiring that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful). See also UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 67, U.N. Doc. A/HRC/10/21 (Feb. 16, 2009) (reminding states that the legality of detention must be open for challenge before a court and 2); UNHRC, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 52, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008) (reminding states of the right of the detained to a prompt review).

<sup>10</sup> ICCPR, supra note 3, art. 7 (stating that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment); ICCPR art. 10(1) (requiring that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2) (requiring that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

<sup>11</sup> ICCPR, supra note 3, at art. 9(4).

<sup>12</sup> UNHCR, Exec. Comm., *Detention of Refugees and Asylum Seekers, Conclusion No. 44* (XXXVII) UN Doc. A/41/12/Add.1 (Oct. 13, 1986) (stating that “in view of the hardship which it involves, detention should normally be avoided” and sets out the limited accepted bases on which the detention of refugees or asylum-seekers may be justified, namely: to verify identity; to determine the elements of the claim; to deal with cases where refugees 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. Those detained must have access to either an administrative or judicial review, an essential safeguard against arbitrary detention). See also, UNHCR, *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Feb. 26, 1999.

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<sup>13</sup> UDHR, *supra* note 7, art. 14; 1951 Convention relating to the Status of Refugees, art. 33(1) July 28, 1951, 189 U.N.T.S. 137 [*hereinafter* Refugee Convention] (stating that no State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). *Id.* art. 31 (recognizing that refugees and asylum seekers may be forced by their circumstances to enter a country illegally in order to escape persecution, and providing that 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).

<sup>14</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [*hereinafter* Convention Against Torture or CAT] (stating that for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights).

<sup>15</sup> UDHR, *supra* note 7, art.16 (3); ICCPR, *supra* note 3, art. 23 (1), (3) (stating that the right of men and women to marry and found a family shall be recognized and that this right includes the right to live together); *id.* art. 17(1) (stating that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family or correspondence . . .”).

<sup>16</sup> UNHRC, 7th Session, *Report of the Special Rapporteur on the Human Rights of Migrants*, ¶ 17, A/HRC/7/12/Add.2 (Mar. 5, 2008) (*prepared by* Jorge Bustamante).

<sup>17</sup> The INA of 1952 also created the Immigration and Naturalization Service (INS), the federal agency responsible for administering immigration law and policy until the creation of the Department of Homeland Security in 2003. *See* Immigration and Nationality Act, 8 U.S.C. § 1187 (2006).

<sup>18</sup> The term “refugee” means “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42).

<sup>19</sup> *See* INA § 101(a)(43). *See also* The Anti-Drug Abuse Act of 1988, Pub. L. 100-690, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating a separate ground of deportation for serious crimes such as murder, drug trafficking or illegal trafficking of firearms or destructive devices), Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1999) (substantially expanding the category of aggravated felony).

<sup>20</sup> Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>21</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>22</sup> *See* INA § 101(a)(43).

<sup>23</sup> INA § 235.

<sup>24</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>25</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005).

<sup>26</sup> 72 Fed. Reg. 9958 (Mar. 6, 2007) Notice of Determination.

<sup>27</sup> Local enforcement of immigration laws has resulted in problems with racial discrimination and profiling. *See generally* U.S. DEPT. OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS (Mar. 2010); ACLU OF N.C. LEGAL FOUND. AND IMMIGR. AND HUM. RIGHTS POL’Y CLINIC AT THE U. OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS, 287(G) PROGRAM IN NORTH CAROLINA, (Feb. 2009), *available at* <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (Jan. 2009), *available at* <http://www.gao.gov/new.items/d09109.pdf>; TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY AT THE U.C. BERKELEY L. SCH., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM, (Sept. 2009), *available at* [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

<sup>28</sup> U.S. DEPT. OF HOMELAND SECURITY, FY 2011 BUDGET IN BRIEF, at 15 [*hereinafter* DHS BUDGET IN BRIEF].

<sup>29</sup> *Id.* at 63.

<sup>30</sup> *Id.* at 64.

<sup>31</sup> ABA, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5 (2010) [*hereinafter* REFORMING THE IMMIGRATION SYSTEM], *available at* [http://www.abanet.org/media/nosearch/immigration\\_reform\\_executive\\_summary\\_012510.pdf](http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf).

