United States' Compliance with the International Covenant on Civil and Political Rights
Suggested List of Issues Relating to Refugees, Asylum Seekers and Other Non-citizens

Submitted by The Advocates for Human Rights,
a non-governmental organization in special consultative status with ECOSOC

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I. Reporting Organization

1. The Advocates for Human Rights ("The Advocates") is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Established in 1983, The Advocates conducts a range of programs to promote human rights in the United States and around the world and holds Special Consultative status with the United Nations Economic and Social Council. The Detention Watch Network contributed to this submission.

II. Issue Summary

2. The United States' immigration system, while generous in many respects, is riddled with systemic failures to protect human rights and meet obligations under the International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognizes that non-citizens in the United States have the right to freedom from discrimination (Article 2), as well as the right not to be subjected to inhuman or degrading treatment or punishment (Article 7). Pursuant to Article 9, non-citizens have the right to liberty and security of person, freedom from arbitrary and inhumane detention, and are entitled to prompt review of their detention. Non-citizens in the United States also have the right to due process and fair deportation procedures, including international standards on proportionality (Article 13).

3. Streamlined immigration procedures fail to guarantee non-citizens' rights to due process, access to counsel, presentation of their case before a judge, and other fundamental safeguards of fairness. Automatic prosecutorial programs belie the right to an individualized, case-by-case assessment of the need to detain and criminally prosecute. Operation Streamline, begun in 2005, has criminalized illegal entry and stripped judges of discretion in immigration cases.[1] For the past three consecutive years, immigration cases made up the largest category of federal convictions.[2]

4. The United States' immigrant detention system has evolved without regard for international human rights standards. As a result, detention is a cornerstone of immigration enforcement policy. To accommodate the increasing number of non-citizen detainees, the federal government contracts with private prison companies to provide prison beds in facilities exclusively for aliens convicted of nonviolent immigration offenses.[3] Additionally, in violation of the right to humane conditions of detention, these facilities fail to provide including access to adequate physical and mental medical care, fresh air, access to family and legal counsel, and rehabilitation and educational services.[4]

5. Problems with the asylum and refugee protection systems have resulted in denial of protection to *bona fide* refugees. 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.[5] Rather than preventing fraud, which was the stated purpose behind the filing deadline,[6] in practice the deadline penalizes *bona fide* asylum seekers and disproportionately affects those most in need of protection.[7] Further, the practice of mandatory detention for asylum-seekers having a credible fear of persecution[8] risks re-traumatizing aliens who are already in a psychologically delicate state. Non-citizens who are detained have a more difficult time establishing their eligibility for asylum because they face difficulty of gathering evidence and seeking counsel.[9]

III. Concluding Observations

6. In the 2006 review of the United States' compliance with the ICCPR, the Committee noted the following in the **Concluding observations of the Human Rights Committee** (Consideration of Article 40 report submitted by the United States at the 87th Session (2006)):

a. The Committee welcomed the promulgation of the National Detention Standards in 2000, establishing minimum standards for detention facilities holding Department of Homeland Security detainees, and encouraged the State party to adopt all measures necessary for their effective enforcement (¶ 8)

b. The Committee expressed concern that the Patriot Act and the 2005 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. It regrets having received no response on this matter from the State party. (article 7) The State party should ensure that the "material support to terrorist organisations" bar is not applied to those who acted under duress (¶ 17)

c. The Committee also noted the United States' failure to report sufficient information on measures being considered in relation to the reportedly nine million undocumented migrants in the United States, as well as the " increased level of militarization on the southwest border with Mexico." (¶ 27)

IV. Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights

7. The United States' report provides detail on the authority, policy, and procedure related to many aspects of the immigration system in relation to its obligations under ICCPR Article 9 (Liberty and security of person)[10], Article 10 (Treatment of persons deprived of their liberty)[11], Article 13 (Expulsion of aliens)[12] and Article 24 (Protection of children)[13]. The report fails, however, to discuss the problems with the immigration detention system and other failures to comply with human rights obligations under the ICCPR.