<sup>32</sup> DHS BUDGET IN BRIEF, *supra* note 28, at 54.

<sup>33</sup> *Id.* at 54.

<sup>34</sup> *Id.* at 54.

<sup>35</sup> *See* INA § 236(c) (directing that the Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in INA § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense).

<sup>36</sup> *See id.* § 101(a)(43). *See also* *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 264 (5<sup>th</sup> Cir. 2009) (pet’n for cert. pending) (holding that lawful permanent resident aliens who have been convicted of misdemeanor simple possession of a controlled substance are barred from applying for cancellation of removal because an “aggravated felony” includes any felony under the Controlled Substances Act, and under that Act, simple possession of most narcotics is a misdemeanor but possession of a controlled substance by an individual who has a prior conviction for possession is a felony).

<sup>37</sup> *See* INA § 240(a)(3) (stating that the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien has been lawfully admitted for permanent residence for not less than 5 years, has resided in the United States continuously for 7 years after having been admitted in any status, and has not been convicted of any aggravated felony).

<sup>38</sup> *See id.* § 238(b); DHS BUDGET IN BRIEF, *supra* note 28, at 64. (citing 4,112 administrative removal cases completed by ICE attorneys in FY 2009).

<sup>39</sup> DHS BUDGET IN BRIEF, *supra* note 28, at 64.

<sup>40</sup> The National Immigrant Justice Center, analyzing data obtained through a Freedom of Information Act request, found that 94 percent of the 80,844 stipulated orders of removal signed between April 1997 and February 2008 were by immigrants who spoke primarily Spanish, and most had not been charged with a crime. *See* NAT’L IMMIGR. JUSTICE CTR., LANGUAGE BARRIERS MAY LEAD IMMIGRANTS TO WAIVE RIGHT TO HEARING BEFORE DEPORTATION (Jun. 3, 2008), *available at* <http://www.immigrantjustice.org/news/detention/preleasestiporderdata20080603.html>.

<sup>41</sup> INA § 292. *See also*, ABA, Reforming the Immigration System, *supra* note 30, at 40 (noting that while courts may apply a case-by-case approach to determining whether the assistance of counsel would be necessary to provide fundamental fairness, under the United States Constitution’s Fifth Amendment due process guarantee, appointment of counsel has been denied in every published case).

<sup>42</sup> REFORMING THE IMMIGRATION SYSTEM, *supra* note 31, at 39.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See* BORDER NETWORK FOR HUM. RTS., HUMAN RIGHTS ABUSE DOCUMENTATION REPORT 2009: EL PASO, TEXAS – SOUTHERN NEW MEXICO (Dec. 9, 2009).

<sup>46</sup> In a survey conducted with over 300 families in Arizona border communities, the Border Action Network found that a startling majority of residents (41% in Pirtleville, 66% in Naco, 70% in Nogales, and 77% in Douglas) felt that Border Patrol Agents stopped people for simply having brown skin.

<sup>47</sup> U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, ICE ACCESS, *available at* <http://www.ice.gov/partners/dro/iceaccess.htm>

<sup>48</sup> *See* Submission to the Office of the High Commissioner for Hum. Rts., United Nations Universal Periodic Review (UPR): United States of America, Nov. 26, 2010, Ninth Session of the Working Group on the UPR, Human Rights Council, “The Persistence, in the United States, of Discriminatory Profiling Based on Race, Ethnicity, Religion and National Origin” at ¶¶ 20-27.

<sup>49</sup> *Id.* at ¶ 26. The Advocates for Human Rights has documented cases of state and local law enforcement officers calling in federal immigration authorities for use as “interpreters” when making traffic stops of Latinos in the Upper Midwest region of the United States.

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<sup>50</sup>See, e.g. AM. CIVIL LIBERTIES UNION OF GA., *THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G)* (Mar. 2010) (demonstrating impact of the 287(g) program on the Gwinnett County, Georgia community and documenting exacerbation of racial profiling that has taken place after the implementation of 287(g)); MIGRATION POLICY INST., *A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G)* (Mar. 2010); UNIV. OF N.C. AT CHAPEL HILL, *THE 287(G) PROGRAM: THE COSTS AND CONSEQUENCES OF LOCAL IMMIGRATION ENFORCEMENT IN NORTH CAROLINA COMMUNITIES*, (February 2010) (examining available data on the 287(g) program related to public safety, financial cost, and the relationship between immigration and crime and examining effects on community relationships between police and Hispanic populations); CARDOZO IMMIGR. JUSTICE CLINIC, *IMMIGRATION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS* (July 2009) (analyzing ICE arrest records from home raids in NY and NJ, finding a far-reaching pattern of misconduct and constitutional violations by ICE agents); POLICE FOUNDATION, *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* (April 2009) (discussing implications of state and local police enforcing federal immigration laws through the ICE 287(g) program, and the effect this enforcement has on the ability of local police to maintain trust and cooperation with immigrant communities); ACLU OF N.C. LEGAL FOUNDATION AND IMMIGR. & HUM. RGTS. POLICY CLINIC, UNIVERSITY OF N.C. AT CHAPEL HILL, *THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA* (Feb. 2009); (finding shortcomings in complaint mechanisms, designation of functions, nomination of personnel, training of personnel, certification and authorization, ICE supervision, civil rights standards and provision of interpreters, required steering committee, community outreach, media relations/discretion, modification, and duration); JUSTICE STRATEGIES, *LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT* (Feb. 2009) (finding 287(g) programs were not targeted at high-crime areas but did target race); MIGRATION POLICY INST., *COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM* (Feb. 2009) (examining the National Fugitive Operations Program (NFOP), run by ICE, comparing apprehension and detention data from Fugitive Operations Teams (FOTs) to stated program objectives and finding that 73 percent of FOT apprehensions from the beginning of the program in 2003 to FY 2008 had no criminal conviction); U.S. GOVT. ACCOUNTABILITY OFFICE, *IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS* (Jan. 2009) (finding that 287(g) program lacks “documented program objectives,” that 4 of 29 287(g) participants reviewed used the agreement to process minor crimes, such as speeding; that ICE does not describe in detail its supervision over 287(g) participants, creating a “wide variation in the perception” of supervisory responsibilities for ICE field officials; and that over half of the 29 agencies surveyed reported concerns from community members that local law enforcement would engage in racial profiling and intimidation).

<sup>51</sup> See U.S. Dept. of Homeland Security, Custom and Border Protection, Press Release: Border Patrol Introduces, Reiterates Enhanced Enforcement Operations (Mar. 28, 2008) available at [http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/archives/2008\\_news\\_releases/march\\_2008/03282008\\_5.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/march_2008/03282008_5.xml); *Operation Streamline*, WASH. POST, June 2, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/graphic/2008/06/02/GR2008060200068.html?sid=ST2008060102603>.

<sup>52</sup> JOANNA LYDGATE, *ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, U. OF CAL., BERKLEY LAW SCHOOL (Jan. 2010) (noting that the “program has fundamentally transformed DHS’s border enforcement practices. Before Operation Streamline began, DHS Border Patrol agents voluntarily returned first-time border crossers to their home countries or detained them and formally removed them from the United States through the civil immigration system. The U.S. Attorney’s Office reserved criminal prosecution for migrants with criminal records and for those who made repeated attempts to cross the border”).

<sup>53</sup> DR. DORA SHRIRO, U.S. DEPT. OF HOMELAND SECURITY, IMMIGR. AND CUSTOMS ENFORCEMENT, *IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS* (Oct. 6, 2009) at 2.

<sup>54</sup> *Id.*

<sup>55</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>56</sup> Section 236(c) of the INA mandates detention of any alien who is inadmissible by reason of having committed any offense covered in § 212(a)(2); is deportable by reason of having committed any offense covered in INA § 273(a)(2)(A)(ii), (A)(iii), (B), (C), or (D); is deportable under INA § 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year; or is inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)(B) when the alien is released, without regard to whether the alien

is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

<sup>57</sup> See *Id.* § 236(c).

<sup>58</sup> INA § 235(b)(1)(B)(iii)(IV).