V. Human Rights Committee General Comments

8. The Committee's General Comment 15 provides that "[a]n 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." The Comment further provides that "[a]liens have the full right to liberty and security of the person," and if lawfully deprived of their liberty, "they shall be treated with humanity and with respect for the inherent dignity of their person."[14]

9. While the particular rights of article 13 protect only those aliens who are lawfully in the territory of a State party, the Committee's General Comment 15 notes, "However, 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."[15] This provision is

particularly relevant to asylum seekers, who are "rarely in a position to comply with the requirements of legal entry."[16] Article 31(1) of the Convention relating to the Status of Refugees prohibits the imposition of penalties on refugees whose entry or presence within a country is illegal, so long as there is good cause for such irregular entry or presence.[17]

10. Other General Comments that are relevant to the rights of non-citizens include **General Comment No. 08: Right to liberty and security of persons (article 9) (1982); General Comment No. 18: Non-discrimination (1989); General Comment No. 20: Prohibition of torture or cruel, inhuman or degrading treatment or punishment** (article 7) (1992); **General Comment No. 21: Humane treatment of persons deprived of their liberty** (article 10) (1992); **General Comment No. 31: The nature of the general legal obligation imposed on States parties (2004); and General Comment No. 32: Right to equality before courts and tribunals and to a fair trial** (article 14) (2007).

VI. Other UN Body Recommendations

11. The Special Rapporteur on the human rights of migrants made numerous recommendations related to the treatment of non-citizens (see Report of the Special Rapporteur on the human rights of migrants, mission to the United States (2008)), including the following regarding specific issues:

12. **Right to fair deportation and detention procedures, right to liberty of person**:
    a. The Special Rapporteur stated that "United States deportation policies violate the right to fair deportation procedures, including in cases in which the lawful presence of the migrant in question is in dispute, as established under article 13 of the ICCPR" (¶ 10). The Special Rapporteur also noted that non-citizens should be able to challenge the validity of the deportation order against them (¶ 15)
    b. The Special Rapporteur found that, "[T]he United States detention and deportation system for migrants lacks the kinds of safeguards that prevent certain deportation decisions and the detention of certain immigrants from being arbitrary within the meaning of the ICCPR." (¶ 24)
    c. Further, "The policy of mandatory detention [for aliens convicted of certain offenses] also strips immigration judges of the authority to determine during a full and fair hearing whether or not an individual presents a danger or a flight risk." (¶ 37)

14. Restrictions **on relief for refugee convicted of crimes::**The Special Rapporteur found that forms of relief for refugees are per se unavailable to non-citizens with aggravated felonies or with convictions that the Attorney General deems particularly serious, stating in his report that, "United States restrictions on relief for refugees convicted of crimes violate the Convention and the Protocol relating to the Status of Refugees." (¶ 20)

15. Detention
    a. The Special Rapporteur found that migrants in detention in the United States include asylum-seekers, torture survivors, and victims of human trafficking. . "Asylum-seekers granted refugee status, spend an average of 10 months in detention, with the longest period in one case being three and a half years." (¶ 30) .The Special Rapporteur stated that, "Detention is emotionally and financially devastating. . ." (¶ 31)
    b. Regarding conditions of detention, the Special Rapporteur stated, "The conditions and terms of detention [for migrants detained by immigration officials] are often prison-like: freedom of movement is restricted and detainees wear prison uniforms and are kept in a punitive setting. Many detainees are held in jails instead of detention centers . . . [a]s a

result, the majority of non-criminal immigrants are held in jails where they are mixed in with the prison's criminal population." (¶ 28)