<sup>59</sup> See HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30<sup>TH</sup> ANNIVERSARY OF THE REFUGEE ACT (Mar. 2010) at 10 (noting that while Immigration Judges can review ICE’s custody decisions for other immigrant detainees, they are precluded under regulatory language from reviewing the detention of “arriving aliens,” a group that includes asylum seekers who arrive at airports and other U.S. entry points under regulations located primarily at 8 C.F.R. § 1003.19 and § 212.5, as well as § 208.30 and § 235.3). See also U.S. Comm’n on Int’l Religious Freedom, ICE Parole Guideline is an Important First Step to Fix Flawed Treatment of Asylum Seekers in the United States (Dec. 23, 2009) (noting low rates of release on parole and citing that New Orleans released only 0.5 percent of asylum seekers, New Jersey less than four percent, and New York eight percent following a finding of credible fear), available at [http://www.uscirf.gov/index.php?option=com\\_content&task=view&id=2891&Itemid=126](http://www.uscirf.gov/index.php?option=com_content&task=view&id=2891&Itemid=126).

<sup>60</sup> U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, News Release: ICE issues new procedures for asylum seekers as part of ongoing detention reform initiatives (Dec. 16, 2009), available at <http://www.ice.gov/pi/nr/0912/091216washington.htm>.

<sup>61</sup> See DHS BUDGET IN BRIEF, *supra* note 28, at 52 (noting that “CBP increased the number of miles of border under effective control from 757 in FY 2008 to 939 miles by the end of FY 2009”).

<sup>62</sup> See ACLU OF SAN DIEGO AND IMPERIAL COUNTIES AND MEXICO’S NAT’L COMM’N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER (Oct.1, 2009) at 19.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 17.

<sup>65</sup> SHRIRO, *supra* note 53, at 2.

<sup>66</sup> See NAT’L IMMIGR. L. CTR., ACLU OF S. CAL., AND HOLLAND & KNIGHT, A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 4 (2009) [*hereinafter* A BROKEN SYSTEM].

<sup>67</sup> See e.g., DETENTION WATCH NETWORK, ABOUT THE U.S. DETENTION AND DEPORTATION SYSTEM, available at [www.detentionwatchnetwork.org/aboutdetention](http://www.detentionwatchnetwork.org/aboutdetention).

<sup>68</sup> SHRIRO, *supra* note 53, at 2.

<sup>69</sup> ICCPR, *supra* note 3, art. 10(1) (guaranteeing that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person); *id.* art. 10(2)(a) (providing that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons).

<sup>70</sup> See Human Rights Advocates, Submission to the Human Rights Council, 11th Session, Agenda Item 3: Rights of Migrants.

<sup>71</sup> County jails holding immigrant detainees in Minnesota have “video visits” with family members, where detainees see and speak with their family members via closed circuit television.

<sup>72</sup> See A BROKEN SYSTEM, *supra* note 666, at 14-15.

<sup>73</sup> See, e.g., KATHERINE FENNELLY AND KATHLEEN MOCCIO, U. OF MINN. HUBERT H. HUMPHREY INST. OF PUB. AFFAIRS, ATTORNEYS’ PERSPECTIVES ON THE RIGHTS OF DETAINED IMMIGRANTS IN MINNESOTA (Nov. 2009).

<sup>74</sup> County jails, designed for short periods of detention, do not necessarily have outdoor recreation facilities. The Ramsey County Law Enforcement Center in St. Paul, Minnesota, has an average daily immigrant detainee population over 100. The facility has no outdoor recreation access. See also A BROKEN SYSTEM, *supra* note 666, at 21.

<sup>75</sup> See Dana Priest & Amy Goldstein, *Caught Without Care*, THE WASH. POST, May 13, 2008 (reporting that suicide is the most common cause of death among detained immigrants with 15 of 83 deaths since 2003 the result of suicide and stating, “No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent -- about 4,500 -- are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention”). See also PHYSICIANS FOR HUMAN RIGHTS, BELLEVUE/NYU CENTER FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS (2003), available at <http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf>.

<sup>76</sup> A client of The Advocates for Human Rights seeking asylum from Ethiopia and being treated for depression and Post-Traumatic Stress Disorder, was detained for over one year in the Ramsey County Adult Detention Center in St. Paul, Minnesota, following her asylum hearing in front of an immigration judge. While detained, she never saw the outdoors and was co-mingled with the general convicted population because the facility with which ICE contracts lacks the facilities.

<sup>77</sup> U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Press Release: ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009), *available at* <http://www.ice.gov/pi/nr/0908/090806washington.htm>; U.S. Dept. of Homeland Security, Immigr. and Customs Enforcement, Fact Sheet: ICE DETENTION REFORM: PRINCIPLES AND NEXT STEPS: Sec. Napolitano Announces New Immigration Detention Reform Initiatives (Oct. 6, 2009), *available at* [http://www.dhs.gov/xlibrary/assets/press\\_ice\\_detention\\_reform\\_fact\\_sheet.pdf](http://www.dhs.gov/xlibrary/assets/press_ice_detention_reform_fact_sheet.pdf).

<sup>78</sup> The New York Times alone contained at least 25 reports of problems with conditions in detention, including deaths in detention, between 2005 and March 2010.

<sup>79</sup> Immigration and Customs Enforcement, List of Detainee Deaths Since October 2003, *available at* [http://graphics8.nytimes.com/packages/pdf/nyregion/ICE\\_FOIA2.pdf](http://graphics8.nytimes.com/packages/pdf/nyregion/ICE_FOIA2.pdf).

<sup>80</sup> Nina Bernstein, *Hong Kong Emigrant's Death Attracts Scrutiny of U.S. Detention System*, N.Y. TIMES, Aug. 13, 2008 (reporting that “[i]n April, [Hiu Lui] Ng began complaining of excruciating back pain. By mid-July, he could no longer walk or stand. And last Wednesday, two days after his 34th birthday, he died in the custody of Immigration and Customs Enforcement in a Rhode Island hospital, his spine fractured and his body riddled with cancer that had gone undiagnosed and untreated for months.”).

<sup>81</sup> See A BROKEN SYSTEM, *supra* note 66, at 4-5.

<sup>82</sup> Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, *available at* <http://www.nytimes.com/2010/01/10/us/10detain.html>.

<sup>83</sup> See NAT'L IMMIGR. FORUM, SUMMARIES OF RECENT REPORTS ON IMMIGRATION DETENTION 2007-2009 (Feb. 2010), *available at* <http://www.immigrationforum.org/images/uploads/DetentionReportsSummaries2007-2009.pdf>

<sup>84</sup> 8 U.S.C. § 236; 8 C.F.R. § 236.1; CBP Directive No. 3340-030A (Mar. 9, 2004), *available at* <http://foia.cbp.gov/streamingWord.asp?i=10>.

<sup>85</sup> NO MORE DEATHS, CROSSING THE LINE: HUMAN RIGHTS ABUSES OF MIGRANTS IN SHORT-TERM CUSTODY ON THE ARIZONA/SONORA BORDER 13 (Sept. 2008) [*hereinafter* CROSSING THE LINE].

<sup>86</sup> Adam Borowitz, *Wackenhut Worries: A Company with a Sketchy Record has Quietly Taken Over Deportation Duties from the Border Patrol*, THE TUCSON WEEKLY, May 2, 2007.

<sup>87</sup> CROSSING THE LINE, *supra* note 85, at 20.

<sup>88</sup> INA § 208(a)(2)(B).

<sup>89</sup> “We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system.” 142 Cong. Rec. S4468 daily ed. (May 1, 1996) (statement of Sen. Simpson).

<sup>90</sup> “[T]he cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted [and] brutalized by their own governments. They have an inherent reluctance to come forward . . . before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to do it” 142 Cong. Rec. S3282 daily ed. (April 15, 1996) (statement of Sen. Kennedy).

<sup>91</sup> INA § 208(a)(2)(D) (permitting grant of asylum filed more than one year after arrival only where the applicant can demonstrate (1) “changed circumstances which materially affect the applicant's eligibility for asylum,” or (2) “extraordinary circumstances relating to the delay in filing the application”).

<sup>92</sup> See TAHIRIH JUST. CTR., PRECARIOUS PROTECTION: HOW UNSETTLED POLICY AND CURRENT LAWS HARM WOMEN AND GIRLS FLEEING PERSECUTION 33 (Oct. 2009).

<sup>93</sup> A client of The Advocates for Human Rights, a Guinean political activist who was detained for over 2½ years and tortured by the Guinean government fled to the US. He entered on a false passport and could not prove his date of entry. He filed his application within 1 year of arrival and submitted some proof of entry, but he could not prove his date of entry to the satisfaction of either the asylum office or the immigration judge. He was denied asylum and ordered removed from the United States; he remains in the U.S. under an order of withholding of removal.