16. During the Universal Periodic Review of the United States, numerous Human Rights Council delegates made recommendations[18](see Report of the Working Group on the Universal Periodic Review, United States of America (2011). Most relevant to this submission were the following:
    a. Attempt to restrain any state initiative which approaches immigration issues in a repressive way toward the migrant community (Guatemala) (¶92.79); Spare no efforts to constantly evaluate the enforcement of the immigration federal legislation, with a vision of promoting and protecting human rights (Guatemala) (¶92.80); Ensure that detention centers for migrants and the treatment they receive meet the basic conditions and universal human rights law (Guatemala) (¶92. 164); Ensure that migrants in detention, subject to a process of expulsion are entitled to counsel, a fair trial and fully understand their rights, even in their own language (Guatemala) (¶92.185);
    b. Ensure the right to habeas corpus in all cases of detention (Austria) (¶92.186);
    c. Incarcerate immigrants only exceptionally (Switzerland); Investigate carefully each case of immigrants' incarceration; and Adapt the detention conditions of immigrants in line with international human rights law (Switzerland) (¶92.182-184);
    d. Reconsider alternatives to the detention of migrants (Brazil) (¶92.212).

17. The United States accepted the following recommendations in the Report of the Working Group (see also United States views on conclusions and/or recommendations in the Report of the Working Group (Addendum)
    a. The United States is committed to improving its immigration system and protections for migrants (¶ 73);
    b. The United States established that each arriving alien with a credible fear of persecution or torture would be considered for release, and those who established their identity would not be detained pending completion of their immigration proceedings (¶ 74);
    c. For detained aliens, the United States recognizes the need to improve conditions of confinement, medical care, and the ability to exercise their human rights (¶ 74).

VII. Recommended Questions

18. What measures has the United States taken to address the drastic growth in the number of non-citizens in the federal prison system who have been convicted of criminal charges for immigration offenses? Has the government taken steps to halt or modify Operation Streamline, which significantly contributes to the problem?

19. How does the United States justify the use of privately owned prison facilities exclusively for non-citizen offenders? Why are the medical, rehabilitation, and education services provided in prisons holding non-citizens significantly inferior to the services in facilities holding United States citizens?

20. What measures has the United States taken to ensure that asylum seekers detained pursuant to the Expedited Removal process have the opportunity to pursue their claims of asylum and other forms of relief?

VIII. Suggested Recommendations

21. The United States government should halt the practice of prosecuting in the criminal justice system aliens charged with immigration offenses such as unlawful entry or re-entry. To address the dramatic increase in the number of immigration offenders in the federal criminal justice system, the United States must stop policies and procedures such as Operation Streamline.

22. Immediately implement enforceable rights-respecting detention standards in all facilities detaining non-citizens, including short-term facilities and privately contracted prisons. Detention standards should ensure humane treatment, including access to adequate physical and mental medical care, fresh air, access to family and legal counsel, and rehabilitation and educational services.

23. The United States should cease the practice of detaining asylum seekers. Until that time, the United States must ensure that asylum seekers are not inhibited from pursuing claims of asylum because of their detention.

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[1] Operation Streamline was implemented in 2005 and orders criminal charges for every person crossing the border illegally. The policy strips judges of discretion in deciding immigration cases and has resulted in a staggering increase in non-citizens detained for immigration offenses in the Untied States. *See, e.g*, ACLU, "Operation Streamline Fact Sheet" (July 21, 2009), *available at* http://www.immigrationforum.org/images/uploads/OperationStreamlineFactsheet.pdf.

[2] *See* United States Sentencing Commission, "2011 Annual Report," at 37, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf ("Illegal re-entry into the United States was the most commonly filed federal charge last year").

[3] The Huffington Post, *Private Prisons: Immigration Convictions in Record Numbers fueling Corporate Profits* (Sept. 27, 2012), *available at* http://www.huffingtonpost.com/2012/09/27/private-prisons-immigration_n_1917636.html.

[4] *See* Justice Strategies, *Privately Operated Federal Prisons for Immigrants: Expensive. Unsafe. Unnecessary*, *available at* http://www.justicestrategies.org/sites/default/files/publications/Privately%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf.