<sup>94</sup> INA § 208(a)(3). Note that INA § 242(a)(2)(D), added to the INA by the REAL ID Act of 2005, provides courts with jurisdiction over all constitutional claims or questions of law notwithstanding other restrictions on review in the INA. See *Nakimbugwe v. Gonzales*, 475 F.3d 281 (5th Cir. 2007) (reversing BIA's timeliness finding because BIA misinterpreted the regulation regarding when a document is deemed filed); *Diallo v. Gonzales*, 447 F.3d 1274 (10th

Cir. 2006) (reversing BIA's interpretation of INA § 208(a)(2)(B) for purposes of determining whether petitioner filed within one year); *Mabasa v. Gonzales*, 455 F.3d 740 (7th Cir. 2006) (finding jurisdiction to review allegation that BIA failed to provide meaningful review because BIA wrongly analyzed claim as extraordinary circumstances when it should have been analyzed as changed circumstances); *Wijono v. Gonzales*, 439 F.3d 868 (8th Cir. 2006) (recognizing that court can review due process violation, but finding claim not exhausted).

<sup>95</sup> INA § 241(b)(3) provides that the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

<sup>96</sup> INA § 241(b)(3)(B)(ii) defines what constitutes a “particularly serious crime.” Under that provision, a determination about whether a conviction for aggravated felony constitutes a conviction for a “particularly serious crime” is based primarily on the length of the sentence that the criminal court imposed. If the sentence imposed is five years or more of imprisonment, the conviction is for a “particularly serious crime.” A conviction of an aggravated felony with a sentence of less than five years’ imprisonment may be a “particularly serious crime.” *Id.* § 241(b)(3)(B)(ii).

<sup>97</sup> See e.g. *Matter of Y-L-, A-G- and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002) (holding that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute “particularly serious crimes” within the meaning of § 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2000), and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007) (holding that in order to be considered a particularly serious crime an offense need not be an aggravated felony under INA § 101(a)(43) and that once the elements of an offense are found to potentially bring it within the ambit of a particularly serious crime, all reliable information may be considered in determining whether the offense constitutes a particularly serious crime, including but not limited to the record of conviction and sentencing information).

<sup>98</sup> Pursuant to the implementing regulations, the claimant must show that “it is more likely than not that he would be tortured” in order to be granted CAT relief. 8 C.F.R. § 208.17.

<sup>99</sup> Article 3 of the CAT requires protection against *refoulement* “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture, *supra* note 14, art. 3.

<sup>100</sup> See *Matter of S-V*, 22 I&N Dec. 1306 (BIA 2000).

<sup>101</sup> See *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. Jun 18, 2003); *Ochoa v. Gonzales*, 406 F.3d 1166 (9th Cir. 2005); *Perez v. Loy*, 356 F.Supp.2d 172 (D. Conn. Feb 17, 2005).

<sup>102</sup> See *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

<sup>103</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (adding a definition of “terrorist organization” consisting of three categories of armed groups, including Tier III organizations defined as any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” “terrorist activity” as defined by the INA and defining “material support” to a “terrorist organization” as “terrorist activity” in its own right). See HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW’S “TERRORISM BARS” ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 21 (2009) [*hereinafter* DENIAL AND DELAY].

<sup>104</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, Pub. L. No. 109-13 (2005) (REAL ID Act) (expanding terrorism-related grounds of inadmissibility and deportation) According to Human Rights First, because of the interplay within the INA between the grounds of inadmissibility and deportation, “with the passage of the REAL ID Act, anyone described in any of the new long list of inadmissibility grounds at section 212(a)(3)(B) is now barred from all forms of refugee protection). See also DENIAL AND DELAY, *supra* note 1033, at 22.