[5] INA § 208(a)(2)(B).

[6] "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).

[7] "[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).

[8] HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 14-16 (2009), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf.

[9] *See* HUMAN RIGHTS FIRST, *supra* note 8, at 7. *See also* Barbara A. Frey and X. Kevin Zhao, "The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law," XXIX Law and Inequality: A Journal of Theory and Practice 2, Summer 2011, at 303.

[10] The INA provides authority for detention or release of aliens during immigration proceedings; description of mandatory detention conditions (¶ 213); description of ICE guidelines regarding release from detention of aliens arriving in United States without proper documentation (¶ 214); description of parole guidelines for arriving aliens having credible fear of persecution (¶ 214).

[11] DHS is the entity responsible for investigating allegations of inadequate detention for ICE detainees (¶ 225); description of ICE detention system, including the different entities responsible for inspection of facilities (¶¶ 237,

243) and administration of health services (¶ 240); Office for Civil Rights and Civil Liberties has trained ICE personnel on human rights law, as well as refugee and asylum-seeker awareness (¶ 245)

[12] Description of**:** authority for custody of aliens pursuant to INA during removal proceedings (¶¶ 260-61); immigration judge authority to grant relief from removal (¶ 264); post-order detention of aliens that have been ordered removed (¶ 269); forms of relief available to aliens subject to removal (¶ 271); applications for asylum when removal proceedings are in process (¶ 274); withholding of removal in removal proceedings as distinct from request for asylum (¶ 275); Temporary Protected Status pursuant to INA (¶ 278); forms of protection for aliens subject to a removal order (the domestic implementation of Convention Against Torture Article 3) (¶ 283).

[13] Special consideration is given to asylum applications filed by unaccompanied alien children (¶ 433).

[14] General Comment No. 15: The Position of Aliens under the Covenant (11/04/1986).

[15] Id. at para. 9.

[16] Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments p. 57) (including the Secretary-General's background study on refugee matters).

[17] Generally speaking, any individual who has not secured refugee protection in another country has "good cause" for irregular entry or presence. *See e.g.*, Guy Goodwin-Gill, *Article 31 of the 1951Convention relating to the Status of Refugees: Non-penalization, Detention and Protection, in* REFUGEE PROTECTION IN INTERNATIONAL LAW 3.1 (UNHCR ed., 2003).

[18] Eliminate discrimination against migrants and religious and ethnic minorities and ensure equal opportunity for enjoyment of their economic, social and cultural rights (Bangladesh) (¶92.99); Reconsider restrictions on undocumented migrants' access to publicly supported healthcare (Brazil) (¶92.211); End violence and discrimination against migrants (Cuba) (¶92.207); Increase its efforts to eliminated alleged brutality and use of excessive force by law enforcement officials against, inter alia, Latino and African American persons and undocumented migrants, and to ensure that relevant allegations are investigated and that perpetrators are prosecuted (Cyprus) (¶92.144); Protect the human rights of migrants, regardless of their migratory status (Ecuador) (¶92.210); Prohibit, prevent and punish the use of lethal force in carrying out immigration control activities (Mexico) (¶92.208); Guarantee the prohibition of use of cruelty and excessive or fatal force by law enforcement officials against people of Latin American or African origin as well as illegal migrants and to investigate such cases of excessive use of force (Sudan) (¶92.209); Avoid the criminalization of migrants and ensure the end of police brutality, through human rights training and awareness-raising campaigns, especially to eliminate stereotypes and guarantee that the incidents of excessive use of force be investigated and the perpetrators prosecuted (Uruguay) (¶92.105); Adopt a fair immigration policy, and cease xenophobia, racism and intolerance to ethnic, religious and migrant minorities (Bolivarian Republic of Venezuela) (¶ 92.82); Make further efforts in order to eliminate all forms of discrimination and the abuse of authority by police officers against migrants and foreigners, especially the community of Vietnamese origin people in the United States (Viet Nam) (¶ 92.104).