<sup>105</sup> The Human Rights Committee in its Concluding Observations noted at ¶ 17 that the Committee is concerned the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided “material support” to a “terrorist organization”, whether voluntarily or under duress. The Committee noted regret at having received no response on this matter from the State party. The Committee observed that the State party should ensure that the “material support to terrorist organizations” bar is not applied to those who acted under duress. UNHRC, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

<sup>106</sup> The following cases of The Advocates for Human Rights illustrate the “material support” problem: A Nepalese woman sought asylum in the US because Maoist insurgents had kidnapped her son. We had to advise her that she would be considered a “terrorist” under the material support guidelines because she paid the ransom for her son’s

release. A Zimbabwean man was granted asylum in August 2008 on account of imputed political opinion, because the Zimbabwean government suspected him of supporting the Movement for Democratic Change. He petitioned for his wife and children to join him in the US in September 2008. In June 2009, The Advocates for Human Rights received notice that the cases are on “hold” under INA section 212(a)(3) – security related bars. An Oromo man was granted asylum by the immigration judge on account of the persecution and torture he suffered at the hands of the Ethiopian government. He applied for adjustment of status, but his application was placed on hold because of his affiliation with the Oromo Liberation Front. In the fall of 2009, The Advocates for Human Rights was contacted by a therapist practicing in St. Paul who was worried that her Hmong clients, who were receiving that their applications for permanent residence or family reunification were “on hold” for material support of terrorism, could commit suicide

<sup>107</sup> DENIAL AND DELAY, *supra* note 103.

<sup>108</sup> Terrorist activity includes “any activity which is unlawful under the laws of the place where it is committed” and which involves any of a range of acts including “the use of any ... explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” INA § 212(a)(3)(B)(iii)(V).

<sup>109</sup> Tier III terrorist organizations include any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” “terrorist activity” as defined by the INA.

<sup>110</sup> See generally DENIAL AND DELAY, *supra* note 103.

<sup>111</sup> See 72 Fed. Reg. 9958 (Mar. 6, 2007) Notice of Determination.

<sup>112</sup> *Id.*

<sup>113</sup> INA § 240A(a)(3).

<sup>114</sup> HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 5 (Apr. 2009).

<sup>115</sup> See, e.g. DORSEY & WHITNEY L.L.P. AND THE URBAN INST., SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA’S IMMIGRATION ENFORCEMENT POLICY (March 2009).

<sup>116</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009), available at <http://trac.syr.edu/immigration/reports/220/> (finding that the number of detainees that ICE has transferred each year has grown much more rapidly than the already surging population held in custody by the agency, with over 50% of detainees transferred at least once and nearly 25% of detainees transferred multiple times while detained).

<sup>117</sup> INA § 245(a).

<sup>118</sup> *Id.* § 212(a)(9)(B).

<sup>119</sup> *Id.* § 212(a)(9)(B)(v) (stating that the Attorney General has sole discretion to waive unlawful presence bars in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause).

<sup>120</sup> For example, U.S. citizen Kimberly Anderson married Seferino Aulis Morales, a Mexican citizen. Seferino had entered the U.S. without inspection and was required to leave the U.S. to process his visa abroad. Kim and Seferino were separated for over 2 years before their second waiver application was approved. The impact on families in the U.S. is vast, with an estimated 3.2 million noncitizens married to U.S. citizens. See Nina Bernstein, *A Fatal Ending for a Family Forced Apart by Immigration Law*, N.Y. TIMES, Feb. 11, 2010, available at <http://www.nytimes.com/2010/02/12/nyregion/12family.html>.

<sup>121</sup> See INA § 203(a) (outlining the preference allocation for family-sponsored immigrant visas to include (1) unmarried sons and daughters of U.S. citizens, (2)(a) spouses and children of lawful permanent resident aliens, (2)(b) unmarried sons and daughters of lawful permanent resident aliens, (3) married sons and daughters of U.S. citizens, and (4) siblings of U.S. citizens).

<sup>122</sup> See, e.g., U.S. DEPT. OF STATE, VISA BULL., Apr. 2010 (indicating that the most current family reunification visas being processed are those filed in June 2006 for spouses and children of lawful permanent residents. Visa petitions for siblings from the Philippines filed in September 1987 are being processed).

<sup>123</sup> See U.S. DEPT. OF STATE, DNA AND PARENTAGE BLOOD TESTING, available at [http://travel.state.gov/visa/immigrants/info/info\\_1337.html](http://travel.state.gov/visa/immigrants/info/info_1337.html).

<sup>124</sup> See U.S. DEPT. OF STATE, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FACT SHEET: FRAUD IN THE REFUGEE FAMILY REUNIFICATION (PRIORITY 3) PROGRAM, Feb. 3, 2009, *available at* <http://www.state.gov/g/prm/rls/115891.htm>.

<sup>125</sup> *Id.*